CHAPTER 16
Constitutional Law
JOHN D. O'REILLY, JR.

§16.1. Religion and the state. Prayer in public schools again became a controversial matter in the courts of the Commonwealth when a school committee adopted a resolution permitting the opening of its public school classrooms five minutes before commencement of classes to teachers and pupils who wished, but were not required, to participate in informal prayer or other activity "in the free exercise of religion." The form of the permissible prayer or other activity was not prescribed by the school committee. The practice seemingly was authorized by a Massachusetts statute that provided: "The school committee of any city or town may permit any child attending its public schools to participate in voluntary prayer with the approval of such child's parents before the commencement of each daily school session." In Commissioner of Education v. School Committee of Leyden, the Supreme Judicial Court enjoined the school committee from continuing the permitted prayers, on the ground that the practice constituted an establishment of religion and was forbidden by the Constitution of the United States. Although the exercises were completely voluntary, without prescribed form, and not held under the supervision of teachers or school administrators, the Court held that the practice was constitutionally objectionable because the exercises involved use of public school property.

The Court's holding on Leyden would seem to be a corollary of McCollum v. Board of Education, as that case was explained in Zorach v. Clauson. In McCollum, the Constitution was held to have

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5 333 U.S. 203 (1948).
been violated when representatives of certain religious faiths were allowed to visit a public school to give doctrinal instruction to such pupils as desired to receive it. Zorach distinguished McCollum in ruling that public school pupils might be excused from class to go elsewhere to receive religious instruction. The fact that the exercises involved in Leyden were nondenominational was immaterial, since it has been clearly established that the Constitution prohibits any compulsory school prayer, whether denominational or not. 7 The Supreme Judicial Court did not reach the question of whether the Leyden resolution or the statute involved in Leyden was a violation of the Massachusetts Constitution, but it seems likely that the Massachusetts Constitution had indeed been violated. 8

A more involved problem was presented when a town and a parochial school run by a parish of the town proposed a project of mutual benefit. The town would lease the first floor of the parochial school building at a nominal rent plus an agreed percentage of building operating costs, and the rented floor would constitute a part of the town public school system. Public school teachers there would conduct courses in secular subjects, while teachers employed and governed by the parish would give courses in religion and certain secular subjects on the second floor. Pupils would attend both schools in "platoons." Those who attended the private school in the morning session would attend the public school in the afternoon. Those who attended the public school in the morning would have the option of spending the afternoon either in the private school upstairs or in a nearby public school.

The attorney general, in an opinion to the commissioner of education, ruled that the plan was constitutionally objectionable. 9 He found the plan in conflict with both the "establishment of religion" provision of the federal Constitution and the "aid" provision of the Massachusetts Constitution. 10 With respect to the federal Constitution, the attorney general's opinion was compelled, he felt, by Lemon v. Kurtzman, 11 in which the Supreme Court had held unconstitutional Pennsylvania and Rhode Island statutes that permitted public funds to be applied to the salary payments of teachers of secular subjects in nonpublic schools, all or most of which, in both states, were Catholic elementary schools. In Kurtzman the Supreme Court had recognized that total separation between church and state was an unrealistic concept, and that "the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circum-

8 Mass. Const. amend. art. XVIII, §2, as replaced by amend. art. XLVI, Nov. 6, 1917, provides: "[N]o . . . use of public money or property or loan of public credit shall be . . . authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning, whether under public control or otherwise, wherein any denominational doctrine is inculcated. . . ."
10 See nn.3, 8 supra.
stances of a particular relationship." Although in *Kurtzman* the teacher salary subsidies were applicable only to teachers of "secular" subjects, the Court had accepted the thesis that in Catholic elementary and secondary schools the teaching of religious doctrine is such a pervasive part of the curriculum that it tends to be reflected in the presentation of subjects which are not in themselves of a religious nature. Assurance that religious doctrines were not so reflected in subsidized secular courses would, said the Court, require supervision and monitoring of private school classrooms by the state. The Court had concluded that "the cumulative impact of the entire relationship arising under the statutes [at issue] . . . involved excessive entanglement between government and religion." The attorney general felt that similar surveillance would be required under the proposed plan and that the forbidden entanglements would result.

The attorney general found further support for his position in *Sanders v. Johnson*, wherein the Supreme Court had affirmed a federal district court's decision invalidating Connecticut's Nonpublic School Secular Education Act. The district court had declared that the primary effect of the act was to bestow control of the secular parts of the private schools on the public school system, while leaving control of the nonsecular parts unchanged. What resulted, according to the district court, was an unconstitutional advancement of religion.

In treating the matter under the Massachusetts Constitution, the attorney general noted that the shared-time proposal was offered to solve problems in both the public and the private school systems. The private schools were finding themselves less able, for financial reasons, to continue to operate, and the public schools were having to absorb, at overwhelming expense, large numbers of pupils who were seeking public instruction as their private schools were forced to close. While the proposal was designed to avoid consequences which would impose hardship both on the public treasury and on sponsors of private education, it nevertheless involved a form of aid to nonpublic schools. In light of the rigid language of the state Constitution, as interpreted by the Supreme Judicial Court, the attorney general felt that the plan was not constitutionally acceptable.

Public deference to religious belief was at issue in *Dalli v. Board of"
Education. The Commonwealth's compulsory school attendance law had required that pupils be vaccinated against smallpox and immunized against certain other communicable diseases, but also provided that where the parent of a school-age child objected to his vaccination or immunization upon the ground that it conflicted with the tenets and practice of a recognized church or religious denomination, and a church or denominational official certified by affidavit that the parent was an adherent or a member in good standing, the child would be exempted from the requirement. Ms. Dalli, the mother of a school-age child, possessed religious convictions against vaccination that were not based upon the doctrine of any church. Since it appeared that school officials would refuse to exempt her daughter from the vaccination statute, Ms. Dalli filed an action for a declaratory judgment to ascertain whether the statute applied to her child. The question before the Supreme Judicial Court was whether the plaintiff would be embraced within the exemption to the vaccination statute for adherents or members of a "recognized" church or religious denomination. There being no compelling state interest, the Court recognized that if the plaintiff's beliefs were sincere, they were entitled to the same protections as the more widely held belief of others. Upon findings of fact by the trial court, including a determination that the plaintiff's beliefs were sincere, the Court implicitly found that the plaintiff was equally entitled to the exemption from vaccination. By no stretch of the imagination, however, did the plaintiff come within the language of the exemption clause. The Court held that the preferred granting of the exemption to members of recognized religions was discrimination against others having different beliefs and therefore in violation of both the federal and state constitutions.

Ironically, while the plaintiff prevailed in her contention that the statutory classification of religious grounds for exemption was unconstitutional, she did not receive the relief she sought. The Court felt that the statute was not susceptible of an interpretation that would broaden the exemption so as to include the plaintiff; instead, the Court invalidated the exemption in its entirety. As a result of the decision in Dalli, however, the legislature rewrote the statute to exempt from vaccination any child whose parent or guardian states in writing that vaccination conflicts with the parent's or guardian's religious belief.

The unarticulated reasoning of the Court seems to have been based on the principle that there must be a reasonable relation between the classification of persons eligible for the exemption embodied in the statute and the statute's legitimate objectives. This principle has recently been carefully delineated by the federal courts in numerous cases.

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19 G.L., c. 76, §15.
selective service cases that have prevented Congress from disallowing military conscientious objector status to those whose objections to war are based upon atheistic religious principles.\(^{22}\) Of course, the legislature is under no compulsion to defer in secular matters to religious beliefs,\(^{23}\) but it may selectively defer in some cases to religious doctrine.\(^{24}\) Within the constraints of the First Amendment as outlined in the recent cases, however, legislatures drawing distinctions upon religious grounds must reflect in their classifications valid secular purposes such as facilitating the administration of general policy, and must avoid discrimination in favor of one or another set of moral values.\(^{25}\)


\(^{25}\) Ibid.

§16.2. Academic freedom: Students and teachers. During the 1971 Survey year, public education continued as a subject of federal court litigation. In Mailloux v. Kiley,\(^{1}\) a teacher had written a pungent vulgarity on a blackboard during the course of a discussion and had invited his eleventh-grade class to define it. For this conduct the teacher was dismissed by the school committee, but he was soon reinstated under a preliminary injunction.\(^{2}\) At the trial on the merits in federal district court, expert witnesses testified as to whether the technique used by the teacher on the occasion in question was conducive to a serious educational discussion. Although the court found the testimony inconclusive, it also found that the teacher had acted in good faith for what he thought to be a valid educational purpose. The court ruled that although the academic freedom of a teacher on the secondary school level is subject to a substantial degree of administrative control, the teaching method employed by the teacher under the particular circumstances was constitutionally protected, absent a school regulation clearly prohibiting it. The challenged conduct was held not proscribed by a general regulation against "conduct unbecoming a teacher."\(^{3}\)

While the law has traditionally been tolerant of authoritarianism in school administration,\(^{4}\) recent years have witnessed a perceptible trend towards subjecting educational disciplinary measures to judicial scrutiny;\(^{5}\) a great deal of case law will be required, however, to bring about a balancing of individual rights with the necessary flexibility of control of the educational process. One of the problem areas is that

\(^{1}\) 323 F. Supp. 1387 (D. Mass.), aff'd per curiam, 448 F.2d 1242 (1st Cir. 1971).


\(^{5}\) See Van Alstyne, The Student as University Resident, 45 Denver L.J. 582 (1968); Wilson, Campus Freedom and Order, 45 Denver L.J. 502 (1968); Wright, Constitution on the Campus, 22 Vand. L. Rev. 1027 (1969).
of unpromulgated school regulations. In *Hasson V. Boothby*, six high school students had attended a social event at the school and had been caught by a teacher with the odor of beer on their breath. Although the beer was actually consumed off school premises, the boys were placed on probation when the school principal learned of their transgression. The boys sought judicial relief on the ground that the school had no published regulation concerning consumption of beer off school premises, although no contention was made that the drinking of beer was a constitutionally protected activity. The federal district court concluded that school regulations that do not have a chilling effect upon the exercise of constitutional rights need not be so narrowly drawn as those that do. It went on to hold that where, as in the instant case, the unacceptability of the conduct is readily known, there may be no need for a specific promulgation to put a violator on notice of his exposure to disciplinary measures. The court went on, however, to suggest that the seriousness of the offense and severity of the concomitant sanctions would be relevant in an appraisal of the necessity for specific regulations. Although the punishment imposed in *Hasson* was sustained, the court clearly intimated that if the boys' conduct had resulted in their suspension or expulsion, due process would demand a rather precise regulation defining what conduct was forbidden.

The termination of a teacher's employment was at issue in *Roumani v. Leestamper*. The plaintiff, a nontenured assistant professor at a state college, was employed under a one-year contract to teach for the academic year 1970-1971. By the terms of the contract, he was entitled to notice by December 15, 1970, if he was not to be reappointed for the year 1971-1972. No notice was given by that date. On April 16, 1971, the college president requested that the professor resign. This he declined to do. On May 14, 1971, the president, apparently implementing the trustees' approval of the president's nonrenewal recommendation, notified the professor that his contract would not be renewed for the year 1971-1972. The notification of nonrenewal indicated, without specification, that the decision was based upon the plaintiff's misstatement of fact concerning his eligibility for a Ph.D. degree. There was no further communication between the plaintiff and the college administration with respect to the decision.

The professor sued to regain his position. In an earlier decision from New Hampshire, the Court of Appeals for the First Circuit had held that a nontenured teacher who has been given timely notice of nonrenewal for a subsequent year is constitutionally entitled to receive a detailed written statement of the reasons for nonrenewal of his contract

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7 In *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 514 (1969), the Court held that the rights of students to symbolic free speech had been unconstitutionally obstructed by school regulations.

of employment.9 The statement of reasons given in the instant case clearly did not meet this requirement. In Roumani, however, the district court went a step further. Since the notice of nonrenewal was not timely given, the court ruled that the college’s action amounted to a discharge of the teacher for cause, a matter of substantially more significance in the academic community than failure to rehire a probationary teacher. The court held that under the circumstances due process required not only that the teacher be notified in detail of the reasons for the adverse action, but also that he be accorded a full hearing before the trustees, the governing body possessing the authority to make decisions as to the termination of faculty employment.

Roumani is an important case in the trend away from the premise that public employment is a privilege rather than a right of the employee, a concept epitomized in the pithy sentence of Justice Holmes: “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”10 Government’s promotion of its own concerns in the management of governmental affairs must be tempered by a consideration of the interests of individuals affected by such management.11

§16.3. No-fault automobile insurance. In Pinnick v. Cleary,1 a case of first impression in the Commonwealth, the Supreme Judicial Court sustained the validity of the so-called no-fault system of compulsory motor vehicle insurance.2 In part, the no-fault plan provides that claims for compensation for pain and suffering are not allowable subject to certain exceptions, the principal one being with respect to an injury resulting in medical expenses of more than $500. Where the injury is caused by the fault of another, the tort-feasor is not liable for damages to the extent that the injured person is entitled to receive personal injury benefits from his own insurer. Pinnick’s injuries had been caused solely by the negligence of the defendant; the plaintiff would have received (according to a stipulation of the parties) a verdict of $800 for pain and suffering had a jury been permitted to assess damages. The plaintiff, who would have had a common law claim against the defendant for a total of $1565, was held to have no right of recovery against the defendant, and was inferentially left with the $115 medical expense claim against his own insurer.

The Court ruled that there is no constitutionally vested right in common law remedies, and that the legislature is competent, within due process limitations, to abrogate or modify such remedies. The new no-fault legislation, in changing the rights of a motor vehicle accident

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2 “No-fault,” as it is popularly known, was passed as Acts of 1970, cc. 670, 744, amending G.L., cc. 90, 175, 231. For a detailed discussion of the legislation, see 1970 Ann. Surv. Mass. Law c. 22; recent developments are discussed in §§11.17 to 11.19 supra.
victim, was not wanting in due process of law since it was reasonably calculated to achieve the public purpose of alleviating the heavy burden that was imposed upon the judicial system by the incidence of motor vehicle tort cases. Considering, without necessarily accepting, the contention that a legislature is not free to take away completely an injured person's remedy against a wrongdoer without providing a reasonably just substitute, the Court held that such a requirement, if one exists, was satisfied in the instant setting for the same reasons that the requirement was satisfied in the case of the workmen's compensation laws. The motor vehicle accident victim, while denied the benefit of special damages, was, in the Court's view, given assurance of recovery of actual outlays and was spared the risks of litigation, such as trial delays, possible successful defenses, inadequate verdicts, and disproportionate expenses. The Court also considered equal protection objections to the statute. Damages for pain and suffering were not available to the plaintiff because his injury did not involve medical expenses in excess of $500, nor did it involve his death, a fracture, loss of a body member, permanent and serious disfigurement, or loss of sight or hearing. The Court concluded that if, in keeping with a perceived and permissible legislative policy expressed in the statute, pain and suffering were to be eliminated as an element of damages in claims for "minor" injuries, the selection of the enumerated criteria as definitive of "serious" injuries was not unreasonable.

Chief Justice Tauro concurred on the limited ground that the plaintiff had failed to overcome the presumption of the constitutionality of the statute, i.e., he had failed to prove that the provisions thereof "cannot be supported upon any rational basis of fact that reasonably can be conceived to sustain" them. Such a burden, Chief Justice Tauro conceded, was "a virtually insuperable task in the circumstances." He declined to agree, however, that the statute was justifiable on the theory that it would alleviate the burdens of judicial administration, or by the analogy of the workmen's compensation laws, or both. He also registered reservations with respect to the Court's acquiescence in the statutory criteria for classifying injuries as "minor" or otherwise.

It is no easy matter to define the limits of legislative power to alter or eliminate the common law remedies available to a victim of an unlawful act. However, it might be argued that once it has been established that Massachusetts may attempt to resolve the problem of compensating motor vehicle accident victims by requiring its motorists to carry personal injury liability insurance, it is a relatively small step to transform that obligation into one requiring the carrying of personal injury accident insurance.

§16.4 Disturbers of the peace and stubborn children. In two

Massachusetts cases, different substantive provisions of the same criminal statute, G.L., c. 272, §53,\(^1\) were attacked on constitutional grounds. In each case the defendants contended that the statutory definition of the crime was unacceptably vague. In both cases, however, the challenge was unsuccessful. In *Commonwealth v. Jarrett*,\(^2\) the defendants were charged with disturbing the peace by making loud noises, using abusive language, and striking “divers persons.” They were found guilty in the district court and appealed to the superior court. The superior court justice reported the case to the Supreme Judicial Court prior to trial with questions as to the constitutionality of the statute.\(^3\) The Supreme Judicial Court ruled that the insertion of the phrase “disorderly persons” into the statute in 1943 at the suggestion of a legislative study commission\(^4\) did not create a new crime, but was done for the purpose of establishing a fixed penalty for a common law crime. The Court went on to hold that the constituent elements of the crime of disturbing the peace, as they are reflected in common understanding and practice, are sufficiently definite to give adequate warning of what is prohibited. The defendants further contended that the statutory prohibition against disturbing the peace was “unconstitutionally overbroad” because the statute could be used to prosecute one who was exercising, for instance, his constitutional right of free speech. Although the Court took the occasion to point out that *Commonwealth v. Harris*,\(^5\) and *Commonwealth v. Oaks*,\(^6\) did not by their terms permit prosecution for the exercise of free speech,\(^7\) the Court did not express an opinion as to the second contention of the defendants, because the issue was not involved in the questions presented by the trial court. Had the Court chosen to consider the issue, it might well have concluded that a finding by the trial court to the effect that free speech would be obstructed by prosecution under the statute would be an absolute defense.\(^8\)

In the second case, *Commonwealth v. Brasher*,\(^9\) the Court dealt with

\(^{1}\) Section 53 provides in part: “Stubborn children, runaways, . . . common railers and brawlers, . . . idle and disorderly persons, . . . [and] disturbers of the peace . . . may be punished by imprisonment in a jail or house of correction for not more than six months. . . .”


\(^{3}\) Pursuant to G.L., c. 278, §30A.

\(^{4}\) House Doc. 1462 at 9 (1943).

\(^{5}\) 101 Mass. 29 (1869).

\(^{6}\) 113 Mass. 8 (1873).

\(^{7}\) The Court stated: “The mere making of statements, or expressing of views or opinions, no matter how unpopular, or views with which persons present do not agree, has never been and is not now punishable as a disturbance of the peace under the law of this Commonwealth. . . . [Such is] what we understand the law to have been at the time of the Harris and Oaks decision[s] and at all times since.” 1971 Mass. Adv. Sh. 833, 840, 269 N.E.2d 657, 662.

\(^{8}\) Cf. *Cohen v. California*, 403 U.S. 15 (1971) (public display of a vulgar word not punishable as disorderly conduct even though calculated to arouse resentment on aesthetic or other grounds).

\(^{9}\) 1971 Mass. Adv. Sh. 907, 270 N.E.2d 389. This case is the subject of a student comment in §7.11 *supra.*
the problem it had avoided the year before in *Joyner v. Commonwealth*, namely, whether the statutory provision for punishment of "stubborn children" was sufficiently definite to meet constitutional criteria. In sustaining the statute, the Court stated that the provision in question, like the "disorderly persons" provision, did not create a new crime, but merely prescribed a specific penalty for engaging in conduct of a sort long prohibited by the Commonwealth. The statutory prohibition of the offense was found in a colonial law of 1654 that was directed to the evil of children who behaved themselves "too disrespectfully, disobediently, and disorderly towards their parents, masters and governors. . . ." The elements of the offense, the Court said, are a lawful and reasonable command given to a child by one with authority to give such command, a refusal by the child to obey, and a determination that the refusal was stubborn in the sense that it was "wilful, obstinate and persistent for a period of time." 

On the facts developed at the trial, the case was not the most persuasive vehicle imaginable for a constitutional attack on the "stubborn children" statute. The defendant, living at the Deaconess Home, refused to comply with an order to submit to examination by a physician. She indulged in outbursts of temper, slammed doors, and absented herself from the home in violation of regulations and of specific directives. On some occasions she used language "of a kind formerly used only by common railers engaged in gutter brawls." Antisocial though the conduct of the defendant was, it seems questionable whether the statute, even as interpreted by the Court, gives children any more notice of what is prohibited than, for instance, would be given to another person, also defiant of lawful authority, by an ordinance punishing those who "unreasonably saunter" after being told by a police officer to move on.

§16.5. Criminal procedure: Recent Massachusetts decisions. Of the cases handed down by the Supreme Judicial Court during the 1971 survey year, the largest number involved criminal law and procedure. Several of the cases posed new and interesting questions of constitutional significance. "John Doe" indictment. In *Connor v. Picard*, the plaintiff Connor was appealing from a denial of his request for a writ of habeus corpus from the federal district court. Connor had been found guilty in a state


13 Id. at 915, 270 N.E.2d at 395. In light of *Cohen v. California*, n. 8 supra, it does not appear that any weight should have been given by the Court to the use of vulgar language by Miss Brasher.


§16.5. 1434 F.2d 673 (1st Cir. 1970). This important case is the subject of a student comment in §16.12 *infra*.
court of being an accessory to murder. Connor's claim of federal right was based upon the fact that the indictment returned by the grand jury in the murder prosecution had included an alleged accessory under the name "John Doe." The trial court allowed the prosecutor to amend the indictment later by substituting Connor's name. Relying upon Commonwealth v. Gedzium,\(^2\) the Supreme Judicial Court ruled that such a practice, that is, amending a "John Doe" indictment at trial to include a person not originally known to the grand jury, was not error.\(^3\) The federal District Court for Massachusetts declined to disturb the conviction,\(^4\) but the Court of Appeals for the First Circuit reversed, holding that Connor had been denied equal protection of the laws.

The case presents an unusual interweaving of federal and state constitutionalism. The Constitution of the United States does not give a defendant in a state criminal case a right to be indicted before being placed on trial.\(^5\) The Massachusetts Constitution, however, does establish such a right.\(^6\) In Massachusetts, the prosecutor may unilaterally amend an indictment by supplying the true name of the defendant described in the indictment "by a fictitious name or by any other practicable description, with an allegation that his real name is unknown." It would seem to follow, therefore, that the sufficiency of an indictment is a question of state law and not susceptible to attack by habeas corpus. Nonetheless, the court of appeals took the position that if Massachusetts required indictments in felony cases, it could not try an unindicted Connor for a felony without violating the equal protection clause. The court of appeals agreed with the dissenting Justices of the Supreme Judicial Court that where the identity, as well as the name, of an accused is unknown to the grand jury, a person cannot be said to be indicted by having his name subsequently inserted in the indictment.

The constitutional question posed by the federal court's decision was whether its ruling amounted to a review of the Supreme Judicial Court's decision as to the sufficiency of the indictment, or whether it was merely an application of constitutional standards to a factual situation created by state law. In its application for certiorari to the United States Supreme Court, the Commonwealth emphasized that the Fourteenth Amendment issues had not been properly presented for decision by the Supreme Judicial Court. The Commonwealth claimed that petitioner had erroneously been allowed to raise his particularized constitutional arguments for the first time in the federal court. The Supreme Court granted certiorari and carried the case over to the docket for the 1971 October Term. As the Survey was about to be published,

\(^2\) 259 Mass. 453, 156 N.E. 890 (1927).
\(^5\) Hurtado v. California, 110 U.S. 516 (1884).
\(^7\) G.L., c. 277, §19.
the Supreme Court decided in favor of the Commonwealth and remanded for further state proceedings.\textsuperscript{8}

\textit{Increase of sentence.} During the 1971 \textit{Survey} year, the defendant in the case of \textit{Walsh v. Commonwealth}\textsuperscript{9} continued his efforts to obtain freedom. Walsh, originally sentenced to a 5- to 10-year term for armed robbery, had appealed his sentence to the Appellate Division of the Superior Court,\textsuperscript{10} where his sentence was increased to an 8- to 12-year term. The increased sentence was sustained on application for writ of error in the Supreme Judicial Court. Upon application to federal district court for a writ of habeas corpus, Walsh, relying mainly upon \textit{North Carolina v. Pearce},\textsuperscript{11} contended that the procedure that subjected him to an increase of his original sentence exposed him to double jeopardy and deprived him of liberty without due process of law. The federal district court denied his request and the court of appeals affirmed.\textsuperscript{12} Summarily rejecting the defendant’s double jeopardy arguments and addressing themselves to the petitioner’s due process arguments, both courts ruled that the Commonwealth’s sentence revision procedure was constitutionally permissible. The court of appeals found that the Massachusetts appellate procedure was calculated to achieve the salutary goal of uniformity of sentencing, adapted to the circumstances of particular cases, and did not contain the seeds of vindictiveness. The majority of the court felt that a sentence-revising tribunal was no more obligated to explain its revision than was a trial judge obligated to explain the original sentence. The dissenting Judge Coffin felt that constitutional due process required an explanation of an increased sentence.

The Supreme Court ruled in \textit{Pearce} that when a second trial is ordered as a result of a successful appeal and the sentence imposed after the second conviction is more severe than the original sentence, close scrutiny of the second sentence is required. The Court’s concern stemmed primarily from the fear that the imposition of a more severe sentence might be a vindictive device to punish a defendant, not for his crime, but merely for having appealed his conviction. Such a practice, declared the Court, would be lacking in due process of law, and would be subject to due process and equal protection objections to the extent that it discouraged the resort by defendants to appellate procedures. The Court did not hold that the Constitution forbids a more severe sentence after a second trial than was imposed after the first, but nonetheless did require that the reasons for the heavier penalty be affirmatively stated. The Massachusetts procedure, unlike the procedure examined by the Supreme Court in \textit{Pearce}, does not provide for a review of the merits of the conviction. The function of the Appellate Division review, as viewed by the Supreme Judicial Court, is to

\textsuperscript{8} 404 U.S. 270 (1971).
\textsuperscript{10} Such an appeal is authorized by G.L., c. 278, §§28A-28D.
\textsuperscript{11} 395 U.S. 711 (1969).
consider "whether a particular defendant's sentence is excessively short or long compared to other defendants' sentences for the same or similar offences." 13

The rejection of any double jeopardy argument by the courts that reviewed Walsh's application for habeas corpus seems inescapable. Since there is no federal or state constitutional right to more than one hearing, one who invokes a statutory right of appeal that looks to a new trial necessarily waives whatever immunity he might have had to a second trial for the same offense. 14 The same rationale would seem to imply that one who chooses to appeal only his sentence takes the statutory procedure the way he finds it. It would also seem that the Supreme Court's reasoning in *Pearce* would not reach the situation presented in *Walsh* absent a showing that the Commonwealth's appellate review was a vindictive or an arbitrary process. It is perhaps the view of the dissenting Judge Coffin that *Pearce* makes suspect any increase in the severity of an already imposed sentence and therefore by its terms requires an appellate court to affirmatively justify such an increase. There is little to indicate, however, that the United States Supreme Court would extend the affirmative justification aspect of *Pearce* to the situation presented by *Walsh*.

*Issues relating to the right to jury trial.* Last year this author critically discussed the Supreme Judicial Court's decision in *Ladetto v. Commonwealth,* 15 which had presented, for a second time, 16 constitutional objections to the composition of the trial jury in a prosecution for murder in the first degree. The trial judge in *Ladetto* had excused a prospective juror for cause after a voir dire examination had elicited from the venireman an ambiguous answer to the question, "Have you any opinion which would prevent you from finding the defendant guilty of an offense punishable by death?" 17 The crucial issue in *Ladetto* was not the propriety of putting the question to the veniremen, but the judge's conclusion, on the basis of an unresponsive answer, that the juror did not stand indifferent and should for that reason be excused. The Supreme Judicial Court had found no error in the earlier case and did not prove any more receptive the second time around. The Supreme Court of the United States, apparently disagreeing with the Supreme Judicial Court's evaluation of the situation, granted certiorari and summarily reversed, 17 simply citing *Witherspoon v. Illinois,* 18 *Boulden v. Holman,* 19 and *Maxwell v. Bishop.* 20


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The putting of the question in itself seems perfectly proper. In Witherspoon, the Supreme Court held that a sentence of death could not be imposed by a jury from which there had been automatically excluded *veniremen* who had scruples against, or were opposed to, capital punishment. The Witherspoon holding is not incompatible with the applicable Massachusetts statute, which excludes only jurors whose opinions would actually preclude a finding of guilt of a capital offense. The statute would not exclude jurors who, given the choice (as are Massachusetts juries in such cases) between a sentence of death or one of life imprisonment, might be reluctant, because of attitudes toward capital punishment, to impose the former penalty. An unusual and significant problem remains, however, with respect to the disposition of an appeal that has been sustained on the ground that veniremen having scruples against capital punishment were automatically excluded from the jury. The Supreme Court was careful to point out in *Witherspoon* that only the sentence of death was vacated; the verdict of guilty was not affected. Although the Massachusetts death sentence statute differs from the statute examined in *Witherspoon* (the Massachusetts statute imposes the death sentence unless the jury recommends otherwise, while in Illinois the jury decides both guilt and punishment), it seems clear that the death sentence should not be automatically imposed in cases where the veniremen who would vote against its imposition have been automatically excluded from serving. Were such a case to occur in Massachusetts, it would seem to require a new trial since there is no available procedure for the disposition of the sole issue of sentence. There are as yet no reported decisions that shed any light on this interesting procedural problem. As for Ladetto, his sentence has been commuted to life imprisonment, so the question has become academic as far as this case is concerned. It is unlikely that other cases presenting the Ladetto issue will arise, since judges may be expected to continue the practice of conducting penetrating voir dire examinations of veniremen who indicate personal opposition to capital punishment, rather than automatically excluding them.

Several other aspects of the "jury clemency" statute were considered in *Commonwealth v. Stewart*. Since the statute makes death the normal punishment upon a finding of guilty, the alternative of life imprisonment may be imposed only if the jury unanimously recommends it. Such was the Supreme Judicial Court's interpretation of the statute in 1952, and in *Stewart* the Court declined to review it, although the great majority of courts which have considered the question (as the opinion of the court documents) have ruled otherwise. Reconsideration of the established rule was deemed a proper

21 G.L., c. 278, §3.
22 G.L., c. 265, §2.
subject for the legislature, not the judiciary, and the issue was not regarded as one of constitutional dimension.

Two more constitutional issues were tendered in the case, and both were summarily rejected. One contention was that the procedure whereby the jury decided both the question of guilt and the question of punishment after a single trial is not constitutionally acceptable. The other was that the Constitution does not tolerate giving the jury absolute discretion, without guiding standards, to grant or withhold clemency after a finding of guilt. The first contention was rejected on the authority of *McGautha v. California.* The second was rejected because “[w]e are not persuaded by this argument.” (A substantially identical contention had also been rejected in *McGautha*). It should be pointed out that both contentions were rejected by the Supreme Court of the United States over vigorous dissents. Justice Douglas pointed out that to tie determinations of both guilt and punishment to a unitary trial was to subject a defendant desiring to present matter in mitigation of punishment to risk of loss of his privilege against self-incrimination. Justice Brennan argued that a statute giving a jury the decision of life or death for a convicted defendant without providing standards of decision should be held void for vagueness. Justice Marshall joined the dissenters. In view of the strength of the dissents and the upsurge of public opinion concerning capital punishment, it cannot yet be said that the issue is dead.

An advisory opinion by the Supreme Judicial Court has clarified some constitutional questions concerning a proposal for radical change in criminal procedure. Traditionally, crimes cognizable by the district courts have been tried before a judge only; those defendants who are found guilty are entitled to a trial de novo in the superior court before a jury of 12 members. An alternative appellate procedure exists in some districts in accordance with which the defendant might have a de novo trial before a 6-member jury of the district court if he so elects. The Justices were asked for their opinion as to whether it would be constitutional for a defendant in a district court to be given access to a 6-member jury trial in the district court in lieu of the de novo trial in the superior court, the only place where a defendant could be tried before a 12-member jury. The problem, of course, was whether a law implementing the proposal would comply with the constitutional mandates of trial by jury in criminal cases. The Justices answered in the affirmative.

As to federal constitutional requirements, the answer had already been indicated by the Supreme Court of the United States. In 1968 the Court had ruled in *Duncan v. Louisiana* that the states must
provide jury trials in criminal cases that, if triable in federal courts, would have to be before juries. *Duncan* had generated problems for several states that had assumed they were not subject to federal constitutional jury trial restrictions and had thereupon adopted jury standards at variance with the traditional 12-member, unanimous-verdict jury. The problems had come to a head in *Williams v. Florida*, in which the Supreme Court had held that Florida satisfied a defendant's constitutional right to jury trial in a criminal case by providing a jury of 6 members. The Supreme Judicial Court, after ruling that *Williams* made the 6-member jury proposal unobjectionable under the Fourteenth Amendment of the federal Constitution, concluded that the reasoning behind *Williams* should lead to a similar result under Article XII of the Massachusetts Declaration of Rights. The Court noted that common law standards for jury composition have not been rigidly followed, in that women have been recognized as eligible for jury service and more than 12 jurors may be impaneled for protracted trials (though only 12 participate in the verdict); its conclusion was that rigid adherence to the size of the jury was similarly optional. Justice Quirico, however, felt that the jury trial provision of Article XII expressed a purpose to adopt the 12-member institution which had been developed over the centuries prior to 1780.

The Justices stated two potentially significant caveats to their opinion. First, they pointed out that their opinion had no effect upon trials for the more serious crimes or in any case in which the defendant could be sentenced to state prison. Secondly, the Justices emphasized that they were not considering whether jury trials could be eliminated completely in some minor criminal cases. The implication drawn from the Court's first caveat is that the question of whether capital crimes must be tried by the conventional jury, although other crimes may be tried by various other juries, is a matter of constitutional dimension rather than of prudential judgment of the legislature. It should be noted that some United States district courts, in reliance upon *Williams*, are said to be considering adoption of a system of 6-member juries for

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33 The Supreme Court, in *Williams v. Florida*, overrode a number of earlier precedents that had indicated that the 12-member jury, a traditional part of the Anglo-American criminal justice machinery since the fourteenth century, was indeed constitutionally mandated. The Court concluded that the size of the common law jury was an historical accident and that the number of members in the jury was not necessarily related to the essential nature of the jury procedure.
34 Mass. Const. pt. I, art. XII provides that "... no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges ... or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."

The clause requiring state legislation to conform to the "law of the land" has been held to be more restrictive of state power than the due process clause of the Fourteenth Amendment. Compare Jones v. Robbins, 74 Mass. (9 Gray) 329 (1857) (serious criminal proceedings must be commenced by grand jury indictment under the Mass. Const.) with Hurtado v. California, 110 U.S. 516 (1884) (Fourteenth Amendment does not prevent a state from instituting a capital prosecution by information).
their trials. With respect to eliminating jury trials completely, it should be noted that in *Baldwin v. New York* the Supreme Court ruled that the jury trial requirement of *Duncan* was applicable to prosecutions of crimes punishable by at least six months' imprisonment, the implication being that the trial of crimes carrying lighter penalties may, consistent with the Fourteenth Amendment, be left to judges sitting alone. Whether Article XII of the Massachusetts Declaration of Rights would permit such a result was left undecided by the Justices.

Another facet of the jury trial problem was raised in *Commonwealth v. Thomas*, in which certain persons who had been adjudged delinquents in a district court proceeding took appeals to the superior court and demanded jury trials. The requests for jury trials were denied. After bench trials, the defendants were adjudged delinquents. The Supreme Judicial Court construed the applicable statute to require a jury trial upon an appeal from a judgment of delinquency, although by another statute delinquency proceedings were not deemed to be criminal proceedings. Deciding the case in this fashion, the Court did not reach the issue as to a constitutional requirement of jury trial in juvenile cases. Two months later, the Supreme Court of the United States, in cases from Pennsylvania and North Carolina, concluded that neither *Duncan v. Louisiana* nor *In re Gault* required a state to give a jury trial for persons accused of juvenile delinquency. Open for decision in some future case remains the question of whether Article XII of the Massachusetts Declaration of Rights would permit withdrawal of the right of trial by jury in this class of cases.

Consideration of federal issues on appeal. *Ackerman v. Scafati* involved an unusual problem pertaining to review of a criminal conviction. During and after his trial for rape, the defendant had asserted a number of claims of federal right. The trial judge ruled against him in each instance, but exceptions were not taken to the rulings. Under the felony appeal statute, nothing is brought before the Supreme Judicial Court for review upon appeal unless based upon a valid exception. Nevertheless, the defendant's brief on appeal argued the constitutional issues that had been present. Although the Court might well have disposed of the appeal without considering any constitutional arguments, it affirmed the defendant's conviction in a brief rescript: "[T]he reported testimony shows that the charge was con-

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57 G.L., c. 119, §56 provides for an appeal to the superior court from the district court's finding that the child is a delinquent child. The statute requires that "[t]he appeal, if taken, shall be tried and determined in like manner as appeals in criminal cases. . . ."
58 G.L., c. 119, §53.
60 387 U.S. 1 (1967).
63 G.L., c. 278, §§33A-38.
vincingly proved in detail. No question worthy of discussion has been raised. 45

Subsequently, in response to a petition for habeas corpus in the United States District Court for Massachusetts, the Commonwealth asked for dismissal for failure of the petitioner Ackerman to exhaust state court remedies. The district court ruled that the direct appeal to the Supreme Judicial Court had constituted such exhaustion under the circumstances. Although the rescript of the Supreme Judicial Court had not explicitly enumerated the federal questions upon which the defendant had relied, its failure to base the disposition of the case upon improper or inadequate raising of the questions, together with the fact that the questions were argued, led the federal court to the inference that the decision of affirmance amounted to a ruling on the questions adverse to the defendant. Had the inference been otherwise, the defendant would have had to seek a writ of error in the state court before seeking relief in the federal court.

§16.6. Miscellaneous decisions. In G & M Employment Service, Inc. v. Commonwealth, 1 the plaintiff employment agencies challenged the validity of the Massachusetts statute that establishes a schedule of maximum commissions that may be charged by employment agencies for the placement of certain classes of job seekers. 2 The plaintiffs contended that the statutory fees were so low as to be confiscatory. Offered in proof of the contention was evidence indicating that had the plaintiffs conducted their business in 1967 in accordance with the statute they would have received substantially less income than they actually received and would have consequently suffered in several cases, operating losses. The Supreme Judicial Court held that the plaintiffs' evidence was insufficient to prove their contention. Justice Cutter for the Court pointed out that the plaintiffs had failed to show that the statute would have had similar impact on the employment agency industry generally and that the losses could not have been avoided by the placing of additional emphasis upon categories of placement for which fees were not regulated. The Court further pointed out that there was no basis for evaluating the relevance and reasonableness of the plaintiffs' operating expenses, as there would have been in the case of public utilities and insurance companies who are required to maintain uniform statistical practices. Although the Court accepted the premise that the legislature may not set employment agency fee rates at a confiscatory level, 3 proof of the existence of confiscation would appear to be difficult. The Court suggested that

any plaintiff urging confiscation upon the Court would have the burden of showing, in addition to significantly unfavorable operating figures, that his operating results were fairly representative of a substantial part of the class of regulated businesses to which the plaintiff belonged, that the plaintiff's methods of operation and expenses were reasonable and proper, and that the plaintiff was not able to operate his business so as to avoid the unfavorable effects of the legislature's regulation.

In *Godfrey v. Massachusetts Medical Service*, the Supreme Judicial Court was called upon to referee one aspect of the ongoing controversy between conventional physicians and other persons who profess to be fellow practitioners of the healing arts. Godfrey was one of a group of podiatrists challenging, by a class action, a Massachusetts statute providing that the Massachusetts Medical Service (MMS), the administrator of the Blue Shield medical service plan of insurance, may enter into contracts for the payment of fees of physicians and podiatrists, but must contract for the payment of fees of physicians who desire to participate in the program. MMS has not accepted the applications of podiatrists to participate in its plan. The plaintiffs contended that the omission of podiatrists from the mandatory provisions of the statute constituted a denial of equal protection or due process in violation of the United States Constitution. The Supreme Judicial Court ruled that the statutory distinction between physicians and podiatrists had been made upon a rational basis and that the classification was related to the statutory purpose of promoting public health at manageable expense. In reaching that conclusion, the Court relied on the differences between the extent of the respective practices of physicians and podiatrists, the training requirements of the two groups, and the volume of public demand for the services of each. The Court was also swayed by "the possibility that the subscribing public would bear the cost of having podiatrists included" in the plan.

In *Massachusetts v. Laird*, the latest in the line of cases involving the Shea Bill, an action was filed in the United States district court by the Commonwealth (and several of its citizens who were members of the armed services about to be assigned to military duty in Viet Nam) to have declared unconstitutional the participation of the United States in the Viet Nam conflict. The complaint was dismissed...
on the alternative grounds that the issue presented was not justiciable, or, if it was, various acts of Congress constituted adequate legislative approval of the government’s action.

In *Priestley v. Hastings and Sons Publishing Co.*, the Court recognized additional constitutional limitations on the scope of libel actions. The defendant had published alleged defamatory statements concerning the plaintiff, an architect who had been involved in the construction of a public school. The publication was in a report of a meeting of the town selectmen, at which meeting statements had been made that were critical of the school construction. At the trial, a principal question had been the burden of proof, namely, whether the plaintiff was a “public figure” under the rule of *New York Times Co. v. Sullivan* and thus had the burden of proving that the publication was malicious as well as false. The trial judge, ruling on that question in the negative, refused to direct a verdict for the defendant. After a judgment for the plaintiff, an appeal, and arguments before the Supreme Judicial Court, the Supreme Court of the United States decided *Rosenbloom v. Metromedia, Inc.* *Rosenbloom*, amplifying *New York Times*, held that the First Amendment principles applied through the due process clause of the Fourteenth Amendment to protect the Fourth Estate against liability for nonmalicious publication of a matter of public or general concern, whether the individual involved was a government official, a “public figure,” or a private citizen. The Supreme Judicial Court concluded that the *Rosenbloom-New York Times* doctrine governed *Priestley*, and that the evidence did not warrant a finding of malicious publication; judgment was ordered for the defendant.

In *Meyer v. Massachusetts Eye and Ear Infirmary*, the federal District Court for Massachusetts was presented with an interesting free speech problem involving a hospital staff physician. The physician was concerned about the disparate treatment accorded to different classes of hospital patients: private patients under the continuous care of their own doctors, and clinic patients treated at different times by the various staff physicians assigned on a rotating basis to clinic service. The physician felt that, by reason of the public subsidies for the aged and indigent under such programs as Medicare and Medicare

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8 1971 Mass. Adv. Sh. 1265, 271 N.E.2d 628. This case is the subject of a student comment in §16.10 infra.
10 403 U.S. 29 (1971).
11 The outer limits of a publisher’s First Amendment immunity are a matter for speculation. In *Dun & Bradstreet v. Grove*, 92 S. Ct. 204 (1971), the Court refused to grant certiorari to review a decision imposing liability on the publisher of a credit-rating service for a nonmalicious false statement concerning a private individual’s debt payments. Justice Douglas dissented on the ground that the Court ought to have taken the case to consider the broad question of whether the First Amendment will permit the maintenance of any libel action against legitimate publishers.
aid, clinic patients were in fact financially able to receive private care. A hospital regulation, however, prohibited him from conveying this information to clinic patients. The federal district court rejected his contention that the hospital regulation constituted an abridgment of his freedom of speech. The court ruled that the hospital's prohibition was a reasonable means of guarding against unprofessional solicitation of patients by physicians. Reserved until trial on a second claim was the issue whether, in any event, the hospital regulation constituted "state action" so as to bring it within the ambit of constitutional prohibition, a question that would depend upon the factual extent of the institutional participation in governmentally funded programs. 15

In White v. Minter, 16 a three-judge federal district court was called upon to decide the validity of G.L., c. 119, §23E. The plaintiff, the mother of a small child, had suffered an injury and had left the child with a friend while she recuperated in bed. When the mother returned to collect her child, she learned that the friend had entered a hospital and had turned the child over to the Department of Public Welfare. When the plaintiff went to the department, the officials refused to surrender custody of the child, justifying their action by Section 23E, which directs the department to arrange care for a child who is seemingly without a parent or guardian, and to make arrangements for the child's welfare if the parent is unable or unwilling to do so. The mother challenged the constitutionality of the statute on the ground that it failed to accord the parent a hearing on the question of her ability and willingness to care for the child. The court declined to pass on the validity of the statute, although the parties had stipulated that resolution of that issue would be dispositive of the case. The court ruled instead that the department had applied the statute in an unconstitutional way by refusing to accord the mother an administrative hearing or to apply to the probate court for a custody order. 17 The court declared that the mother's alternative choice of remedy, a petition for habeas corpus, was inadequate because it would have involved an improper shifting of the burden of proof from the department to the mother.

One advisory opinion remains to be noted. 18 The Senate, in 1970, requested an opinion of the Justices as to the constitutionality of a bill that had been filed in the 1970 legislative session but was to be

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14 Id. §1396.
15 A similar issue was considered in McQueen v. Druker, 438 F.2d 781 (1st Cir. 1971), which involved the question of whether the activities of a private landlord, who had constructed a housing facility in connection with an urban renewal program, took on the color of state law and made applicable the due process clause of the Fourteenth Amendment. See §12.19 supra.
17 G.L., c. 119, §23, subsec. c provides: "The department may seek and shall accept on order of a probate court the responsibility for any child under [21] who is without proper guardianship due to the death, unavailability, incapacity or unfitness of the parent or guardian. . . ."
considered by the legislature jointly with a companion bill to be filed in 1971. The 1970 session was prorogued before the request was transmitted. The Justices declared that the question had not been put on a "solemn occasion" and declined to give their opinion. Although in at least one instance the Justices have given advice to a legislature for the guidance of its successor, the instant opinion seems to indicate abandonment of that practice. The instant answer was necessitated by the almost unbearable burden on the Court from the increasing volume of requests for advisory opinions and the expansion of the appellate and single-justice dockets.

§16.7. Supervision of the judiciary. *In re DeSaulnier* potentially poses a constitutional question of significant dimension, namely, whether and to what extent a judicial body may impose sanctions against a judge for misconduct in the performance of judicial duties. For the first time in the history of the Commonwealth, an information was filed in the Supreme Judicial Court alleging acts of misconduct by two judges of the superior court. The judges were directed to answer to the allegations, and were notified that the matter would be set down for hearing. In response to challenges by the judges as to the jurisdiction of the Court, the Justices held that the Court had jurisdiction on at least four grounds: (1) its inherent powers as the highest constitutional court of the Commonwealth; (2) its supervisory powers over the lower courts; (3) its disciplinary powers over members of the bar; and (4) its power "to establish and enforce rules of court for the orderly conduct (1) of officers and judges of the courts and (2) of judicial business and administration." The Court held that it has jurisdiction to impose appropriate discipline upon a member of the bar, who is also a judge, for misconduct or acts of impropriety, whether such acts involve his judicial conduct or other conduct. This, we hold, even though, because he is a judge, he is not permitted to engage in the practice of law. Of course, it is well settled in Massachusetts, where many practicing

19 Mass. Const. amend. art. LXXXV.

2 As this volume was going to press, the Supreme Judicial Court confronted this question. One judge was disbarred, and the Court ordered that no judicial business be assigned him until further order. Another judge was censured. It was also ordered that copies of the record of the proceedings be forwarded to the governor and the legislature. In *DeSaulnier*, 1972 Mass. Adv. Sh. 65, 274 N.E.2d 454. At the request of the governor, the disbarred judge has resigned, and the chief judge of the superior court has announced that no cases will be assigned to the second judge. The governor requested the resignation of the second judge, but the latter refused to resign. A legislative commission, composed of members of both branches, has been selected to look into the matter.
3 G.L., c. 211, §3 describes the Court's supervisory powers.
5 Id. at 1347, 274 N.E.2d at 456.

http://lawdigitalcommons.bc.edu/asml/vol1971/iss1/19
lawyers are part-time judges, that the Court may entertain disciplinary proceedings against an attorney for misconduct, even though he is also a judge. Indeed, it has been held that the seriousness of an individual's misconduct as an attorney may be aggravated by the very fact that he is also a judge. It is not a long step from this to conclude that what an individual does qua judge may be relevant in a disciplinary proceeding against him qua attorney. The relevance of conduct in a bar discipline matter is its bearing upon the individual's fitness to practice law. In the instant case, the Court ruled that its competence to proceed as a matter of bar discipline was not affected by the fact that the respondents, while they were judges, were prohibited by statute from practicing law.

Reference in the opinion to the inherent and statutory supervisory powers of the Court, however, may raise a difficult question as to the power of the Supreme Judicial Court to proceed against a respondent as a judge. There are constitutional provisions for removal, either by legislative impeachment or by executive action upon address by both legislative houses, and it may be that these methods were intended to be the exclusive means of reining in an errant judge. The Supreme Court of the United States has recently exercised great ingenuity in avoiding coming to grips with the problem as it has arisen with the federal judiciary. In Chandler v. Judicial Council of the Tenth Circuit, the council had ordered that no new cases be assigned to a particular district court judge within the circuit. The judge applied for a writ of prohibition, but the Supreme Court denied relief for failure to exhaust alternative remedies. Justice Harlan concurred on the ground that the council had acted within the bounds of its lawful jurisdiction. Justices Douglas and Black dissented, arguing that a judicial body cannot be invested with power to strip a judge of his judicial power. The lack of supervisory authority even in the Supreme Court may be illustrated by the fact that precedents exist on the proposition that the Supreme Court does not have power to prevent one of its own members from participating in a particular case on the ground that he is disqualified. In Massachusetts, by the statute implementing judicial reorganization in 1963, the chief justice of the district courts was given broad supervisory powers over judicial administration in those courts, including the power to issue directives to individual judges. In the event of disobedience of such directive, the chief justice is to report to the Chief Justice of the Supreme

8 G.L., c. 212, §27.
9 Mass. Const. pt. 2, c. 1, §3, art. VI; id. §2, art. VIII.
12 Jewell Ridge Coal Corp. v. Local 6167, UMWA, 325 U.S. 897 (1945) (Jackson, J., concurring).
13 Acts of 1963, c. 810, codified as a portion of G.L., c. 218, §§6-77A.
Judicial Court for the issuance of an "appropriate order." 14

The supervisory function has traditionally been exercised through the appellate process 15 or by invocation of the power to make general rules of practice and procedure. Apart from such informal practices as the giving of distasteful assignments, the recognition and punishment of unacceptable judicial conduct has usually been reserved for legislatures through the exercise of their power to impeach. Impeachment is unquestionably cumbersome, and can be activated only in the most extreme cases. It has perhaps been responsible for the establishment of an independent judiciary, for it minimizes the possibility of removal of a judge for inadequate, though temporarily popular, reasons. A by-product of its cumbersome nature, however, has been the continuance of some incompetents on the bench. If this is deemed to be too high a price for judicial independence, perhaps a solution would be found in a constitutional amendment providing for a tribunal, acting within carefully drawn standards, to consider disciplinary proceedings in matters involving members of the judiciary.

§16.8. Privileged communications: Constitutional right of newsmen to protect sources. During the 1971 Survey year, the Supreme Judicial Court was presented with the question of whether there existed a constitutional privilege on the part of news reporters to refuse to testify before a court or grand jury. The petitioner in In re Pappas 1 had been employed by a New Bedford television station as a newsman-photographer. In the summer of 1970, he had been assigned to report on civil disorders that were occurring in New Bedford. In carrying out his assignment, the defendant sought entrance into a building that was being used as a headquarters by the Black Panthers, a group of New Bedford residents who were apparently intimately involved in the disturbances. The newsman was allowed to enter the headquarters only on the condition that he would not report anything he saw or heard there, unless a police raid occurred. No police raid occurred, and Pappas reported nothing. Some months later, Pappas was subpoenaed before a county grand jury that had convened to investigate the civil disruptions that Pappas had been assigned to cover. He appeared, but refused to answer certain questions concerning what he had witnessed inside the Panther headquarters. After refusing to testify, the petitioner filed a motion to quash an outstanding subpoena requiring him to testify at a further grand jury sitting, at which he presumably would have been asked the same questions he had already refused to answer. A superior court judge ruled that Pappas was not protected by any privilege and that he had to respond to the subpoena

14 G.L., c. 218, §43A.

and answer any questions put to him by the grand jury. The judge then reported to the Supreme Judicial Court the question of whether a newsman had a constitutional right to protect his confidential sources of information against a grand jury inquiry. The Supreme Judicial Court affirmed the lower court ruling and held that there existed no constitutional newsman’s privilege, either qualified or absolute, to refuse to appear and testify before a court or grand jury.

Pappas, on appeal, had relied chiefly upon the now famous Caldwell v. United States, in which the Court of Appeals for the Ninth Circuit had found a qualified newsman’s privilege in the First Amendment to the Constitution. In Caldwell, the grand jury had apparently been seeking general information concerning the Black Panther party and had subpoenaed Caldwell, a black reporter for the New York Times, as part of its general inquiry. In response to Caldwell’s motion to quash the outstanding subpoena, a federal district court entered a protective order to the effect that, inter alia, the reporter need not reveal his sources or relate confidential information to the grand jury. The court of appeals concluded that the protective order embodied to the maximum extent the newsman’s First Amendment privilege and held that to require Caldwell to appear at all, the government would have to show “a compelling need for the witness’s presence.”

In the course of its opinion in Pappas, the Supreme Judicial Court took the occasion to review the status of the newsman’s privilege. The applicable overriding principle, implied the Court, is that the public “has a right to every man’s evidence.” It was also noted that although other states may have created a statutory privilege covering newsmen, Massachusetts has not chosen to do so. Although the Court acknowledged an argument for finding a qualified constitutional newsman’s privilege, it also pointed out the prevailing countervailing view that “[i]f a privilege to suppress the truth is to be recognized at all, its limits should be sharply determined so as to coincide with the limits of the benefits it creates.”

The common law was read by the Court as permitting, in the exercise of the power of courts to compel testimony, at least some weighing of competing public interests so as to prevent “unreasonably broad, unnecessary, irrelevant, or needlessly burdensome inquiry.” The broad implications of the Caldwell decision were criticized by the Court on several grounds. Initially, the Court indicated that the creation of a First Amendment newsman’s privilege

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4 Id. at 73, 266 N.E.2d at 301, citing E. Morgan, preface to ALI Model Code of Evidence at 7 (1942).

5 Id. at 74, 266 N.E.2d at 301.
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would be a "judicial amendment of the Constitution or judicial legis­
lation." The Court then observed that compelling a newsmen’s testi­mony would not prevent the dissemination of the information he possessed: only future news, said the Court, would perhaps be affected. Writing for the Court, Justice Cutter felt that important state interests in the enforcement of criminal law had been disregarded by the Caldwell court in favor of interests of the news media that could reasonably be protected by the judiciary under existing common law principles. The obligation of newsmen, explained the Court, is "to appear when summoned, with relevant written or other material when required, and to answer relevant and reasonable inquiries. Such appearances, however, like those of other citizens, are subject to super­vision by the presiding judge to prevent oppressive, unnecessary, irrelevant, and other improper inquiry and investigation."6 The Court declared that the witness complaining of improper grand jury pro­ceedings has the burden of establishing that the grand jury inquiry is improper or oppressive.

Certiorari was granted in both Caldwell7 and Pappas,8 as well as in a case from the Kentucky court of appeals raising a similar issue.9 All three cases will be argued together.

STUDENT COMMENTS

§16.9. Constitutionality of public school regulations. In the wake of the 1968 decision of the United States Supreme Court in Tinker v. Des Moines Independent School District,1 there remains much uncertainty over the state’s power to regulate student activity. The United States District Court for Massachusetts and the First Circuit Court of Appeals discussed the problem last year in Richards v. Thurston,2 striking down a grooming reg.Jlation that set a maxi­mum allowable hair length and regulated other aspects of hairstyle. During the 1971 Survey year, the federal district court, in Hasson v. Boothby3 and Orduway v. Hargraves,4 contributed two additional decisions that define more clearly the extent of state regulatory power and the correlative rights of students under the Fourteenth Amend­ment.

The case law that governs the relative rights of schools and students has developed primarily in federal courts and within the past three decades. Before 1942, there was little mention of students’ rights.

6 Id. at 77, 266 N.E.2d at 303.
9 Branzburg v. Hayes, docketed as U.S. No. 70-85. Reported below, 461 S.W.2d 845 (Ky. 1970).

§16.9. 1 393 U.S. 503 (1968).
Even the landmark freedom of education case of *Meyer v. Nebraska*, for example, turned upon “[the teacher’s] right thus to teach, and the right of parents to engage him so to instruct their children [which rights], we think, are within the liberty of the [Fourteenth] Amendment.” The Supreme Court decided that parents have a duty to educate their children that corresponds to their right to control them; but if the children were thought to have rights of their own, the Court chose not to mention them. Constitutional protections were extended directly to students for the first time in 1942, in *Board of Education v. Barnette*. In that case, a regulation required all students to join in the pledge of allegiance to the flag under pain of expulsion from school. The Supreme Court struck down the regulation because it denied First Amendment religious freedom to Jehovah’s Witnesses, whose beliefs forbade them to salute the flag.

Then, in *Tinker*, the Supreme Court held explicitly that “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.” (Emphasis supplied.) Despite the division of opinion on the Court and the majority’s express narrowing of the holding, *Tinker* has generated a flood of litigation and considerable diversity of opinion among lower federal courts. The Seventh Circuit Court of Appeals has cited *Tinker* for the broad proposition that “the Constitution protects minor high school students as well as adults from arbitrary and unjustified governmental rules.” The United States District Court for the Northern District of Ohio, on the other hand, has quoted

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5 262 U.S. 390, 400 (1923).
6 319 U.S. 624 (1942).
7 393 U.S. 503, 506 (1968).
8 Justice Black was reluctant to find the wearing of armbands “symbolic speech” under the First Amendment. But even if it were, he argued, public schools were not the appropriate forum for the exercise of such speech. Id. at 515-526. Justice Harlan agreed that the Fourteenth Amendment did have some bearing on the activities of local school boards, but that “school officials should be accorded the widest authority in maintaining discipline and good order in their institution.” To give effect to this policy, he would place upon the student the burden of proving that a particular school rule was motivated by other than legitimate school concerns. Id. at 526. Justice Stewart agreed with the Court’s decision, but rejected the “Court’s uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults.” Id. at 515.

9 “The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. . . . It does not concern aggressive disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to ‘pure speech.’” Id. at 507-508.
10 Although the Supreme Court itself has made no further pronouncements, the most recent statement by a Supreme Court Justice in the area of student rights was made by Justice Black in *Karr v. Schmidt*, 401 U.S. 1201 (1971). In that case, Justice Black heard an appeal in his capacity as Circuit Justice for the Sixth Circuit, to vacate stay of an injunction that would have prevented a public school committee from enforcing a rule against long hair in its high schools. Although some lower federal courts have granted relief in similar circumstances, e.g., Richards v. Thurston, 304 F. Supp. 449 (D. Mass. 1969), aff’d, 424 F.2d 1281 (1st Cir. 1970), Justice Black refused to find that the right to long hair was constitutionally protected from intrusion by a local school board.
11 Breen v. Kahl, 419 F.2d 1034, 1036 (7th Cir. 1969).
Justice Stewart's concurring opinion in *Tinker*\(^{12}\) to support the proposition that "children cannot be accorded all the liberties constitutionally afforded to adults without encountering very serious practical difficulties."\(^{13}\) Even those courts that interpret *Tinker* broadly have disagreed as to the source of students' rights, finding the source variously in the First and Ninth Amendments\(^{14}\) and in the due process clause\(^{15}\) and the equal protection clause\(^{16}\) of the Fourteenth Amendment. In *Richards*, the federal District Court for Massachusetts held that the freedom to wear long hair is embraced by the concept of liberty and is entitled to protection unless the state can show a compelling interest in its regulation. The First Circuit affirmed, but without conceding that the freedom to wear long hair is within the ambit of the First Amendment. Instead, the circuit court held that whenever a personal liberty is shown, the state's countervailing interest in regulation must either be self-evident or affirmatively shown.\(^{17}\) It is within the context of *Tinker* and *Richards* that the *Hasson* and *Ordway* cases arose.

*Hasson* and *Ordway* were brought under 42 U.S.C. §1983. Section 1983 provides that a civil action will lie in federal court against any person who has acted under color of state law to deprive the plaintiff of a right granted by the United States Constitution.\(^{18}\) Section 1983 has been the basis for jurisdiction in cases in which students have challenged school regulations involving haircuts,\(^{19}\) clothing,\(^{20}\) refusal to live in a dormitory,\(^{21}\) school newspaper publication,\(^{22}\) and speakers on campus.\(^{23}\) Some federal courts, however, have refused to entertain student cases under section 1983, either because of the lack of a substantial federal question,\(^{24}\) or because state remedies have not been previously exhausted.\(^{25}\)

The significance of federal jurisdiction under Section 1983 should

\(^{12}\) "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees." \(^{393}\) U.S. 503, 515 (1968). Justice Stewart quoted his own earlier concurring opinion in *Ginsburg v. New York*, 390 U.S. 629, 648-650 (1968).


\(^{14}\) Breen v. Kahl, 419 F.2d 1054 (7th Cir. 1969).


\(^{17}\) 424F.2d 1281, 1286 (lstCir.1970).

\(^{18}\) 42 U.S.C. §1983 reads as follows: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

\(^{19}\) Richards v. Thurston, n.2 supra.


not be underestimated, since Massachusetts courts have traditionally approached the school regulation problem from a much different perspective. The controlling state precedent is *Watson v. City of Cambridge*, wherein the Supreme Judicial Court said:

> The management of the schools involves many details; and it is important that a board of public officers, dealing with these details, and having jurisdiction to regulate the internal affairs of the schools, should not be interfered with or have their conduct called in question before another tribunal, so long as they act in good faith within their jurisdiction.\(^{26}\)

*Watson* has been cited as authority most recently in *Leonard v. School Committee of Attleboro*,\(^{27}\) in which haircut regulations similar to those in *Richards* were upheld four years before the *Richards* decision. Apart from the good faith test in *Watson*, a standard of reasonableness has occasionally been applied by the Supreme Judicial Court,\(^{28}\) but under either standard, challenges to school regulations have generally met with little success at the state level.

*Hasson* involved three high school athletes who had attended a dance held on school premises during a school vacation. At the dance the boys met one of their teachers, who was also a coach on the track team. When asked about the smell of beer on their breath, they admitted that they had been drinking off the school premises; when the teacher did not require them to leave the dance, they considered the episode ended. At no time did the boys cause any disturbance. On the following day, the boys learned from their respective coaches that they were to be suspended from athletics. Suspension was the usual sanction for athletes caught drinking and the boys were aware of it. In addition, the principal ordered that the boys be put on one year’s probation. Although automatic probation was in fact a part of the usual school response to student drinking, no policy to that effect had ever been published. After two meetings with the boys’ parents, the school committee upheld the principal’s decision, but directed him to review each boy’s status periodically. After reviewing the status of each boy at the beginning of the following school year, the principal refused to terminate the penalties prior to November. The boys were superior athletes with hopes of obtaining college athletic scholarships, but the principal’s decision left them ineligible to play football and to compete for athletic scholarships during their junior year.

Shortly thereafter, the boys brought a suit in the United States District Court for Massachusetts under Section 1983 to set aside their punishments. They alleged that their punishments violated Four-

\(^{26}\) 157 Mass. 561, 563, 32 N.E. 864, 865 (1893).
\(^{28}\) See, e.g., Hodgkins v. Inhabitants of Rockport, 105 Mass. 475 (1870); see also G.L., c. 76, §5.
teenth Amendment due process guarantees because the policy against drinking had not been published. The court disagreed and held that the validity of punishment in the absence of published rules depends upon three factors: "(1) prior knowledge of the offending student of the wrongfulness of his conduct and the clarity of the public policy involved, (2) potential for a chilling effect on First Amendment rights inherent in the situation, (3) severity of the penalty imposed." Upon finding the required prior knowledge, the absence of First Amendment considerations, and a reasonable penalty, the district court upheld the punishment and dismissed the complaint. The court's opinion did not indicate, however, whether any one of the three due process tests is more important than the others, or whether all three must be unfavorable before a student's due process rights will be considered violated.

Moreover, each test presents its own problems. For example, there are no clear guidelines to assist in determining when a particular penalty is severe. As an example of a major penalty, the court lists "expulsion or suspension for any significant time." Probation would seem to be a minor penalty, but the court added a qualification:

[W]ere the plaintiffs required to serve the full "sentence" [probation for one year] imposed on them for an offense as minor as theirs appears to have been, despite good behavior [during the probation period], such a penalty might approach the order of arbitrary and capricious in a constitutional sense.

There may also be a problem of vagueness in the dual test of prior knowledge and clarity of public policy. To avoid the constitutional questions, the Hasson court emphasized the probability of actual knowledge in the case at hand. The court noted that pamphlets warning of the dangers of alcohol had been distributed in health classes at school, and that the Massachusetts General Laws forbid the consumption of alcohol by minors. Moreover, plaintiffs admitted their knowledge of the athletic department's policy against drinking on or off school premises. The test of actual or constructive knowledge, although applied soundly in Hasson, may need additional refinement. A student with actual knowledge of disciplinary policies, for example, might reasonably expect that they do not apply to situations outside of school. He might reasonably assume that drinking rules would be relaxed during school vacations or for certain social functions in his home.

Closely related is the administrative problem of writing regulations which are broad enough to provide effective discipline, yet specific enough to be enforceable. As might be expected, the courts are divided in their approach to specific regulations. Several courts have applied the stringent principles of statutory construction to regulations and


\[30\] Ibid.

have applied the constitutional tests of vagueness\textsuperscript{32} and overbreadth\textsuperscript{33} to determine the sufficiency of notice. Other courts have taken the more reasonable position that “handbook rules” should be more liberally construed to permit effective discipline.\textsuperscript{34} The liberal construction rule is also more practical where school authorities have limited experience in statutory draftsmanship. The Hasson decision seems to be a compromise between two extremes. The first extreme is the doctrine asserted by plaintiffs in Hasson that no rule is enforceable unless it has been officially promulgated prior to enforcement. The district court felt compelled to reject this contention because of dictum in the First Circuit's decision in Richards: “[W]e do not wish to see school officials unable to take appropriate action in facing a problem of discipline or destruction simply because there was no preexisting rule on the books.”\textsuperscript{35} The second extreme is the doctrine that school officials have an inherent authority to punish students, even without published rules. Although the penalty in Hasson was upheld on the facts of the case, the court pointedly acknowledged that “imposition of a severe penalty without a specific promulgated rule might be constitutionally deficient.”\textsuperscript{36}

In Ordway, an 18-year-old unmarried high school senior brought a Section 1983 action against her principal and the seven members of her local school committee for an order to compel them to readmit her to school on a regular-class-hour basis. In January 1971, the plaintiff had informed her principal that she was pregnant and expected to give birth the following June. At the time, a school committee rule provided: “Whenever an unmarried girl enrolled in . . . [h]igh [s]chool shall be known to be pregnant, her membership in the school shall be immediately terminated.” Pursuant to this rule, the principal informed Miss Ordway that she must stop attending regular classes following the February school vacation. In a confirmatory letter to the girl’s mother, the principal set forth the conditions for Miss Ordway's future association with the school. He stated that she would be prohibited from attending classes during normal school hours, but would be allowed to engage in extracurricular activities and receive instruction from her teachers after the usual school hours. The local school committee endorsed the principal's action, although he had failed to sever Miss Ordway’s connection with the school, as a

\begin{itemize}
  \item \textsuperscript{32} Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).
  \item \textsuperscript{34} E.g., Pritchard v. Spring Branch Indep. School Dist., 308 F. Supp. 570 (S.D. Texas 1970).
  \item \textsuperscript{35} 424 F.2d 1281, 1282 (1st Cir. 1970). Although the circuit court ordered the school principal to readmit the student plaintiff, its decision was not based on the lack of a previously published rule.
\end{itemize}
literal reading of the rule would have required. Thereupon, Miss Ordway brought her action in the United States District Court for Massachusetts.

At the hearing on her motion for a preliminary injunction, the plaintiff introduced testimony to support three contentions: first, that her regular attendance at classes would not endanger either her health or the health of the child (there was even testimony that a greater danger to the mental well-being of both mother and child might result should Miss Ordway be excluded from school against her will); second, that her pregnancy had not disrupted any school events; and third, that she would obtain an education inferior to that of her classmates if excluded from regular classes. Citing Richards, the court held that the right to receive a public school education is a basic personal right, and that the burden of justifying any rule which limits or terminates that right is on the school authorities. Since the court found no adequate justification, it ordered that Miss Ordway be readmitted as a regular student.

The court considered it sufficient to point out that none of the previously recognized "compelling state interests" was present; no attempt was made to define which of those interests would or would not present an adequate justification for expulsion of Miss Ordway. The broadest category of compelling interests recognized by other federal courts in school situations is the state's interest in maintaining order and discipline in the school. Two decisions handed down by the United States Court of Appeals for the Fifth Circuit, one granting a student constitutional protection from a school regulation forbidding the wearing of "freedom buttons,"\(^{37}\) the other upholding a similar regulation in a different school,\(^{38}\) were distinguished by the court in Ordway on the basis of disciplinary problems in the second school. One other federal court, in upholding the right of an unwed mother to continue her high school education, has indicated that proof that the girl was a bad influence on the morals of the other girls at the school would be sufficient to deny her a public education.\(^{39}\) The district court in Ordway implied that the state's interest in removing immoral influences or in protecting the health of mother or baby might be compelling enough to justify exclusion from regular classes, but that these dangers had not been proven in the case at hand.\(^{40}\)

Although Miss Ordway alleged a denial of equal protection, the court chose not to rely on the Fourteenth Amendment in its opinion. Plaintiff had argued that the violation lay in denying her the same educational opportunities afforded girls who were not pregnant. Because the local school regulations seemed to allow married preg-

\(^{37}\) Burnside v. Byers, 363 F.2d 744 (5th Cir. 1966).

\(^{38}\) Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).


nant girls to continue regular school attendance, it might have been better to stress the different treatment given girls who were married and pregnant as opposed to girls who were not married and pregnant. There is precedent for the argument that discrimination based on marital status is unconstitutional in some school situations. In a 1969 Mississippi case, two unwed mothers claimed that their expulsion from a public high school while married mothers were allowed to continue their education violated the equal protection clause of the Fourteenth Amendment. The federal District Court for the Northern District of Mississippi held that the equal protection clause demands equal treatment for unmarried mothers unless the state can show special justification, such as immoral character, for their exclusion.\(^{41}\) The plaintiff in *Ordway* may have chosen the broader equal protection argument—on behalf of all pregnant girls—so that the school could not circumvent a decision in her favor by rewording the rules to apply to both married and unmarried pregnant girls.

Although the basis of the *Ordway* decision was the "basic personal right or liberty" to receive a public education, the source of the right was not discussed. Presumably, the source is in the Constitution, since jurisdiction in the case was based upon 42 U.S.C. §1983, which gives every person deprived of a constitutional right an action in a federal district court.\(^2\) One possible indication is found in *Richards*, where the Court of Appeals for the First Circuit held that the right to determine one's own appearance is an aspect of the "liberty" assured by the Fourteenth Amendment:

The idea that there are substantive rights protected by the "liberty" assurance of the Due Process Clause is almost too well established to require discussion. Many of the cases have involved rights expressly guaranteed by one or more of the first eight Amendments. But it is clear that the enumeration of certain rights in the Bill of Rights has not been construed by the [United States Supreme] Court to preclude the existence of other substantive rights implicit in the "liberty" assurance of the Due Process Clause.\(^{43}\) [Footnote omitted.]

Having thus affirmed the student's right to determine his own appearance, the First Circuit placed the burden on the school authorities to justify their grooming regulations. The court agreed with the findings below that the defendant had failed to show that the plaintiff's long hair "involves a health or sanitary risk to him or to others, or will interfere with plaintiff's or others' performance of their school work, or will create disciplinary problems of a kind reasonably thought to be a concern of public officials."\(^{44}\)


\(^{42}\) See n.18 supra.

\(^{43}\) 424 F.2d 1281, 1284 (1st Cir. 1970).

§16.9 CONSTITUTIONAL LAW

If the "liberty assurance" of the due process clause has been extended in *Ordway* from the right to govern one's own appearance to the right to a public school education, a number of crucial questions are presented. The most important question is whether all future expulsions from public schools will automatically raise a constitutional issue. If so, the presumption in favor of a school regulation's validity, presently available in Massachusetts state courts, may effectively be destroyed, for each time a student questions the validity of a rule under which he has been expelled, he would have a federal cause of action where the burden would be on the school authorities to show compelling state interest. Most local school regulations might be open to question. Furthermore, there seems to be nothing in the *Ordway* opinion to limit its holding to cases involving expulsion—as opposed, for example, to a lengthy suspension. If there is a right to education, perhaps such a suspension would also deny that right. Education might even be defined broadly enough to include certain extracurricular activities. *Ordway* also leaves doubts regarding the levels of public school education to which the decision pertains. Other federal courts have considered the constitutional rights of grade school students and college students, affording certain constitutional protection to both groups.

An additional question, the geographical extent of school regulatory power, was not treated in either *Hasson* or *Ordway*, although the offensive conduct in each case, the drinking in *Hasson* and the beginning of Miss Ordway's pregnancy, occurred off the school premises. Traditionally, however, Massachusetts courts have granted broad powers to public school authorities to regulate both off-structures conduct and conduct after normal school hours when such conduct bears some relation to a function of the school. In *Antell v. Stokes*, the Supreme Judicial Court upheld a principal's regulation of student clubs whose only connection with the school was that their membership included children from the school. It will be necessary to await future decisions to see whether the federal courts will attach any importance to the time or place at which an offense occurs.

Conclusion. In both *Hasson* and *Ordway*, the federal courts employed a balancing test. In *Hasson*, the school's interest in effective and flexible discipline was weighed against the student's right to be warned in advance by published rules of the danger of punishment. In *Ordway*, the court balanced the interest of the school in excluding

45 Since *Ordway*, the California Supreme Court in *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), has openly asserted that a public high school education is a "fundamental interest" protected by the United States Constitution. In that case, however, protection was found in the equal protection clause of the Fourteenth Amendment.
an unwed pregnant student against the student's right to a public school education. The court accepted for the first time the proposition that the Constitution protects a right to public education, and this may lead to an even more frequent use of the federal courts as the forum for asserting student rights. It may also create uncertainty in the formulation of school disciplinary rules, for any rule used to expel a student could be open to scrutiny as to a compelling state interest. In the absence of additional guidelines, Tinker affords the clearest test for finding compelling interests in a given case: if "appropriate discipline" necessitates a rule, it will stand.\(^5\) Although many questions remain in the wake of Hasson and Ordway, the cases mark an increasing role for the federal courts in local public education.

RICHARD A. OLIVER

§16.10. Expansion of the constitutional privilege to defame: Priestley v. Hastings and Sons Publishing Co.\(^1\) The defendant was sued for libel\(^2\) in Essex Superior Court, based on three articles printed in its newspaper. The articles reported charges of incompetence, bad faith, and misconduct that had been made by the town manager of Saugus against the plaintiff,\(^3\) an architect who had been commissioned by the town of Saugus to design and supervise the construction of a new junior high school. The allegedly libelous statements reported in the defendant's newspaper emanated from conversations between the defendant's reporter and the town manager and from meetings of the town selectmen at which complaints about the school's construction were aired.

It was the defendant's contention that the "actual malice" standard articulated by the United States Supreme Court in New York Times Co. v. Sullivan\(^4\) was applicable to the case. This standard denies recovery to a "public official" unless he can prove that his alleged libeler acted "with knowledge that . . . [the publication] was false or with reckless disregard of whether it was false or not."\(^5\) At the close of evidence, the trial judge ruled that the plaintiff was not a

\(^{50}\) 395 U.S. 503, 513 (1968).

2 There is no statutory definition of libel in Massachusetts. See Grande and Son v. Chace, 333 Mass. 166, 168, 129 N.E.2d 898, 899 (1955), for a common law definition.
3 The final article printed by the defendant, that of Oct. 19, 1967, contained by far the most damaging statements about the plaintiff. The town manager's remarks, as reported by the defendant, were narrowly focused on the plaintiff's alleged "illegalities, incompetence and bad faith." The articles also reported statements attributed to the town manager that he intended to seek to have the plaintiff's state registration revoked; that the district attorney's office was not investigating, but only because it lacked sufficient manpower at the time; and that the town manager's office had filed a complaint against the plaintiff with the Ethics Committee of the American Institute of Architects. 1971 Mass. Adv. Sh. 1265, 1266-1267, 271 N.E.2d 628, 630.
5 Id. at 280.
public official and that, as a matter of law, the burden of proof under the *New York Times* standard was not applicable to him. The jury returned a verdict for the plaintiff of $25,000 in compensatory damages.6 In reversing, the Supreme Judicial Court held that the case was controlled by the decision of the United States Supreme Court in *Rosenbloom v. Metromedia, Inc.*,7 a decision rendered after oral arguments had been heard by the Supreme Judicial Court in *Priestley*.

In the *Rosenbloom* case, Philadelphia police, responding to complaints regarding the distribution of obscene material, raided the residence and warehouse of George Rosenbloom, a magazine distributor. Newscasts by defendant’s radio station reported both Rosenbloom’s arrest for possession of obscene literature and police seizure of “obscene books.” Subsequent news reports, while not mentioning Rosenbloom by name, referred to the police action as part of a campaign against “girlie-book peddlers” and the “smut literature racket.” Following his acquittal on criminal obscenity charges, Rosenbloom brought a diversity action in federal district court seeking damages under Pennsylvania’s libel law. When the case reached the United States Supreme Court, it was held that

> a libel action . . . by a *private individual* against a licensed radio station for a defamatory falsehood in a newscast relating to his involvement in an *event of public or general concern* may be sustained only upon clear and convincing proof that the defamatory falsehood was published with knowledge that it was false or with reckless disregard of whether it was false or not.8 [Emphasis added.]

In *Priestley*, the Supreme Judicial Court found that the articles published by the defendant related to a “local controversy of legitimate public concern” in which the plaintiff was involved. The Court held, therefore, that *Rosenbloom* required application of the actual malice standard in a case such as *Priestley*.

*Rosenbloom* is the capstone of a series of cases that have expanded the common law’s qualified privilege for fair comment and criticism into a rule of constitutional law. Selected cases will be discussed in this comment to show how the “actual malice” standard has evolved, but the comment is intended primarily to examine the effect of *Rosenbloom* upon the libel plaintiff and to suggest possible judicial and legislative responses to the decision.

Prior to the *New York Times* case, publishers commenting on the conduct of public officials or on matters of public concern were generally protected from liability for defamation by the fair comment and criticism privilege recognized by a majority of the states.9 The

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6 Punitive or exemplary damages are not allowed in libel actions in Massachusetts. See G.L., c. 231, §93.
7 403 U.S. 29 (1971).
8 Id. at 52.
9 See, e.g., Knapp v. Post Printing and Pub. Co., 111 Colo. 492, 144 P.2d 981 (1943);
prevailing view held that statements of opinion made without malice were privileged, but that false statements of fact were actionable.\textsuperscript{10} The minority view extended the privilege to protect even false statements of fact if made without malice.\textsuperscript{11} In \textit{New York Times}, the Supreme Court interpreted the First and Fourteenth Amendments as providing not only a privilege for comment and criticism regarding official conduct, but as providing a privilege for misstatement of fact concerning the official conduct of "public officials." The Court qualified the privilege to the extent that any defamation of a "public official" had to be free of malice.\textsuperscript{12} In effect, \textit{New York Times} adopted the minority common law view of fair comment and criticism. The Supreme Court observed that in a democratic society there is a need for the actions of elected officials to be open to the scrutiny of the people, and that the First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."\textsuperscript{13}

The constitutional privilege articulated in \textit{New York Times} was soon expanded in \textit{Garrison v. Louisiana},\textsuperscript{44} where the Supreme Court decided that any statement "which might touch on an official's fitness for office" is protected, even though such a statement might concern the official's private life. However, \textit{Garrison} did draw a distinction between "criticism of the official conduct of public officials" and "purely private defamation."\textsuperscript{15} The term \textit{public official} was construed to include not only incumbents and candidates for public office, but appointed officials as well. Moreover, in \textit{Rosenblatt v. Baer}, the Supreme Court held that whether a person is a "public official" is not to be determined under state law standards, but in accor-

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\textsuperscript{10} In a leading case that stated the majority view, Justice Holmes said that "what is privileged, if that is the proper term, is criticism, not statement, and however it might be if a person merely quoted or referred to a statement as made by others, and gave it no new sanction, if he takes upon himself in his own person to allege facts otherwise libelous, he will not be privileged if those facts are not true." \textit{Burt v. Advertiser Newspaper Co.}, 154 Mass. 238, 242, 28 N.E. 1, 4 (1891).
\textsuperscript{11} Under the minority view, if a newspaper published, in good faith, an article commenting on the official conduct or character of a state official, the publication was privileged, even though matters contained in the article were untrue in fact and derogatory to the official's character. E.g., Coleman \textit{v. MacLenman}, 78 Kan. 711, 722-723, 98 P. 281, 283 (1908).
\textsuperscript{12} \textit{Malice}, under the \textit{New York Times} decision, was defined as the publisher's knowledge of the falsity of the defamatory statement or his reckless disregard of whether the statement was false or not. 376 U.S. 254, 280 (1964). This definition of \textit{malice} did not require proof of bad motivation or ill will.
\textsuperscript{13} Id. at 270.
\textsuperscript{14} 379 U.S. 64 (1964).
\textsuperscript{15} Id. at 76.
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dance with the basic constitutional protections afforded free expres-
sion.\footnote{383 U.S. 75, 84 (1966). The term public official has been applied to a deputy sheriff in St. Amant v. Thompson, 390 U.S. 727 (1968); to a criminal court clerk in Beckley Newspapers Corp. v. Hanks, 389 U.S. 81 (1967); to a county ski resort operator in Rosenblatt v. Baer, 383 U.S. 75 (1966); to a state judiciary in Garrison v. Louisiana, 379 U.S. 64 (1964); to a police lieutenant in Pape v. Time, Inc., 354 F.2d 558 (7th Cir. 1965), cert. denied, 384 U.S. 909 (1966); and to a village president in Proesel v. Myers Pub. Co., 48 Ill. App. 2d 402, 199 N.E.2d 73 (1964).} It was also determined in Rosenblatt that a government employee who has, or who appears to the public to have, substantial responsibility for the conduct of governmental affairs is a public official and, under \textit{New York Times} and Garrison, cannot recover damages for defamatory comment about his official conduct unless he can prove actual malice.\footnote{388 U.S. 130 (1967).}

In the companion cases of \textit{Curtis Publishing Co. v. Butts} and \textit{Associated Press v. Walker},\footnote{388 U.S. 130 (1967).} the \textit{New York Times} requirement of proving actual malice was extended to "public figures."\footnote{The term public figure has been applied to a state university athletic director in Curtis Pub. Co. v. Butts, 388 U.S. 130 (1967); to a prominent retired Air Force general in Associated Press v. Walker, 388 U.S. 130 (1967); to a professional baseball player in Cepeda v. Cowles Magazines & Broadcasting, Inc., 392 F.2d 417 (9th Cir. 1968), cert. denied, 393 U.S. 840 (1968); and to a prominent scientist in Pauling v. Globe-Democrat Pub. Co., 362 F.2d 188 (8th Cir. 1966), cert. denied, 388 U.S. 909 (1967).} It should be noted that the Supreme Court in \textit{Walker} found that the respondent attained the status of a public figure by his "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy,"\footnote{388 U.S. 130, 155 (1967).} and the Court decided that a private person could lose his right to privacy and anonymity by voluntarily seeking public attention.\footnote{For a vivid example of a libel plaintiff who was held to have projected himself into the public eye, see Tripoli v. Boston Herald-Traveler Corp., 1971 Mass. Adv. Sh. 461, 268 N.E.2d 350.}

Justice Harlan, writing for a divided majority in \textit{Butts}, proposed a new and less rigorous test of malice that would ease a libel plaintiff's burden of proof.

We consider and would hold that a 'public figure' . . . may also recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.\footnote{388 U.S. 130, 155 (1967).}

Even if Harlan's proposed standard of "unreasonable conduct" had been adopted, Curtis' liability would have been upheld because the publisher had failed to check either the substance of its informant's story or his claimed sources, although the publisher knew that its informant had a criminal record. Justice Harlan, however, failed by...
one vote to gain majority support for his proposed standard. Chief Justice Warren expressed the view that the *New York Times* standard should apply to both public officials and public figures, and that Curtis' liability could have been based equally on its reckless disregard of the truth within the meaning of the *New York Times* standard. Subsequently, *St. Amant v. Thompson* settled the question of a negligence standard by declaring that "reckless" conduct is not to be measured by a reasonable man standard, and that the defendant must publish the statement with serious doubts as to its truth before liability will arise. Justice White, who wrote the majority opinion in *St. Amant*, recognized that "such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity." But Justice White went on to state that "the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies."

*Time, Inc. v. Hill* is possibly the pivotal case in the extension of the *New York Times* rule. *Hill* was not a libel case; it involved a claimed violation of a New York right of privacy statute. The decision was significant, nonetheless, because it extended the protection afforded publishers by *New York Times* to false statements on all matters of "public interest." As Justice Brennan stated in the majority opinion:

The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and of press.

According to the *Hill* decision, once an individual is catapulted into the limelight, his conduct can be reported under the protection of the actual malice standard. *Hill* appears to define "matter of public inter-

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23 Justices Clark, Stewart, and Fortas joined Justice Harlan in advocating a variable "unreasonable conduct" standard. Chief Justice Warren and Justices White and Brennan concurred in the result, but disagreed with the proposed standard. Justices Black and Douglas, while concurring in the result, reiterated their position that the First Amendment prohibits libel actions against the press.

25 Id. at 731.
26 Id. at 731-732.
27 385 U.S. 374 (1967).
28 Id. at 388.
est” as any matter which, as judged by the news media, is of interest to the public.29 Under this definition, everyone is a potential public figure.

Rosenbloom, as the logical culmination of this series of cases, determined that the “First Amendment [protects] . . . all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”30 In applying the New York Times standard to all plaintiffs, public or private, involved in an event of public or general concern, the majority in Rosenbloom found that only “[c]alculated falsehood . . . falls outside ‘the fruitful exercise of the right of free speech.’”31

In the wake of Rosenbloom, the practitioner is forced to question what remains as a potential libel action. The answer may depend on what the Supreme Court eventually establishes as criteria for determining when a private citizen’s conduct has become an event of “general interest or public concern”; in Rosenbloom, the Court left the delineation of that phrase to future cases and offered only such vague guidance as the following: “Voluntarily or not, we are all ‘public’ men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern.”32 The only type of activity which the Supreme Court mentioned as possibly falling outside the constitutionally protected area of public interest is the “purely commercial communication made in the course of business.”33 Still, the basic question remains as to who will decide what is newsworthy. Will the Supreme Court establish guidelines or standards, as Justices Marshall and Stewart advocated in their dissent to the Rosenbloom decision,34 or will the news media be allowed to determine newsworthiness by default? If the press is allowed to determine what is a public issue, publishers may soon enjoy the advantage of determining their own liability.

In a recent decision, the United States District Court for the Northern

30 403 U.S. 29, 44 (1971). “Drawing a distinction between ‘public’ and ‘private’ figures makes no sense in terms of the First Amendment guarantees.” Id. at 45-46.
31 Id. at 52, quoting Garrison v. Louisiana, 379 U.S. 64, 75 (1964).
33 Id. at 44 n.12. See also Grove v. Dun and Bradstreet, Inc., 438 F.2d 433 (3rd Cir. 1971), in which it was held that the doctrine of New York Times does not extend to private credit reports and that allegations of defamation concerning such reports are properly subject to the libel laws of the states.
34 “In order for particular defamation to come within the privilege there must be a determination that the event was of legitimate public interest. That determination will have to be made by courts generally and, in the last analysis, by this Court in particular. Courts, including this one, are not anointed with any extraordinary prescience. But, assuming that under the rule announced by Mr. Justice Brennan for the plurality, courts are not simply to take a poll to determine whether a substantial portion of the population is interested or concerned in a subject, courts will be required to somehow pass on the legitimacy of interest in a particular event or subject; what information is relevant to self-government.” 403 U.S. 29, 79 (1971).
District of California held that matters of public interest could be equated with "newsworthiness" and that a magazine article on young Americans abroad, containing photographs and interviews of such Americans on Crete, was newsworthy.\textsuperscript{35} The decision articulated a standard, based on state precedent,\textsuperscript{36} for determining whether a particular incident is newsworthy. The court recognized such criteria as "(1) the social value of the fact published; (2) the depth of the article's intrusion into ostensibly private affairs; and (3) the extent to which the party voluntarily acceded to a position of public notoriety."\textsuperscript{37} The court applied Rosenbloom in reaching its decision and attempted to expand on Rosenbloom by establishing some guideposts to assist in separating newsworthy incidents from those which are not. In the process, it appears the court looked back to some pre-Rosenbloom decisions for its criteria. Although any measure of "social value" is highly subjective, the second criterion noted above is similar to the recognition in Garrison of an area of "purely private defamation," and the third criterion is similar to the discussion in Butts regarding reduced protection from public scrutiny for one who thrusts himself into the discussion of a question of pressing public concern.

The Supreme Court will also have to decide to what extent publishers other than the news media are privileged under the New York Times standard to comment on public officials, public figures, and newsworthy events. As has been noted, perhaps some or all publications of a purely commercial nature will fall outside the protection of New York Times. What of those publications which have made the sensational expose, the bizarre, and the lurid their hallmark? It may be asked whether such sensationalistic publications are to receive the same broad protection as those publications committed to an informed public. One's response may well be that reputable professional news publishers who unintentionally injure someone's reputation in the course of supplying the public's informational needs deserve more protection from libel judgments than do the purveyors of innuendo and scandal. However, it is difficult to conceive how a distinction can be drawn between the reputable and the disreputable publisher, with one receiving the protection of Rosenbloom and the other not, without basic notions of equal protection being violated. The question of which publishers, if any, are to be denied the protection of Rosenbloom again hinges on whether judicial distinctions can be made among matters of legitimate public interest, matters of mere public curiosity, and matters relating to purely private relationships.

It might also be asked whether a libeled private citizen could recover on the ground that his name was needlessly associated with an event of public interest, i.e., that the First Amendment goal of an informed citizenry could have been achieved without mentioning his name.\textsuperscript{38}

\textsuperscript{38} See Comment, Further Limits on Libel Actions—Extension of the New York Times
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It would appear to be justifiable for a plaintiff to argue that he was needlessly defamed, and that his defamation added nothing of significance to the public discussion. Again, however, such an attack calls for a judicial interpretation of the scope of public concern. In light of the Court's strong language in *Rosenbloom*, it is doubtful whether any attack would succeed if predicated on the relevance of the defamation to the subject of public concern or if based on the publisher's negligence in failing to delete the plaintiff's name. As Justice Brennan stated:

> In this case, the vital needs of freedom of press and freedom of speech persuade us that allowing private citizens to obtain damage judgments on the basis of a jury determination that a publisher probably failed to use reasonable care would not provide adequate 'breathing space' for these great freedoms.  

The majority was concerned that a publisher's fear of being wrong would inevitably lead to self-censorship of the press. Indeed, the Court went so far as to state that "[t]he very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance."  

Justice Harlan in his dissent in *Rosenbloom* took strong exception to this notion that the First Amendment gives the press special protection from being engaged in litigation. It was his view that freedom of the press does not include immunity from the general application of law, and he argued that the states were not completely prohibited from exacting compensation for the adverse consequences of speech.

Rule to Libels Arising From Discussion of Public Issues, 16 Vill. L. Rev. 955, 973 (1971). While Priestley did follow Rosenbloom in applying the actual malice standard to a situation where the plaintiff was involved in an event of public and general concern, the Court also cushioned its decision with the use of traditional standards of reasonability. The Supreme Judicial Court stressed that the defendant operated under time restraints; that the defendant was impartial in its reporting; that it was accurate in what it reported; and that at trial none of the defendant's statements were proven to be false.

It is also interesting to note that just four months prior to the decision in Rosenbloom, Justice Black stated that "the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so. . . . Just as the incidental 'chilling effect' of such statutes does not automatically render them unconstitutional, so the chilling effect that admittedly can result from the very existence of certain laws on the statute books does not in itself justify prohibiting the State from carrying out the important and necessary task of enforcing these laws against socially harmful conduct that the State believes in good faith to be punishable under its laws and the Constitution." *Younger v. Harris*, 401 U.S. 37, 51-52 (1971).

Justice Harlan quoted from his opinion in *Curtis Publ. Co. v. Butts*, 388 U.S. 130, 160 (1967): "To exempt a publisher, because of the nature of his calling, from an imposition generally exacted from other members of the community, would be to extend a protection not required by the constitutional guarantee."
As he stated, "if this is not so, it is difficult to understand why governments may, for example, proscribe 'misleading' advertising practices or specify what is 'true' in the dissemination of consumer credit advertisements." Nevertheless, the majority feared the effect that large damage awards would have upon the viability of the press. However, if damages are indeed a real danger, it seems that a plaintiff's damages could be limited carefully to those he actually suffered, as Justices Marshall and Stewart suggested in their dissent. In his concurring opinion, Justice White even said, "... I am unaware that state libel laws with respect to private citizens have proved a hazard to the existence or operations of the communications industry in this country."

The impact that Rosenbloom will have on publishing standards in this jurisdiction and across the nation should be very significant. Proof by a private citizen of actual knowledge on the part of a publisher that the matter published was false is extremely difficult. Rosenbloom gives to individual publishers a privilege that closely parallels the absolute privilege that common law has recognized for high government officials. Publishers may now be free to defame private citizens as long as the defamation takes place within the context of reporting an event of "public or general concern," which after all is the perimeter within which the news media supposedly operate by definition. When this extensive privilege to defame is coupled with the trend toward consolidated control of mass media, a danger to the right of an individual citizen to be free in his integrity and privacy seems apparent. The Supreme Court in Hill spoke of the "primary value" which our society places on freedom of speech. Yet privacy is also a basic right, and in this technological age it is in need of increasing protection. It is significant that in the evolutionary process which produced the Rosenbloom decision, Justice Harlan's suggested standard of unreasonable conduct "constituting an extreme
departure from the standards . . . ordinarily adhered to by responsible publishers” has been rejected. The Court’s rejection of this standard will certainly not encourage the news media to improve and enforce their own standards of professional responsibility.

It is also questionable whether the expansion of the New York Times rule in Rosenbloom will in fact help to protect and foster the First Amendment rights that were the concern of the Supreme Court. As one commentator has stated:

In a system where free expression is not allowed, decisions are made by the few and obeyed by the masses. Unlimited freedom of expression, however, may well result in the same situation if it allows the powerful, the unscrupulous, or the careless to defame those they oppose, shout into silence those who disagree, distort the truth to a guileless population, and make an interested citizenry cynical and jaded.\(^50\)

Providing a constitutional privilege to defame private individuals may actually deter the public discussion the Court seeks. Any private individual who speaks his mind on an issue or who is involuntarily involved on the periphery of news may now be subject to privileged defamation.\(^51\) The private citizen who is defamed has neither the position of the public official nor the notoriety of the public figure to facilitate his rebuttal. Freedom of speech is not an absolute, nor is it an end in itself. The constitutionally protected right of speech is directed primarily toward guaranteeing political dialogue and fostering an open atmosphere in which decisions affecting the body politic can be made without governmental suppression of information.\(^52\) The meaning of “public or general concern” in Rosenbloom should be narrowed in the direction of insuring the goal of an informed citizenry while protecting the reputations of all persons, particularly private citizens, from unjustified invasion and wrongful hurt. The Massachusetts legislature should be sensitive to the implications of the Rosenbloom and Priestley decisions with regard to the vulnerability of private citizens who enter or are drawn into events of “public or general concern.” In fact, the majority in Rosenbloom said:

If the states fear that private citizens will not be able to respond adequately to publicity involving them, the solution lies in the direction of ensuring their ability to respond, rather than in stifling public discussion of matters of public concern.\(^53\)

Some states have adopted retraction statutes\(^54\) or right of reply stat-
utes, but while these legal devices do allow a form of rebuttal or confession of error, they do not have the effect of legally determining the truth or falsity of the disputed statements. Litigation is usually the only route available to a private plaintiff to vindicate his reputation. But given the difficulty of the actual malice standard and the cost and time involved, a person defamed may decide to avoid litigation, in which case his reputation must absorb the impact of the defamation. Professor Freund of Harvard Law School has suggested that defamation plaintiffs be permitted to request a special verdict, so that if there is a verdict for the defendant based solely and simply on absence of malice, the plaintiff could nevertheless receive a vindication of his character by a special verdict, finding that the utterances were untrue but not actionable because not spoken with malice.

Professor Freund’s plan seems to assume, however, that the plaintiff can successfully overcome the obstacles of summary judgment and directed verdict and can reach the jury. This would appear to be an unwarranted assumption after Rosenbloom. It is suggested, instead, that the Massachusetts legislature consider the merit of permitting a defamation plaintiff in the Commonwealth to bring a declaratory action for a jury determination of the truth or falsity of the disputed statement. This would be a right exclusive of the traditional damages suit. Calendar priority should be provided for such actions, considering that speed is important in reaching the publisher’s original audience and in preventing further harm to the plaintiff. Furthermore, the right to bring such an action should be allowed to survive the death of the plaintiff and to accrue to the benefit of the decedent’s immediate family. The reason for such a provision is that the impact of defamation, in many instances, strikes beyond the plaintiff and seriously affects the well-being of his or her family. Upon a determination of falsity, the court would issue an order requiring the defendant publication to print the findings of the court. This vindicatory publication of the jury determination would be given the same prominence in the publication as the article which precipitated the action. The above procedure would not only help to clear damaged reputations but would also help to provide accuracy in the forum of public discussion.

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in proving actual malice, defendant publishers may be less inclined to retract because any award of damages is unlikely.


57 The above suggestion for a special declaratory action for the determination of the truth or falsity of allegedly defamatory statements is set forth in Mass. House Bill 2104, drafted and filed in the General Court by the author for the 1971-1972 legislative session.
§16.11. Successive prosecutions for the same criminal act: Commonwealth v. White.¹ The defendant was indicted by a Middlesex County grand jury for larceny of a motor vehicle in Massachusetts. The automobile had been stolen in Montreal, Canada, from a resident of that city, and White was later apprehended in Lexington in possession of the vehicle. The defendant moved to dismiss the indictment on the ground that the superior court lacked jurisdiction over the alleged offense. He contended that the motor vehicle, if stolen at all, was stolen outside of the United States. The motion to dismiss the indictment was granted by the superior court on the authority of Commonwealth v. Uprichard,² and the Commonwealth appealed. The Supreme Judicial Court reversed the order and held: "The distinction drawn in the Uprichard case . . . between bringing into Massachusetts (a) goods stolen in another nation's territory and (b) goods stolen in another state, is illogical and cannot stand."³

Uprichard was decided in 1855 and involved money that had been stolen in Nova Scotia. The alleged thieves were later caught and indicted in Massachusetts for larceny. The Supreme Judicial Court held that the bringing into Massachusetts of goods stolen in a foreign country did not constitute larceny within the Commonwealth. Almost 50 years prior to its decision in Uprichard, the Supreme Judicial Court, in Commonwealth v. Andrews, had held that when goods stolen in another state are brought into Massachusetts, a crime is committed under the laws of the Commonwealth.⁴ In Andrews, the Court upheld the larceny conviction even though the original theft had occurred in New Hampshire. The defendant contended that allowing his Massachusetts conviction to stand would subject him to multiple prosecution and punishment for the same offense since he could subsequently be indicted in New Hampshire. In rejecting his argument, the Court concluded that Massachusetts had a compelling interest in protecting its citizens from the sale of stolen goods and in not becoming a refuge for felons. The opinion in Andrews also noted that English law allowed a thief to be indicted in any county in which he was caught in possession of stolen goods, and the Court felt that the same law should apply between the American states. Justice Sedgwick summarized the position of the Court: "For myself, I feel no such tenderness for thieves, as to desire that they should not be punished wherever guilty. If they offend against the laws of two states, I am willing they should be punished in both."⁵

Although the holding in White was confined to overruling Uprichard, the tenor of the decision indicates that the Supreme Judicial Court was reaffirming the rationale of Andrews. Since White had not been convicted in Massachusetts or anywhere else, the Court was not re-

² 69 Mass. (3 Gray) 434 (1855).
⁴ 2 Mass. 13 (1806).
⁵ Id. at 22.
quired to consider his argument that a conviction in Massachusetts would not bar a later indictment in Canada for the same offense. The Court noted that "[t]he present record presents no question of double jeopardy and the point is not sufficiently argued to require us to consider it," yet Justice Sedgwick's rationale in *Andrews* was quoted with approval. If the rationale of *Andrews* is still correct, as the Court in *White* strongly suggested, White's indictment in Massachusetts would not be affected by pending or potential indictments in Canada or other states through which the stolen vehicle had passed.

The situation in *White* offers a starting point for discussing the constitutionality of successive prosecutions by different jurisdictions for the same criminal act, even though *White* involved only the first stage of the question. This comment will examine the background, current status, and possible future developments in the area of successive criminal prosecutions. The English common law will be mentioned because it bears significantly on the early American cases, such as *Andrews*, which still retain much of their vitality today.

The common law crime of larceny consisted of three elements: a taking, a carrying away, and a felonious intent in the taking and carrying away of the property. Under early English common law, a court could take jurisdiction of a larceny only if the taking had occurred within its geographic jurisdiction. Since the English courts were organized by counties, flight across a county line was a great protection for the criminal. Of course, if he was subsequently caught in another county, he could be returned to the county where the taking had occurred, but the probability of this happening was small. The inefficiencies in the communication and transportation of that day made arrest and rendition to another county difficult and unlikely in all but a few cases.

The jurisdiction of the English courts over larceny was expanded by statute in 1773. Under the statute, a person who stole goods in one county and carried them into another could be indicted for larceny in either county. The rationale behind the statute was that rightful possession of the stolen goods vested in the true owner, and every moment's wrongful possession by a thief was a continuing trespass and constituted a new taking of the goods. It should be noted that the basis for the court's jurisdiction over larceny was not changed by the statute: all the elements necessary for a larceny still had to have occurred within that court's jurisdiction. The only change the statute made was to infer a new taking from the fact of wrongful possession with felonious intent, thereby permitting the alleged thief to be tried in any county where he was caught with the stolen goods.

It was this English view of larceny as a continuing offense that was

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7 See 4 Blackstone, Commentaries 229-232 (Christian ed. 1807).
9 15 Geo. 3, c. 91, §4.
adopted by the early Massachusetts cases, based on the analogy that the states legally related to each other in the same way as did the English counties.\(^\text{11}\) That analogy, it is submitted, was inaccurate even in the early 1800s. The states, with their separate systems of criminal law, do not stand in the same relation to each other as do the English counties, which are all under the same system of criminal law. The English view was simply a legal fiction created to extend venue—not jurisdiction—to any county in England into which a thief might flee.\(^\text{12}\) Under English law, “the measure of the crime, the mode of trial, the extent of punishment, and the effect of the conviction would be identical in whichever county the trial occurred.”\(^\text{13}\) However, not every thief who was found with stolen goods within an English county could be tried for larceny. In order for the law to apply, the initial taking must have been within the jurisdiction of English common law.

Under English law, a thief could be prosecuted either by the jurisdiction apprehending him or the jurisdiction where the original taking occurred, but since both jurisdictions were under the same system of law, a conviction or acquittal in one was a bar to an indictment in the other. However, the adoption of the English view of larceny by Massachusetts and a majority of other American states\(^\text{14}\) made it possible for a defendant to be twice prosecuted and punished for the same criminal act. On its face, such a result would appear to be unconstitutional as violative of the Fifth Amendment’s prohibition against double jeopardy; but, as will be seen, the United States Supreme Court has sustained the practice of successive prosecutions by different jurisdictions for the same criminal conduct.

In 1847, the United States Supreme Court, in Fox v. Ohio,\(^\text{15}\) heard the appeal of a man who had been convicted under a state law punishing the uttering of counterfeit money. The petitioner argued that the federal Constitution, in granting to Congress the exclusive power to coin money, had given the federal government exclusive jurisdiction over counterfeiting offenses. The Supreme Court agreed with an earlier Massachusetts decision which had held that Congress did not possess the exclusive power to punish counterfeiting activities;\(^\text{16}\) however, the Supreme Court did not conclude, as had the Supreme Judicial Court in the earlier case, that where state and federal courts have concurrent jurisdiction, a judgment in one is conclusive and bars the other from a subsequent prosecution.\(^\text{17}\) The Supreme Court expressed serious doubts that a defendant would ever be subjected to successive prosecutions by the state and federal governments: “It is


\(^{13}\) State v. LeBlanch, 31 N.J.L. 82, 85 (Sup. Ct. 1864).

\(^{14}\) 2 Anderson, Wharton’s Criminal Law and Procedure §485 (1957); Annot., 156 A.L.R. 802 (1945).

\(^{15}\) 46 U.S. 410 (1847).

\(^{16}\) Commonwealth v. Fuller, 49 Mass. (8 Met.) 313 (1844).

\(^{17}\) Id. at 317-318.
almost certain, that, in the benignant spirit in which the institutions both of the State and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same. . . ." 18 However, the Court went on to add that

were a contrary course of policy and action either probable or usual . . . [it would not] justify the conclusion [advanced by the petitioner], that offences falling within the competency [sic] of different authorities to restrain or punish them would not properly be subjected to the consequences which [both] those authorities might . . . affix to their perpetration. 19

The language in Fox seemed to indicate clearly, at least on the facts of that case, that the Supreme Court would find nothing unconstitutional in successive prosecutions. The dictum in Fox regarding multiple prosecutions was strengthened in United States v. Marigold, wherein the Supreme Court Stated:

With a view of avoiding conflict between the State and Federal jurisdictions, this court in the case of Fox v. The State of Ohio have [sic] taken care to point out, that the same act might . . . constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either [or both] as appropriate to its character in reference to each. 20

Prior to 1922, the United States Supreme Court had never been directly confronted with the question of the constitutionality of successive prosecutions. In Fox, the defendant had raised the possibility of a subsequent prosecution as an argument against the constitutional validity of a first indictment, but in no case had a defendant actually been indicted by a second jurisdiction for the same criminal act. The question of the constitutionality of successive prosecutions for the same criminal act was first brought directly before the Supreme Court in United States v. Lanza. 21 The defendants in Lanza were indicted for manufacturing, transporting, and possessing intoxicating liquor in violation of the National Prohibition Act. They filed a special plea in bar setting out the fact that they had been indicted and convicted under the laws of the state of Washington for manufacturing, transporting, and possessing the same liquor. The United States demurred to the plea, but the federal district court dismissed the indictment. The government appealed the dismissal directly to the United States Supreme Court under the provisions of the Criminal Appeals Act. 22

The defendants argued that two prosecutions for the same act, one

18 46 U.S. 410, 435 (1847).
19 Ibid.
20 50 U.S. 560, 569 (1850).
21 260 U.S. 377 (1922).
under federal law, the other under state law, amounted to double
jeopardy in violation of the Fifth Amendment. They further argued
that both prohibition laws derived their force from the same authority,
the second section of the Eighteenth Amendment and, therefore, it
was as if both prosecutions were by the United States in its courts. The
Supreme Court rejected the defendant's Fifth Amendment argument on
the grounds that the Fifth Amendment applied 'only to proceedings by
the Federal Government, . . . and the double jeopardy therein for­
bidden is a second prosecution under authority of the Federal Govern­
ment after a first trial for the same offense under the same author­
ity.' 23 Neither did the Court agree with the defendant's contention
that both state and federal prohibition laws derived their power from
the same source. The Court found that the states had the independent
authority to prohibit intoxicating liquors under the powers reserved
to them by the Tenth Amendment. After deciding against the 'defen­
dant's double jeopardy arguments, the Court outlined what has since
become the rationale for allowing successive prosecutions, the dual
sovereignty theory:

We have here two sovereignties, deriving power from different
sources, capable of dealing with the same subject matter within
the same territory. Each may, without interference by the other,
enact laws to secure prohibition, with the limitation that no
legislation can give validity to acts prohibited by the Amendment.
Each government in determining what shall be an offense against
its peace and dignity is exercising its own sovereignty, not that
of the other. 24

The basis for the dual sovereignty theory rests on the nature of our
federal system. Under the Constitution, the federal government is one
of enumerated powers; all powers not specifically given to the federal
government are reserved to the states. 25 Therefore, in matters properly
within their power, the states are truly sovereign, and one of the tra­
ditional powers of a sovereign government is the power to make and
enforce criminal laws. In the United States, the power of local law
enforcement has historically been left to the states. The federal gov­
ernment, however, also has defined certain criminal acts which in­
fringe on its sovereign interests. If one looks solely at the need for each
state and the federal government to be able to protect its own sovereign
interests, then the result in Lanza is reasonable. The Court in Lanza,
however, apparently did not consider important the fact that the de­
defendants were forced to defend themselves twice and eventually to
receive two punishments for the same criminal conduct.

Although the decision in Lanza may have been influenced by the
special problems encountered in enforcement of the prohibition laws,
the dual sovereignty theory has been used to sustain successive prose­

24 Ibid.
25 U.S. Const. amend. X.
cutions in other contexts. In *Bartkus v. Illinois*, the defendant had originally been tried and acquitted in federal district court for robbery of a federally insured savings and loan association, in violation of 18 U.S.C. §2113. He was subsequently indicted and convicted by the state of Illinois under its robbery statute. Prior to Bartkus' state trial, the local United States attorney and the Federal Bureau of Investigation cooperated fully with state law enforcement officials in gathering new evidence and in preparation of the case. Bartkus challenged his state conviction, claiming that the right not to be twice placed in jeopardy for the same offense is so fundamental that the second trial deprived him of due process of law under the Fourteenth Amendment. He also argued that the second trial was a sham and nothing more than a second federal trial, in violation of the Fifth Amendment, because of the large part played by federal authorities in preparing the state's case.

The Supreme Court, in a 5 to 4 decision, rejected both of Bartkus' arguments. The Court found his due process arguments insufficient in light of the standards set out in *Palko v. Connecticut*, where the Court had held that the words "due process of law" excluded only those procedures which were "so acute and shocking that our [policy] will not endure it." Because in 1959 a majority of the states would have allowed a second prosecution in the Bartkus situation, the Court found that there was nothing in the petitioner's second trial which appeared to violate the conscience of American society. The Court also found little substance in the defendant's Fifth Amendment argument. The fact that federal law enforcement officials assisted the state in the preparation of the case for the state trial did not mean the federal government was trying the defendant a second time. Because the second trial was under the authority of the state of Illinois, the state was free to accept assistance from any source. The Court even stated that cooperation between federal and state law enforcement officials was both desirable and necessary for the proper administration of justice in America.

The majority opinion in *Bartkus* brought a vigorous dissent from Justice Black. He believed that to allow successive prosecutions, simply because each prosecution was by a different government, was in contravention of the historical prohibition against double jeopardy. He also criticized the Court's reliance on the *Lanza* decision, stating:

> The Court, without denying the almost universal abhorrence of such double prosecutions, nevertheless justifies the practice here in the name of "federalism." . . . I have been shown nothing in the history of our union, in the writings of its Founders, or else-

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27 302 U.S. 319, 328 (1937). The Palko standard of a scheme of due process secured only those rights which were the "very essence of a scheme of ordered liberty" and which were "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* at 325.
where, to indicate that individual rights deemed essential by both State and Nation were to be lost through the combined operations of the two governments. Nor has the Court given any sound reason for thinking that the successful operation of our dual system of government depends in the slightest on the power to try people twice for the same act.\textsuperscript{28}

The Supreme Court in \textit{Lanza} and \textit{Bartkus} appeared to be more concerned with the practical results of disallowing successive prosecutions than with the effect of their decisions on the rights of the accused. This concern was highlighted in a companion case to \textit{Bartkus}, \textit{Abbate v. United States}.\textsuperscript{29} The issue in \textit{Abbate} was the same as in \textit{Bartkus}, except that in \textit{Abbate} the state conducted the first prosecution and the federal government subsequently tried the defendant. Justice Brennan, writing for the majority in \textit{Abbate}, noted that the petitioner's state conviction carried a sentence of three months, whereas the federal prosecution could result in a sentence of up to five years.

Such a disparity will very often arise when . . . the defendant's acts impinge more seriously on a federal interest than on a state interest. But no one would suggest that, in order to maintain the effectiveness of federal law enforcement, it is desirable completely to displace state power to prosecute crimes based on acts which might also violate federal law.\textsuperscript{30}

In Justice Brennan's view, allowance of successive prosecutions was necessary for the effective administration of criminal justice. He pointed out that it would be impractical for the federal government to protect its interests by attempting to keep informed of all the state prosecutions which might bear on federal offenses, yet the government might be forced to do so if a prior state prosecution would bar a trial for a federal offense. According to Justice Brennan, the alternative to the dual sovereignty theory was an increased involvement by the federal government in local law enforcement.\textsuperscript{31}

Although the Supreme Court has discussed at length the difficulties which might arise if the dual sovereignty theory of \textit{Lanza} were overruled, it has not commented on the fact that many jurisdictions have not found it necessary to resort to successive prosecutions in order to enforce their laws effectively. The common law, as it has developed in England and the British Commonwealth, does not allow successive prosecutions.\textsuperscript{32} In this country, at least 20 states have passed statutes specifically barring prosecutions of defendants who have previously .

\textsuperscript{28} 359 U.S. 212, 155-156 (1959). Joining Justice Black in his dissent were Chief Justice Warren and Justice Douglas. Justice Brennan wrote a separate dissenting opinion.

\textsuperscript{29} 359 U.S. 187 (1959).

\textsuperscript{30} Id. at 195.

\textsuperscript{31} See Justice Black's dissenting opinion in Rutkin v. United States, 343 U.S. 130, 143 (1952).

\textsuperscript{32} Grant, Successive Prosecutions by State and Nation: Common Law and British Empire Comparisons, 4 U.C.L.A. L. Rev. 1, 34 (1956).
been tried in another jurisdiction for the same criminal act.\textsuperscript{33} California's statute is typical:

Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another State, Government, or country, founded upon the act or omission in respect to which he is on trial, he has been acquitted or convicted, it is a sufficient defense.\textsuperscript{34}

In 19 of the 20 states, the bar to a second prosecution arises when the first trial occurred under the proper jurisdiction of any state or the federal government, and in all but one of those states the statute has general application to all criminal prosecutions. It is interesting to note that although the majority of the Supreme Court in Bartkus made much of Illinois’ interest in prosecuting Bartkus, apparently Illinois felt its interests could be amply protected without reliance on successive prosecutions. Less than a year after the decision in Bartkus, Illinois enacted a statute similar to the California statute quoted above.\textsuperscript{35}

An examination of some recent Supreme Court decisions dealing with successive prosecutions indicates a possible change in the Court’s approach. In \textit{Benton v. Maryland},\textsuperscript{36} the Supreme Court sustained the petitioner’s double jeopardy claim in the face of successive prosecutions by the state of Maryland. In so doing, the Court found that the \textit{Palko} standard for judging state conduct in the double jeopardy con-


\textsuperscript{34} Cal. Penal Code §656 (West 1970). The proposed revision of the Massachusetts Criminal Code contains a provision similar to that set out in the text but has some additional qualifications. Senate Bill 200 (1972), §13 provides: “When conduct constitutes an offense within the concurrent jurisdiction of this commonwealth and of the United States or of another state in the United States, a prosecution in one of the latter two is a bar to a subsequent prosecution in this commonwealth, under either of the following circumstances; (a) the prior prosecution resulted in an acquittal or a conviction as set forth in section eleven and the subsequent prosecution is based on the same criminal episode, unless (1) the law defining the offense of which the defendant was formerly convicted or acquitted is intended to prevent a substantially different harm or evil from the law defining the offense for which he is subsequently prosecuted, or (2) the second offense was not consummated when the first trial began; or (b) the prior prosecution was terminated by an acquittal or by final order, verdict or finding for the defendant which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact which must be established for conviction of the offense for which the defendant is subsequently prosecuted, unless the court in its discretion determines that the interests of the commonwealth would be unduly harmed if the commonwealth’s prosecution is barred.”

\textsuperscript{35} Ill. Ann. Stat. c. 38, §3-4(c) (Smith-Hurd 1964).

\textsuperscript{36} 395 U.S. 784 (1969).
text was no longer acceptable: "[T]he double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our Constitutional heritage, and . . . should apply to the States through the Fourteenth Amendment." 37 The Court, quoting from Green v. United States, 38 also noted that

the underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. 39 (Emphasis added.)

The decision in Benton is significant in the area of successive prosecutions for two reasons. First, by applying the Fifth Amendment to the states, it made applicable a uniform standard in both the state and federal courts regarding the issue of double jeopardy. Second, and perhaps of more importance, the decision clearly sets forth the approach to be used in analyzing questions of double jeopardy. Prior to Benton, the primary consideration was "the Palko notion [of due process] that basic constitutional rights can be denied by the States so long as the totality of the circumstances does not disclose a denial of 'fundamental fairness.' "40 It was the Palko standard of due process under which the Court in Bartkus upheld successive prosecutions. Under Benton, the courts must look to the specific guarantees of the Fifth Amendment in reaching a decision regarding a question of due process.

Since Benton, there has been only one case dealing directly with successive prosecutions. In Waller v. Florida, 41 the defendant had taken a mural from a city building in St. Petersburg, Florida. He was later apprehended and charged with violation of two city ordinances: (1) destruction of city property, and (2) disorderly breach of the peace. He was found guilty in the municipal court on both counts and was sentenced to six months in the county jail. He was subsequently indicted by the state of Florida for grand larceny, based on the same acts which were involved in the violation of the two city ordinances. The Florida Supreme Court denied the defendant's claim that the municipal court conviction barred the second indictment. The defendant was subsequently found guilty and sentenced to six months to five years, less the time already served. The issue directly before the United States Supreme Court in Waller was the asserted power of two separate courts of the same state to try the defendant for the same alleged criminal acts. The state of Florida sought to justify the two trials under

37 Id. at 794.
38 355 U.S. 184 (1957).
40 Id. at 795.
a dual sovereignty theory. Florida, relying mainly on Bartkus to support its position, alleged that the relationship between a municipality and the state is analogous to the relationship between a state and the federal government. Such a rationale was not new; many states had based similar results in their courts on the dual sovereignty theory.42

The Supreme Court disagreed with the analogy advanced by Florida. It pointed out that both the state and municipal courts derive their judicial power from the same source, the state constitution, and, therefore, their relation is not like that between the state and federal courts.

[T]he apt analogy to the relationship between municipal and state governments is to be found in the relationship between the government of a Territory and the Government of the United States. The legal consequence of that relationship was settled in Grafton v. United States, 206 U.S. 333 (1910), where this Court held that a prosecution in a court of the United States is a bar to a subsequent prosecution in a territorial court, since both are arms of the same sovereign.43

The court held that Florida could not lawfully try the defendant twice for the same offense and vacated the second judgment.

Since the Supreme Court in Waller did not find Bartkus controlling, its decision has no effect on the status of Bartkus as authority for successive prosecutions by different governments (i.e., two different states or state-federal prosecutions). The Court did, however, comment that “[i]n this context [two prosecutions by the same state], a 'dual sovereignty' theory is an anachronism. . . .”44 It should also be noted that the Supreme Court apparently was not concerned with the considerations that Justice Brennan had found important in Abbate. In Waller, the defendant's conviction of a misdemeanor in municipal court obviously carried a much lighter sentence than a state felony conviction would have, and the state was denied the opportunity to enforce whatever it saw as its sovereign interests.

Since Bartkus and Abbate, the Supreme Court has not decided a case in which the issue has been successive prosecutions by two different governments; nevertheless, the decisions in Benton and Waller may be indicative of a change. The Supreme Court has based the validity of successive prosecutions not on constitutional principles, but rather on the dual sovereignty theory. The dual sovereignty theory, however, is not based on any principle of law, but is simply a rationalization which allows a necessary result to be reached. As can be seen in Bartkus and Abbate, the Court has historically placed great weight on the practical necessity of allowing successive prosecutions, and on balance, this consideration has outweighed the rights of the accused. The decision in Benton may have substantially altered the balance.

44 Id. at 395.
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Benton clearly held the Fifth Amendment protection against double jeopardy to be a fundamental constitutional right, and also indicated the approach which the courts should follow whenever fundamental constitutional rights are involved. That approach is to apply the same constitutional standards to both the state and federal governments. If the issue of the constitutionality of successive prosecutions is to be decided in the future by considering, primarily, the effect the decision will have on the rights of the accused, the constitutional status of successive prosecutions may change. Indeed, such an approach would be similar to that of Justice Black in his dissent in Bartkus.45 The practical effect of allowing successive prosecutions seems clear. Regardless of the rationale used by a court, the accused is forced to defend himself twice for the same alleged criminal acts, “... enhancing the possibility that even though innocent he may be found guilty.”46 Some people may take the approach of the Andrews case and argue that criminals “should . . . be punished wherever guilty.”47 However, in all likelihood, it is not the guilty who are tried a second time; it is those who are found innocent in the first instance who carry the greater risk of being tried again.

J. MICHAEL DEASY

§16.12. Grand jury: Indictment by fictitious name: Connor v. Picard.1 A Suffolk County grand jury, on August 4, 1965, returned an indictment for murder against four named defendants and, pursuant to statute, against one “John Doe, the true name and a more particular description of the said John Doe being to the said jurors unknown.”2 Two days later defendant was taken into custody and subsequently served with a “John Doe” arrest warrant. Five days after return of the indictment, the Suffolk Superior Court allowed, over defendant’s objection, the Commonwealth’s motion to amend the indictment by substituting the name James J. Connor (defendant’s true name) for the name “John Doe,” a procedure presumed to be authorized by the same statute permitting indictment by fictitious name.3

45 See n.28 supra.
47 2 Mass. 13, 22 (1804).

§16.12. 1 434 F.2d 673 (1st Cir. 1970).
2 G.L., c. 277, §19 provides: “If the name of an accused person is unknown to the grand jury, he may be described by a fictitious name or by any other practicable description, with an allegation that his real name is unknown. An indictment of the defendant by a fictitious or erroneous name shall not be ground for abatement; but if at any subsequent stage of the proceedings his true name is discovered, it shall be entered on the record and may be used in the subsequent proceedings, with a reference to the fact that he was indicted by the name or description mentioned in the indictment.”
3 It is probable that the form of the Commonwealth’s motion was not carefully chosen. A “motion to amend indictment” was filed on Aug. 9, 1965, presumably in accordance with G.L., c. 277, §19. The Commonwealth apparently intended to move that Connor’s
At trial, defendant was found guilty and sentenced to life imprisonment. On appeal to the Supreme Judicial Court, he challenged the sufficiency of his indictment by fictitious name, contending that the indictment contained no means of identifying him and was therefore violative of both the Massachusetts Declaration of Rights and the United States Constitution. The defendant was not specific as to the particular federal constitutional provision claimed to have been violated, although his brief on appeal contained an argument that the Fifth Amendment right to grand jury indictment would probably be applicable. No due process claim was made, even though some passages in the defendant's brief might have been construed as relating to a due process claim. The Supreme Judicial Court, with two Justices dissenting, affirmed the conviction, relying on the similar case of Commonwealth v. Gedzium, which had held that the "John Doe" indictment statute did not violate the Massachusetts Constitution.

Defendant thereupon unsuccessfully petitioned the federal district court for a writ of habeas corpus. On appeal, the First Circuit Court of Appeals reversed and remanded with instructions to grant the writ unless the Commonwealth indicted petitioner within a reasonable time set by the district court. In an opinion by Chief Judge Aldrich, the First Circuit pointed out that Article XII of the Massachusetts Declaration of Rights has been interpreted as guaranteeing that no one shall be held to answer a criminal charge until a grand jury has found at least probable cause to believe the truth of the facts upon which the criminality depends. By its "John Doe" indictment statute, the Commonwealth authorizes a grand jury to return an indictment when the only evidence before it is the fact that a crime has been committed. Thereafter, a prosecutor may continue to gather

name be substituted in subsequent proceedings and not, as the motion prayed, to amend the indictment. Amendment is permitted by G.L., c. 277, §35A, but necessitates a judicial determination of whether the amendment would prejudice the defendant in his defense, and no such determination appears to have been explicitly made in Connor's case. Indeed, it does not appear that the Commonwealth's motion was supported by any evidence bearing on the identity of "John Doe."

4 Mass. Const. pt. 1, art. XII provides in part: "[N]o subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land."


6 See id. at 11, 12.


9 A Fifth Amendment claim in Gedzium was dismissed by the Supreme Judicial Court. At that time (1927), the Fifth Amendment was held to govern only the actions of the federal government.


12 Article XII was so interpreted by Chief Justice Shaw in Commonwealth v. Holley, 69 Mass. (3 Gray) 458, 459 (1855).
evidence and when he is satisfied as to the identity of the person who committed the crime, he may, without returning to the grand jury, cause that person's name to be entered on the record and thereafter used in the proceedings. This procedure is, according to the circuit court, a delegation of grand jury authority to the prosecutor, which results in two classifications of criminal defendants, those accused on "regular" indictments by a grand jury and those brought to trial by a prosecutor under the statutory procedure. The court decided that the different treatment accorded criminal defendants charged with the same offense is not rationally related to a permissible state purpose and violated petitioner's right to equal protection of the laws. It was held that "[i]n the light of the Commonwealth's otherwise universal commitment to grand jury indictments in felony cases," the arbitrary decision, in petitioner's case, to permit the grand jury to delegate its accusatory power to the prosecutor was "constitutionally impermissible discrimination."13

Following the First Circuit's decision, the Commonwealth petitioned the United States Supreme Court for a writ of certiorari, claiming that: (1) petitioner had not exhausted his state remedies, (2) the "John Doe" indictment statute did not violate the equal protection clause, and (3) the application of the statute in the instant case did not raise a federal constitutional question. On May 3, 1971, the Commonwealth's petition was granted.14 At the time this comment went to press, the case had been argued, and a decision early in 1972 appeared likely.

Grand jury indictment: The federal right in state courts. The Fifth Amendment of the United States Constitution guarantees that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...." In 1884, the United States Supreme Court decided in Hurtado v. California15 that the Fourteenth Amendment due process clause does not compel the states to afford this same protection to persons prosecuted in state courts. Interestingly, of those guarantees of the Bill of Rights relating to the administration of criminal justice, only the Fifth Amendment guarantee of grand jury indictment in serious cases has not been extended to the states through the Fourteenth Amendment due process clause.

In Hurtado, the Supreme Court discussed extensively the common law source and meaning of the phrases "due process of law" and "law of the land" and concluded that neither phrase embodied a right to grand jury indictment in criminal cases. In arriving at its conclusion, the Supreme Court was critical of Jones v. Robbins,16 a decision rendered by the Supreme Judicial Court of Massachusetts in 1857, in which the Court had held that the phrase "law of the land" as used in

13 434 F.2d 673, 676 (1st Cir. 1970).
16 74 Mass. (8 Gray) 329 (1857).
Article XII of the Massachusetts Declaration of Rights made indictment a prerequisite to conviction in felony cases.\(^{17}\)

Notwithstanding the determination that states need not proceed against an accused by indictment, it is important to note that in *Hurtado* the Supreme Court did recognize that the particular state practice employed to bring an accused to trial must conform to due process of law.\(^{18}\) In later decisions, the Supreme Court acknowledged the applicability of the Fourteenth Amendment to state grand jury proceedings by holding that intentional exclusion from grand juries of those belonging to the same race as the accused is violative of the equal protection clause.\(^{19}\)

In his appeal to the Massachusetts Supreme Judicial Court, the petitioner in *Connor v. Picard* suggested that the *Hurtado* rationale should be reevaluated in view of later Supreme Court decisions that have held various Bill of Rights guarantees applicable to the states.\(^{20}\) However, petitioner apparently did not pursue this argument in his petition for a writ of habeas corpus. In fact, in his Supreme Court brief, petitioner conceded that there is no Fourteenth Amendment due process right to a grand jury indictment in state prosecutions.\(^{21}\) Thus, *Connor v. Picard* should not be regarded as an attack on the *Hurtado* decision.

*The Massachusetts "John Doe" indictment statute.* In 1897, the General Court of Massachusetts appointed a commission of three persons to investigate existing criminal procedure and to recommend a plan for its simplification.\(^{22}\) The commissioners, in 1899, sent their report and the draft of a bill to the governor, who transmitted both

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\(^{17}\) Relying primarily on a passage from Lord Coke’s commentary on the Magna Carta, Chief Justice Shaw declared: “The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in cases of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.” *Id.* at 344.

Ironically, the Commonwealth is placed in the anomalous position in *Connor v. Picard* of supporting the *Hurtado* proposition that due process does not include a right to grand jury indictment in criminal cases. Jones v. Robbins was most recently cited as established authority by the Supreme Judicial Court in *Commonwealth v. Favulli*, 352 Mass. 95, 104, 224 N.E.2d 422, 429 (1967).

\(^{18}\) “[W]e are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law.” 110 U.S. 516, 538 (1884).


the report and the draft to the General Court. The bill was enacted into law as Chapter 409 of the Statutes of 1899. Section 8 of the new law embodied a provision substantially the same as the present G.L., c. 277, §19, authorizing indictment by fictitious name or other practicable description. The commissioners' report discussed the constitutionality of portions of the proposed legislation, but there was no mention of a potential conflict of Section 8 with either the Massachusetts or the federal Constitution. Statutes comparable to the present Massachusetts 'John Doe' indictment statute have been enacted in 23 other states and Puerto Rico.

The constitutionality of the Massachusetts statute was challenged in the 1927 case of Commonwealth v. Gedzium, which concerned a murder indictment charging "John Doe, Richard Roe and Richard Doe, whose other and true names and more particular descriptions of whom are to said Jurors unknown." Almost one year after the indictment was returned, on motion of the district attorney, the Middlesex Superior Court ordered the name "Jerry Gedzium" to be entered on the record and used in subsequent proceedings. Defendant moved to quash the indictment on the grounds that it was insufficient and violated both the Massachusetts and federal constitutions. The motion was denied and defendant was thereafter tried and found guilty of first-degree murder. He appealed to the Supreme Judicial Court, alleging error in the denial of his motion to quash the indictment.

Speaking for a unanimous court, Chief Justice Rugg observed that "[i]f it were not for G.L., c. 277, §19, plainly the indictment would have been insufficient" because previous Massachusetts authority had held that "when the name of party was unknown, the best description possible of the person must be given and one sufficient to indicate clearly on whom it is to be served." The Court acknowledged that

23 Section 8 was later amended to require that when the name of the accused person was discovered and entered in the record of subsequent proceedings, there must be a reference to the fact that he was indicted by the name or description mentioned in the indictment.


the grand jury had not known the true names of the defendants and was unable to give more particular descriptions of them, but the Court made allowance for this deficiency by stating that the existence of a state-created right to grand jury indictment did not prohibit the legislature from altering "minor details" or "unessential formalities" not affecting "vital characteristics" of the grand jury proceeding.\footnote{27} It was also declared that the criminal who had successfully concealed his name and other identifying characteristics from general knowledge ought not to escape justice simply because the grand jury was unable to describe him adequately in the indictment, particularly when the evidence disclosed his definite existence as a human being. The Court characterized the efforts of a criminal to disguise himself and conceal his identity as a deliberate and intentional attempt to obstruct the grand jury in the performance of its duties. Under these circumstances, the Court concluded, a statute authorizing indictment by a "fictitious description of an actual person, when that is the best description obtainable," was not repugnant to Article XII of the Massachusetts Declaration of Rights.\footnote{28}

In Commonwealth v. Doherty,\footnote{29} the same case that became Connor v. Picard once a federal habeas corpus petition had been filed, the Supreme Judicial Court adhered to the Gedzium rationale. However, two dissenting Justices took the position that G.L., c. 277, §19 should apply "only where the indictment clearly shows that the grand jury intended to indict a particular person whose identity was known to them although his true name may not have been known."\footnote{30} The dissenters argued that the Doherty indictment prima facie foreclosed the possibility that the grand jury knew the identity of the accused. Because the defendant was subjected to a public trial before the grand jury had determined that there was probable cause to believe that he committed the crime, the dissenters concluded that the indictment was an indictment in blank and therefore fatally defective.\footnote{31}

The dissent also contended that the majority interpretation of G.L., c. 277, §19 would serve to nullify the provisions of the Massachusetts statute of limitations for criminal offenses.\footnote{32} Assuming, for example,
that the criminal act was detected prior to the running of the statute, the grand jury could be convened, sufficient evidence of a criminal act presented to it, and a “John Doe” indictment returned, thereby permitting the state to circumvent the statute of limitations. The efficacy of the statute of limitations as a defense and as a meaningful legislative policy would thereby be substantially impaired, a result not likely to have been intended or even contemplated when the “John Doe” indictment statute was enacted.33

The First Circuit Court of Appeals in Connor v. Picard agreed with the dissent in Doherty that the accusatory procedure under the statute was tantamount to an indictment in blank. However, as discussed earlier, the First Circuit held specifically that the absence of a sufficient description of the petitioner in the indictment denied him the federal right to equal protection of the laws. In a rather strongly worded opinion, the First Circuit found “no end served by the statute except prosecutorial convenience” and declared the Gedzium rationale “sophistical” and “not even minimally persuasive.”34 In answer to the Gedzium “disguise” rationale, the First Circuit said that even if the perpetrator made a deliberate attempt to obstruct the grand jury by concealment and disguise, his conduct would not justify the denial of customary rights to the person the prosecutor elected to accuse.

It is undoubtedly true, as the First Circuit observed, that the Massachusetts “John Doe” indictment statute serves “prosecutorial convenience.” Most statutes which are enacted for the purpose of streamlining cumbersome common law criminal procedures are, to some extent, intended to facilitate the prosecution of criminals. The elimination of the delay, complexity, and inconvenience of outmoded criminal procedure is clearly a legitimate legislative purpose so long as substantive rights are preserved.35 The question thus raised is whether the Massachusetts “John Doe” indictment statute serves any legitimate state purpose without unduly limiting the substantive rights of an accused. To answer this question, the operation of the statute must be examined.

On its face, the statute permits indictment by fictitious name in at least the following three situations: (1) a defendant whom the grand jury has probable cause to accuse of a crime is in custody but refuses to commit such crime or crimes, or as accessory thereto, or any one or more of them may be found and filed within ten years of the date of commission of said crime or crimes. An indictment for any other crime shall be found and filed within six years after the crime has been committed; but any period during which the defendant is not usually and publicly resident within the commonwealth shall be excluded in determining the time limited.”

34 434 F.2d 673, 675-676 (1st Cir. 1970).
35 Statutory procedures providing for substitution of an information for an indictment in less serious cases, a knowing waiver of grand jury indictment or of trial by jury in noncapital cases, and amendments of complaints, informations, and indictments to correct misnomer and other errors of form are examples of procedures intended to serve “prosecutorial convenience” without undue impairment of rights.
to reveal his true name or any other information about himself;\(^{36}\) (2) the defendant is at large, his true name unknown to the prosecutor, grand jury, and witnesses, but he is reasonably identifiable by physical description or other means; or (3) defendant is at large, and the only known evidence of his existence is the fact of his criminal activity.\(^{37}\)

In the first situation, the unidentified defendant in custody, there would seem to exist no valid objection to an indictment by a fictitious name. This assumes, of course, that the grand jury, after a finding of probable cause, would include a description sufficient to indicate that the recalcitrant prisoner is the intended accused. Absent the "John Doe" indictment statute, the unidentified person in custody could, at common law, bring a plea in abatement to any indictment which stated his name incorrectly. He would have to be discharged, or else proceedings would have to be commenced de novo under the name in his plea.\(^{38}\) To avoid the delay and expense resulting from this circuitous common law procedure, the statutory provisions for the indictment by fictitious name would seem to embody a proper legislative purpose without impairment of defendant's constitutional rights.

The second situation noted, the unknown defendant at large but reasonably identifiable by physical description or other means, poses somewhat more difficult constitutional questions. A person indicted by a fictitious name followed by a reasonably accurate description has no complaint if the description is sufficiently narrow to manifest the grand jury's intent to single him out as the subject of its accusation. However, the difficulty arises in attempting to define what constitutes an acceptable description. An examination of several cases will illustrate what the courts have considered meaningful descriptive criteria.\(^{39}\)

In *Commonwealth v. Baldassini*\(^{40}\) the defendant challenged the denial of his motion to suppress an arrest warrant\(^{41}\) which charged "John Doe, also known as 'Baldi' and Baldassini, a white male, between 50 and 55 yrs. of age, 5'8", 170-180 pounds, and dark hair, of said Quincy in said County of Norfolk" with possession of gaming apparatus. Defendant sought to suppress the warrant on the ground that it did not indicate clearly on whom it was to be served, since it did not state his occupation, his place of residence, and the personal peculiarities by which he could be identified. The Massachusetts Supreme Judicial Court upheld the validity of the warrant, citing the

\(^{36}\) This category would include those defendants who falsely identify themselves and are subsequently indicted by the false name.

\(^{37}\) This category would include defendants not yet implicated in the crime charged in the "John Doe" indictment, but who are in custody for some other reason.

\(^{38}\) See United States v. Fawcett, 115 F.2d 764, 766 (3d Cir. 1940).

\(^{39}\) The illustrative cases cited did not all arise in jurisdictions having "John Doe" indictment statutes in force; for example, there is no federal "John Doe" indictment statute.


\(^{41}\) G.L., c. 277, §79 makes the "John Doe" indictment statute applicable to complaints.
authority of Gedzium and Doherty. Even though the Court relied on authority subsequently rejected by the First Circuit in Connor v. Picard, it is submitted that this warrant, which included defendant's surname, a nickname, some accurate physical characteristics, and his city of residence, would meet the constitutional standards set by the First Circuit.42

On the other hand, several courts have found certain descriptions of unknown defendants to be unreasonably vague. In United States v. Doe,43 the defendant was arraigned on a federal indictment accusing "John Doe, a Chinese person, whose true name is to the grand jurors aforesaid unknown," with aiding the illegal landing of an alien. Sustaining a demurrer to the accusation, the federal district court held that "an indictment so indefinite in its description of the defendant that a warrant for his arrest, following the description contained in the indictment, would be void, lacks that degree of certainty which the law requires, and must be held insufficient, when directly assailed by a demurrer or motion to quash upon that ground."44 The court also pointed out that "[w]ith no other description of the defendant than this, it is not possible to say what particular Chinese person the grand jury intended to indict. . . ."45 In the case of State v. Geiger,46 an indictment was returned by the grand jury against "a man in Turner Hall [a town], whose name to the grand jurors is unknown." An Iowa statute permitted indictment by fictitious name if the defendant's true name could not be discovered.47 In quashing the indictment, the Iowa Supreme Court said: "[T]he description [in the indictment] by which it is attempted to identify [defendant], may apply with the same certainty and distinctness to fifty men in Turner Hall, if there are fifty men there."48 In Duffy v. Keville,49 an opinion rendered by the federal District Court for Massachusetts, one Mary Duffy was arrested in Massachusetts and held for removal to New York on an indictment returned in a New York federal court. The indictment charged "Jane Duffy, the name Jane being fictitious" and others with conspiracy. In granting the petitioner's writ of habeas corpus, the district court held that the indictment was patently indefinite and void inasmuch as it was "equally applicable to every woman named 'Duffy' residing anywhere in the world."50

Seeming particularity of description in an indictment can be some-

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42 See Connor v. Picard, 434 F.2d 673, 675 n.4 (1st Cir. 1970), where the court cites with approval dictum of the Supreme Judicial Court in Commonwealth v. Crotty, 92 Mass. (10 Allen) 403 (1865). The dictum suggests some identification cues which might be sufficient to permit issuance of a warrant using a fictitious name.
43 127 F. 982 (N.D. Cal. 1904).
44 Id. at 984.
45 Id. at 983.
46 5 Iowa 484 (1858).
47 The statute was a predecessor of the present Iowa "John Doe" indictment statute, Iowa Code Ann. §773.8 (Supp. 1970).
48 5 Iowa 484, 486 (1858).
50 Ibid.
what deceiving. Two California decisions are illustrative. An indictment that charged "Jane Doe (Charlene) female Negro, 39 years, 5'7", weight 165 lbs., olive complexion" was upheld despite the fact defendant weighed 110 pounds rather than 165 pounds. 51 Similarly, an indictment that designated the accused as "John Doe 'Bill,' male Negro, 30-35 yrs., 5'7"-5'10", 150-160 lbs., black hair, brown eyes" was also found to be sufficient. 52 It is submitted, however, that the latter description could fit thousands of male Negroes, and such particulars as "black hair" and "brown eyes" apply almost universally to the Negro race. It would seem that the potential for error clearly outweighs any inconvenience or delay that may be caused by insisting that the prosecutor resubmit the case to the grand jury when he has either identified the suspect or otherwise narrowed the suspect's description. In the case of the "Jane Doe (Charlene)" indictment, somewhat more particular evidence was presented to the grand jury, and since most of the particulars apparently were correct, it could be argued that it was justifiable to disregard the significant error in weight.

When a "John Doe" indictment is returned in the situation of an unknown defendant at large, it contains no description of the accused. It must be presumed, therefore, that the grand jury has found no more than probable cause to believe a crime has been committed by an unknown person. Connor v. Picard and Gedzium illustrate this situation. Once the prosecutor feels he knows the identity of the person responsible for the crime, that person's name may be substituted for the fictitious name in the indictment on the prosecutor's motion. Viewed as a materially different proceeding, with less assurance of fairness than that contemplated by the regular grand jury procedure, the substitution of names by the prosecutor appears to be inconsistent with the mandate of the Fourteenth Amendment equal protection clause.

In addition, it is submitted that application of the "John Doe" indictment statute to persons wholly unknown to the grand jury contravenes the Massachusetts Constitution by eliminating the substance of the grand jury protection guaranteed an accused by Article XII of the Massachusetts Declaration of Rights. In Gedzium, the Supreme Judicial Court advanced its paradoxical "disguise" rationale as the possible justification for enactment of the forerunner of G.L., c. 277, §19. However, when a criminal disguises himself so as to conceal his identity, the grand jury and the prosecutor should proceed with utmost caution to insure against accusation of an innocent person; and it seems preferable in such a situation to require the prosecutor to return to the grand jury when he has what he considers sufficient evidence as to a particular person. The Supreme Judicial Court in Doherty apparently felt compelled by the doctrine of stare decisis to follow Gedzium, despite the cogent and well-reasoned Doherty

§16.13. Prisoners' rights: Access to the courts; Due process in disciplinary proceedings. Since the introduction of the prison system into the United States in the early nineteenth century, the civil rights of state prison inmates have been drastically curtailed so that prisons could be easily administered and prison discipline maintained. At various times since the late nineteenth century, prison reformers have attempted to advance the civil rights of prisoners, but have toiled against unfavorable public opinion and indifferent legislatures. In the past, the federal courts have not played an active part in protecting the civil rights of state prison inmates. Although the rights of pris-

53 On December 20, 1971, as this article was awaiting publication, the United States Supreme Court, by a 6 to 1 majority (Justice Douglas dissenting), reversed the First Circuit Court of Appeals and remanded respondent (Connor) to the Supreme Judicial Court for a determination of his equal protection claim. Picard v. Connor, 404 U.S. 270 (1971). Specifically refusing to reach the merits of the constitutional question, the Court held that the respondent had not exhausted his state remedies, in that the Supreme Judicial Court had no fair opportunity to consider and act upon his equal protection claim. The Supreme Judicial Court will now be presented with the following considerations and alternatives.

(1) If the Court elects to decide the case on the basis of the equal protection issue, subsequent federal court involvement is likely. A decision adverse to the Commonwealth, i.e., holding the "John Doe" indictment statute invalid, could result in a petition by the Commonwealth to the Supreme Court for certiorari pursuant to 28 U.S.C. §1257(3). Conversely, a decision adverse to the defendant will almost certainly be attacked either by appeal to the Supreme Court under 28 U.S.C. §1257(2) or by a petition for habeas corpus, or both.

(2) If the Court reaffirms the validity of the "John Doe" indictment under state law, it would seem that the equal protection issue must be reached, and the same alternatives as in (1) would follow.

(3) If, however, the Court finds that the defendant was illegally indicted under state law, by overruling Gedzium and Doherty and holding the application of G.L., c. 277, §19 to the defendant as repugnant to Article XII of the Massachusetts Declaration of Rights, no federal court involvement would be likely.

§16.13. 1 Prior to the acceptance of incarceration as a penal instrument, American society relied almost exclusively on harsh corporal punishment to deter criminal activity. See Barnes and Teeters, New Horizons in Criminology 466-475 (1943).

2 Traditionally, state courts have also not been sympathetic to claims of civil rights on the part of state prison inmates. In Ruffin v. Commonwealth, the Virginia Supreme Court declared: "The convicted felon has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords him. He is for the time being a slave of the state.

The bill of rights is a declaration of general principles to govern a society of freemen,
oners have been recognized by the courts, federal judges have generally accepted the thesis that citizens of necessity lose many of their civil rights when they become prisoners. Furthermore, many federal courts have long practiced a hands-off policy with respect to the administration and regulation of state prisons in the belief that the supervision of state institutions belongs exclusively in the hands of the state's own judiciary. It has only been within the past few years that the federal courts have become involved in the protection of the civil rights of state prison inmates. Although accepting the proposition that state authorities should have broad discretion to deal with prison administration, federal judges have come to recognize that the granting of such discretion does not preclude judicial review of the manner in which that discretion is exercised. In carrying out their review, the federal courts have typically employed a balancing test, weighing the prisoner's rights against the demands of prison administration and discipline. This comment will review several recent federal court decisions on prisoners' rights, including four decisions involving inmates of Massachusetts prisons, in order to examine the issues presented by the inmates and the responses of the federal judiciary. Two specific topics will be considered: (1) access of

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3 See In re Bonner, 151 U.S. 242 (1894); Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), in which the court declared: "A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law."


5 E.g., Banning v. Looney, 213 F.2d 771 (10th Cir. 1954), cert. denied, 348 U.S. 859 (1954), in which the court, in a per curiam decision, declared it unnecessary to cite authority for the proposition that federal courts were "without power to supervise prison administration or to interfere with ordinary prison rules or regulations." Id. at 771. See also Johnson v. Avery, 393 U.S. 483 (1969); Burns v. Swenson, 430 F.2d 771 (8th Cir. 1970); Krist v. Smith, 309 F. Supp. 479 (S.D. Ga. 1970); United States ex rel. Keen v. Mazurkiewicz, 306 F. Supp. 483 (E.D. Pa. 1969). For a full discussion of the rationale behind the hands-off doctrine, see Note, Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts, 72 Yale L.J. 506 (1963).


7 For a listing of state statutes granting broad discretion to prison administrators, see Jacob, n.6 supra, at 227 n.1.

8 Muniz v. United States, 305 F.2d 285, 287 (2d Cir. 1962), aff'd, 374 U.S. 150 (1963), in which the court declared: "... [A] mere grant of authority cannot be taken as a blanket waiver of responsibility in its execution. Numerous federal agencies are vested with extensive administrative responsibilities. But it does not follow that their actions are immune to judicial review."

9 The need for a balancing of interests was explicitly recognized in United States ex rel. Yaris v. Shaughnessy, 112 F. Supp. 143, 144 (S.D.N.Y. 1953), where the court said: "It is hard to believe that persons . . . convicted of crime are at the mercy of the executive department and yet it is unthinkable that the judiciary should take over the operation of the . . . prisons. There must be some middle ground between these extremes."

Access to the courts. Of fundamental importance to state prison inmates in their attempts to gain redress for alleged wrongs is the right of access to the judicial system. In four recent cases that involved inmates of Massachusetts prisons, the federal courts unanimously reaffirmed the prisoners' right of access. In Nolan v. Scafati, Nolan, a prisoner at the Massachusetts Correctional Institution in Walpole, Massachusetts, had been involved in prison disciplinary proceedings and had attempted to send a letter to the Massachusetts Civil Liberties Union. The officials at Walpole had refused to allow the letter to be sent, and when Nolan was ordered to solitary confinement by the prison disciplinary committee, he appealed to the federal district court. Nolan sought relief under 42 U.S.C. §1983 and invoked the court's jurisdiction under 28 U.S.C. §1343, contending that the refusal to forward his letter was a denial of due process.

11 Federal court decisions in cases arising in other states have dealt extensively with First Amendment freedoms and prisoners' rights. Although the balancing test applied by the courts is phrased in familiar terms (a strong showing of a substantial and controlling interest, e.g., Jackson v. Godwin, 400 F.2d 529, 541 (5th Cir. 1968)), the rights sought by the prisoners have been basic: to gather in a body for religious services, to consult a minister of their faith, to possess and subscribe to religious literature, and to correspond with their spiritual leader. See Walker v. Blackwell, 411 F.2d 23 (5th Cir. 1969); Long v. Parker, 390 F.2d 816 (3d Cir. 1968); Cooper v. Pate, 382 F.2d 518 (7th Cir. 1967); Northern v. Nelson, 315 F. Supp. 687 (N.D. Cal. 1970); Knuckles v. Prasse, 302 F. Supp. 1036 (E.D. Pa. 1969); Banks v. Havener, 234 F. Supp. 27 (E.D. Va. 1964).


12 430 F.2d 548 (1st Cir. 1970).

13 In his letter, Nolan claimed that his impending sentence to solitary confinement resulted from his insistence on a right to counsel at the disciplinary hearing.

14 42 U.S.C. §1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States ... to the deprivation of any right, privilege, or immunity secured by the Constitution and laws, shall be liable to the party in whose right the deprivation was alleged to have been occasioned in an action at law, suit in equity, or other proper proceeding for redress."

15 28 U.S.C. §1343 provides in part: "The district courts shall have original jurisdiction in any civil action authorized by law to be commenced by any person ... (8) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States ..."
Nolan's complaint was dismissed by the district court, but on appeal the United States Court of Appeals for the First Circuit took a firm stand on a prisoner's right of access to the courts and the "corollary right to obtain some assistance in preparing [a] communication with the court." The circuit court held that in the absence of some "countervailing interest," usually involving prison security, the state cannot "prevent an inmate from seeking legal assistance from bona fide attorneys working in an organization such as the Civil Liberties Union." To rule otherwise would, in the words of the court, "allow prison officials to silence—and perhaps punish—inmates seeking vindication of those constitutional rights clearly held by prison inmates." 18

In *Tyree v. Fitzpatrick*, 49 the petitioner alleged general censorship of his incoming and outgoing mail and the refusal of prison officials to mail "certain communications." The federal District Court for Massachusetts decided that while it would not issue an injunction forbidding Massachusetts correctional officials from opening mail, either incoming or outgoing, it would enjoin officials from deleting material or refusing to mail communications from prisoners to the courts, attorneys, or public officials. In reaching its decision, the court applied the balancing test and found that the necessities of prison administration did not outweigh the need for an inmate to be able to communicate with counsel.

The case of *Meola v. Fitzpatrick*21 also involved issues of access to the courts and due process in prison disciplinary hearings. In *Meola*, the inmate's complaint alleged that the procedure whereby state correctional officials reviewed all petitions sent by a prisoner to the courts, with the right to return those in which the language was deemed "improper," violated his right of access to the courts. The federal District Court for Massachusetts stated flatly that censorship of the contents of a prisoner's petition to court violated his First Amendment rights. United States or by any Act of Congress providing for equal rights of citizens. . . ."

16 The district court believed that the disciplinary committee had informed Nolan of the charges against him and had given him an opportunity to respond by giving his own version of the events in question. 306 F. Supp. 1, 2 (D. Mass. 1969).

17 430 F.2d 548, 551 (1st Cir. 1970).

18 Ibid. Justification for the intervention of federal courts in certain matters relating to state prisoners emanates from the decisions of the United States Supreme Court in Ex parte Hull, 312 U.S. 546 (1941), and Johnson v. Avery, 393 U.S. 483 (1969). In Johnson, the Court expressed guidelines for federal judicial intervention in prisoners' rights cases: "There is no doubt that discipline and administration of state detention facilities are state functions. They are subject to federal authority only where paramount federal constitutional or statutory rights supervene. It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such rights the regulations may be invalidated." Id. at 486. Although both Ex parte Hull and Johnson v. Avery dealt with writs of habeas corpus, federal courts have applied the principles of these cases to the entire area of prisoners' access to the courts.

19 325 F. Supp. 554 (D. Mass. 1971). This case also raised questions concerning the constitutionality and utility of solitary confinement; see n.50 infra.

20 Id. at 559.

rights. It held that "there [was] no valid prison interest in screening and controlling the content of court papers sufficiently compelling so as to limit a prisoner's constitutional right to free and unfettered access to the courts."\(^{22}\) Although noting that men in a prison environment are often prone to exaggerate the conditions under which they are living, the court could not find sufficient justification for review and censorship of their petitions.

Possibly the most important issue raised by any of the Massachusetts cases dealing with access to the courts arose in Nolan v. Fitzpatrick.\(^{23}\) Nolan challenged the policy of state prison authorities against allowing inmates to send grievance letters to the news media. He had attempted to send unsealed letters to Boston newspapers and broadcasters; the letters commented on news reports concerning conditions at Walpole, and one contained an invitation to a particular newspaper reporter to visit the prison. The letters were returned by the prison authorities as "'not allowed . . . pursuant to the policy of the Massachusetts Department of Corrections prohibiting inmates at Walpole . . . from corresponding with representatives of the news media on matters concerning prison management, treatment of offenders, and personal grievances.'"\(^{24}\) The federal District Court for Massachusetts found that although there are often important administrative considerations that might warrant censorship of inmate correspondence, these considerations do not generally affect communications directed to the news media. In regard to the defendant's argument that an added "'burden and expense of administration'" could result if the requested visits were allowed, the court reasoned that such considerations might be valid if the visits were the main issue in the case. Because they were not, and because there would be no additional expense involved in reading the letters, it was decided that permission should have been granted for the letters to be sent. The court reasoned that censorship of media-directed correspondence was not supported by any valid security interests, since representatives of the news media are not inherent security risks. Moreover, the court concluded that such censorship cannot be upheld upon any considerations relating to the punishment of prisoners, their rehabilitation, or the deterrence of other criminal acts they may commit. In explaining its very significant decision, the federal district court said the following:

... Plaintiffs' affirmative claim rests less on analogy than on the argument that they have a right to appeal for the redress of grievances not only to the courts and to the elected and appointed representatives of the people, but to the people themselves, and that such people are best reached by communications with the news media. ... In some cases it is as essential to the cure of the prisoner's grievance that he be able to reach the court of public

\(^{22}\) Id. at 885.  
\(^{24}\) Id. at 210.
opinion as that he reach a judicial court or the General Court of Massachusetts.25

Not all federal courts have interpreted the same broad rights of access to the courts as are found in the recent cases arising in Massachusetts. Two cases holding somewhat stricter views are Sostre v. McGinnis26 and Burns v. Swenson.27 In Sostre, the United States Court of Appeals for the Second Circuit reaffirmed the right of prison officials to open and read all incoming and outgoing mail. In Burns, which concerned correspondence with a branch of the American Civil Liberties Union by an inmate at the Missouri State Penitentiary, the Eighth Circuit Court of Appeals noted a "weighty interest in the security and orderly administration of the internal affairs of the penal institution" and ordered that correspondence with the ACLU may be subjected to "reasonable regulation consistent with legitimate policies of internal prison administration and security, so long as such regulation does not become a subterfuge to deny [petitioner] access to the ACLU, and through it, to the courts."28

Due process in prison disciplinary hearings. Another important issue for prisoners is whether a prison disciplinary committee made up of various prison guards and administrators must accord procedural due process safeguards to inmates, and, if so, how fully this protection must be extended. In Scafati, the petitioner alleged that at his disciplinary hearing he had been denied due process of law by having been denied the right to counsel, the right to cross-examine his accuser, and the right to call witnesses on his behalf. Chief Judge Wyzanski of the federal district court noted that the Fifth Amendment rights that Nolan alleged had been violated were procedural, not substantive, and he held, therefore, that the nature of the hearing did not require the imposition of the requested due process safeguards. Judge Wyzanski took the view that procedural rights vary depending on the forum involved, i.e., the relationship between the party and the particular tribunal, as well as the general context of the particular proceeding. In view of specific prison security and administrative considerations present in the case, he felt compelled to uphold the prison authorities in their administration of disciplinary hearings.29 In its decision on appeal, the First Circuit did not express exact standards for deciding the

25 Id. at 216.
26 422 F.2d 178 (2d Cir. 1971).
27 430 F.2d 771 (8th Cir. 1970).
28 Id. at 777.
29 See Sostre v. McGinnis, 442 F.2d 178, 196-197 (2d Cir. 1971), where the court noted that "[b]eyond the process of guilt determination and initial incarceration, courts have displayed greater reluctance to import all the trappings of formal due process . . . . Certainly, formal rules of evidence would be entirely inappropriate at a disciplinary proceeding . . . . There is correspondingly less need for cross-examination and calling of witnesses . . . . Most important, we think it advisable for a federal court to pass judgment one way or another as to the truly decisive consideration, whether formal due process requirements would be likely to help or to hinder in the state's endeavor to preserve order and discipline in its prisons and to return a rehabilitated individual to society."
due process issues, but sent the case back to the district court for re-hearing on the merits. However, the circuit court did state that a disciplinary hearing must provide "assurances of elemental fairness" when "substantial individual interests are at stake."30

Decisions subsequent to Scafati have sought to interpret the vague standard enunciated by the First Circuit. Tyree involved a Massachusetts inmate who had been given an official disciplinary hearing at which he was informed of the charges against him and was given a chance to explain his version of the events. Relying on the aforementioned remarks of the First Circuit in Scafati, the federal district court held that there was no denial of due process since there was every indication that prison officials had tried to provide at least "some assurances of elemental fairness." However, in Meola, where the imposition of substantial punishment at the disciplinary hearing was summary in nature, the federal District Court for Massachusetts held that the imposition of the punishment without notice to the prisoner of the charges against him or an opportunity for him to reply to them was "unlawful and violative of the provisions of the Fourteenth Amendment of the United States Constitution."31 The court reasoned that the punishments imposed on the prisoner were sufficiently great to require procedural safeguards, "at least the elementary ones of notice of the charges against him and an opportunity to reply to them."32

Among the reasons given for denying certain due process safeguards at prison disciplinary hearings is the claimed similarity of the hearings to nonadjudicatory commission hearings. Concerning the latter type of proceeding, the United States Supreme Court in Hannah v. Larche33 held that certain procedural safeguards34 were not necessary in hearings conducted by the Commission on Civil Rights when allegations of racial or religious discrimination were being investigated. However, the Court discussed what is an important distinction in understanding the difference between the situation involved in Han-

30 430 F.2d 548, 550. (1st Cir. 1970).
31 322 F. Supp. 878, 886 (D. Mass. 1971). The court found the punishments to be as follows: "(a) segregation in the 'new man's section' of the prison [a segregation facility for newly admitted inmates, where men are kept until their classification and assignment to a particular section of the prison] for approximately 60 days . . . on suspicion of placing an explosive in another inmate's cell, (b) loss of 60 days earned good time . . . on a charge of destruction of furnishings in [petitioner's] room . . . , (c) transfer to [departmental segregation unit] for approximately 10 weeks . . . on a principal allegation of racial agitation. As to punishments (a) and (c), no hearing of any kind was held." Ibid.
32 Ibid.
33 363 U.S. 420 (1960). The Supreme Court set out a guide for judicial intervention on due process grounds: "[A]s a generalization, it can be said that due process embodies the differing rules of fair play. . . . Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account." Id. at 442.
34 The safeguards sought by the petitioner included the right to be informed of the specific charges under investigation and the identity of the complainants, and the right to cross-examine these complainants, as well as other witnesses. Id. at 441-442.
nah and that which obtains in many prison disciplinary cases. The Court in Hannah noted that "[the commission] . . . does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property." The commission merely heard complaints and made findings that had no legal significance, whereas a disciplinary committee may make determinations that affect the liberty of the party before it.

Another argument that has been made against any major extension of procedural due process standards to prisoners is that prison disciplinary hearings are not strictly criminal in nature and, therefore, do not demand full application of such safeguards as the right to counsel or the right to cross-examine adverse witnesses. Analogous arguments were rejected by the United States Supreme Court in In re Gault and Mempa v. Rhay. The Gault case dealt with the question of the necessity for due process standards in juvenile hearings, but the rationale supporting the Court's ruling can arguably be applied to prison disciplinary hearings. In stating that juvenile hearings that can result in incarceration demand due process safeguards such as notice and the right to counsel, the Supreme Court affirmed the right to due process protection where there is the possibility of a substantial loss of personal liberty. Admittedly, a prisoner who comes before a prison disciplinary committee is not in the same position as a juvenile who appears before a juvenile court judge, yet the resulting loss of liberty—incarceration for the juvenile and solitary confinement and loss of "good time" for the prisoner—is similar in effect, if not in degree. In Mempa, the Supreme Court applied reasoning similar to that in Gault and decided that the protection of the Fifth and Sixth Amendments applied to probation revocation hearings; this decision was specifically designed to make the right to counsel a basic requirement.

The principal arguments for applying due process safeguards to prison hearings concern the direct affect the disciplinary hearings may have on the liberty of the prisoner. These arguments involve the possible loss of "good time" and/or transfer to another form of confinement. An adverse decision by a prison disciplinary committee can result in loss of "good time," either as part of the decision or because a sentence to solitary confinement cuts off the chance to earn "good time"; such a penalty raises the important question of the legal effect

35 Id. at 441.
36 387 U.S. 1 (1967).
38 Justice Fortas stated in Gault that "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." 387 U.S. 1, 20 (1967).
of this imposed forfeiture. 40 "Good time" is regulated by statute in Massachusetts, 41 and the statute provides for specific deductions of time from a prisoner's maximum sentence if he complies with prison regulations. The statute also provides for forfeiture of portions of earned "good time" upon a determination by prison officials that an inmate has violated a prison regulation.

The leading Massachusetts case regarding "good time" is Lembersky v. Parole Board of the Department of Correction, 42 wherein a prisoner complained that new amendments to the Massachusetts Constitution concerning "good time" affected his rights adversely in certain determinations made by the parole board. The Supreme Judicial Court found that a deprivation of a man's justly earned "good time" "as a practical matter results in extending his sentence and increasing his punishment." 43 Lembersky and subsequent decisions 44 have thus created a foundation for an expanded recognition of prisoners' rights. In view of the determination that deprivation of "good time" in effect constitutes an extension of sentence, it seems to follow that a determination to reduce "good time" must be made with the same procedural safeguards—such as right to counsel and right to call and cross-examine witnesses—that are constitutionally required in criminal proceedings that involve sentencing.

Some federal courts have held that the application of due process standards is required in cases that involve the removal of an inmate from one form of confinement to a substantially harsher form. 45 In United States ex rel. Schuster v. Herold, 46 which involved a habeas corpus proceeding by a New York prisoner protesting his transfer from a penal institution to a state mental institution, the United States Court of Appeals for the Second Circuit held that the transfer could not take place until a full hearing had been conducted, at which the prisoner was to have a right to counsel. It seems that the Second Circuit would also hold that an inmate who is to be confined to solitary,

40 This issue was raised specifically in Nolan v. Scafati, 430 F.2d 548 (1st Cir. 1970).
41 Under G.L., c. 127, §129, "The officer in charge of each correctional institution . . . shall keep a record of each prisoner in his custody whose term of imprisonment is four months or more. Every such prisoner whose record of conduct shows that he has faithfully observed all the rules of his place of confinement, and has not been subjected to punishment, shall be entitled to have the term of his imprisonment reduced by a deduction from the maximum term for which he may be held under his sentence or sentences, which shall be determined as follows . . . . If a prisoner violates any rule of his place of confinement, the commissioner of correction . . . upon recommendation and evidence submitted to [him] . . . in writing by the principal officer, or officer in charge, shall decide what part, if any, of such good conduct deduction from sentence or sentences shall be forfeited by such violation. . . ."
43 Id. at 294, 124 N.E.2d at 524.
with its attendant deprivations, should also be accorded the same basic safeguards. Although it is beyond the scope of this comment to treat the issue of solitary confinement and the challenges that are being raised to its use, it must be noted that a growing body of scientific study is revealing the emotional and psychological damage that usually results from any prolonged period of solitary isolation.47

What will happen in Massachusetts regarding disciplinary hearing procedures may depend on the future interpretation given to the First Circuit’s opinion in Scafati. The admonition to provide “assurances of elemental fairness” may invite one of several standards. A court may feel secure that it is following Scafati if it decides that elemental fairness requires only minimal safeguards, such as notice of

47 What solitary confinement means to a prisoner is this: “A prisoner . . . stays in his own cell for 23 or 23.5 out of each 24 hours; he is not allowed to mingle with other members of the prison population; he is allowed from 30 minutes to an hour a day outside his cell for exercise; and he is not allowed to work, to visit the library, or to attend movies or religious services.” Tyree v. Fitzpatrick, 325 F. Supp. 554, 556 (D. Mass. 1971) (citing conditions at Massachusetts Correctional Institution, Concord).

A growing body of empirical research suggests that, because of the psychological impact of solitary confinement, it ought to be prohibited as being cruel and unusual per se or be used only as a last resort in cases involving the most serious prison disciplinary infractions—and then only under rigidly prescribed circumstances. Psychological studies indicate the following: (a) the limitations of sensory perception imposed by prison conditions cause temporary impairment of emotional reaction, mental activity, and mental health (Heron, Effects of Decreased Variation in the Sensory Environment, [1954] Can. J. Psychology 70-76); (b) isolation from sensory variation and social intercourse tends to alter thought production, to evoke feelings of aggression and sexuality, and to increase levels of anxiety (Zuckerman, Persky, Link, and Basu, Experimental and Subject Factors Determining Responses to Sensory Deprivation, Social Isolation, and Confinement, 73 J. Abnormal Psychiatry 183, 192 (1968)); (c) isolation significantly lowers thresholds for pain, even after isolation is ended (Zubeck, Flye, and Aftamas, Cutaneous Sensitivity after Prolonged Visual Deprivation, 144 Science 1591 (1964); Vernon and McGill, Sensory Deprivation and Pain Thresholds, 133 id. 330, 331 (1961)); and (d) solitary confinement causes “confinement psychosis,” a psychotic reaction “characterized frequently by hallucinations and delusions [that is] produced by prolonged physical isolation and inactivity in completely segregated areas” (Scott and Grandreau, Psychiatric Implications of Sensory Deprivation in a Maximum Security Prison, 14 Can. J. Psychiatry 337 (1969)). More severe effects are undoubtedly caused in prison inmates who, unlike the volunteer experimental subjects, suffer greater sensory isolation under actual prison conditions. See Thurrell, Halleck, and Johnson, Psychosis in Prison, 56 J. Crim. L.C. & P.S. 271, 272 (1965).

These modern findings are supported by historical evidence and recognized by prison administrators, legislators, and courts. The so-called Pennsylvania system, practiced during the nineteenth century, was based on the isolation of individual prisoners as a substitute for group confinement. Studies made in New York of prisoners confined under the Pennsylvania system report widespread insanity. Barnes, The Story of Punishment (1930). See generally Barnes and Teeters, New Horizons in Criminology (1943). See also In re Medley, 134 U.S. 160 (1890). The American Correctional Association recommends that solitary confinement be used only for flagrant offenses and notes that although isolation may encourage conformity in some prisoners over the short term, for the majority it increases and deepens feelings of hostility. Am. Correctional Assn., Manual of Correctional Standards 246 (2d ed. 1960). Massachusetts has restricted the use of solitary confinement to some extent, both as to the reasons for which an inmate may be placed in solitary and as to the length of his stay (a maximum of 15 days per individual offense). See G.L., c. 127, §§39, 40. Although solitary confinement has not been found to be per
the charges and a chance to present a personal defense. On the other hand, it is possible that a court could view the First Circuit's words as demanding the right to counsel and the right to call or cross-examine witnesses. The phrase "assurances of elemental fairness" is at least specific enough to command a consideration of the due process issues.

The recent California case of Clutchette v. Procuinier has apparently gone further than any other in expanding the rights of a prisoner at a prison disciplinary hearing. The case originated as a Section 1983 action brought by inmates who alleged deprivation of their constitutional rights as the result of such hearings. In Clutchette, the federal District Court for the Northern District of California held that whenever a prisoner is subject to "grievous loss," virtually full due process must be accorded him. Among the rights found applicable are the right to notice; the right to call witnesses and to cross-examine adverse witnesses; the right to counsel where the offense will be referred to the district attorney, and the right to at least a "counsel-substitute" in all other cases; the right to an unbiased fact finder's decision based upon the evidence; and the right to appeal the decision.

Conclusion. The charge is often made that according prisoners too many constitutional rights will undermine official authority or will prove impossibly burdensome to the administration of a prison system. Nonetheless, the federal courts, in Massachusetts and elsewhere, are beginning to take the view that prisoners may not be denied fundamental rights solely out of deference to internal prison policy. The Court of Appeals for the Second Circuit noted as early as 1957 that "[w]e must not play fast and loose with basic constitutional rights..."

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48 See n.29 supra.
49 Grievous loss was defined by the court to include any of the following situations: (a) Violations punishable by indefinite confinement in the adjustment center or segregation; (b) Violations, the punishment for which may tend to increase a prisoner's sentence, i.e., those which must be referred to the Adult Authority; (c) Violations which may result in a fine or forfeiture; (d) Violations which may result in any type of isolation confinement longer than ten days; (e) Violations which may be referred to the district attorney for criminal prosecution." Id. at 781.
51 Id. at 782-784.
in the interest of administrative efficiency." 54 Society's continuing responsibility for the inmates in its prisons has been expressed thusly by Chief Justice Burger:

We take on a burden when we put a man behind walls, and that burden is to give him a chance to change. . . . If we deny him that, we deny his status as a human being and to deny that is to diminish our humanity and plant the seeds of future anguish for ourselves. 55

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