Chapter 13: Criminal Law and Procedure

Michael Reilly
CHAPTER 13

Criminal Law and Procedure

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§ 13.1. Discriminatory Exercise of Peremptory Challenges. The Supreme Judicial Court in Commonwealth v. Reid1 extended its ruling in Commonwealth v. Soares,2 which prohibited the discriminatory use of peremptory voir dire challenges by the prosecution, by making the prior ruling apply for the first time to defendants.3

The defendant in the Reid case was charged with first degree murder.4 The evidence was that the son of the victim, Danny Harris, Jr., bit Mrs. Reid’s three year old son and that she then bit Danny Jr. “to teach him a lesson”.5 Danny Jr. went home, returned with his father, Mr. Harris, and an argument ensued between Mr. Harris and Mrs. Reid.6 The argument ended when Mrs. Reid stabbed Mr. Harris with a kitchen knife.7 Mr. Harris died later that evening from the single stab wound.8

At trial, Mrs. Reid’s claim was that she had acted in self-defense only after Mr. Harris had threatened to kill her and had begun to choke her.9 Evidence from other witnesses did not support Mrs. Reid’s version10 and she was convicted of murder in the second degree.

During the jury selection process 53 potential veniremen were found to be indifferent.11 Of the 53 jurors, 23 were males and 30 were female.12 Four-

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4 Id. at 1804, 424 N.E.2d at 496.
5 Id. at 1805, 424 N.E.2d at 497.
6 Id.
7 Id. at 1806, 424 N.E.2d at 497.
8 Id.
9 Id. at 1806, 424 N.E.2d at 498.
10 Id. at 1805-06, 424 N.E.2d at 497-98. Three eye witnesses to the confrontation testified. Only one, a young boy, saw Harris touch Mrs. Reid and he testified that Harris “poked” Reid in the shoulder rather then choked her. Id. The eye witness also testified that they did not hear any threats from Mr. Harris. Id.
11 Id. at 1807, 424 N.E.2d at 498.
12 Id. at 1807 n.4, 424 N.E.2d at 498 n.4.
teen persons were then randomly selected from that group. Eight were female and six were male. The Commonwealth used its first five peremptory challenges to eliminate five of the eight females from the jury. The defendant did not object. The defendant then used six of her challenges to eliminate all six males from the jury. The Commonwealth requested the court to order the defendant to explain the basis for her challenges. The court found that the challenges had been used "to exclude individuals on account of their group affiliations" and requested a justification for the challenges from the defendant. Defense counsel refused, despite three requests by the judge to explain his challenges.

The judge made a finding that the defendant was exercising her peremptory challenges in a deliberately discriminatory fashion and disallowed the challenges. The judge also dismissed the remaining venire. Thus, the defendant was left with a partial jury of six males and three females. The next day a new venire was selected and the remaining jurors were selected from it.

The Supreme Judicial Court upheld the trial court's action. The Court ruled that its decision in Commonwealth v. Soares applied to all litigants and was an absolute bar of the use of peremptory challenges to eliminate jurors based upon their membership in discrete groups. Reid's argument that she had a constitutional right to the unfettered exercise of peremptory challenges was rejected. The Court found that nothing in the federal or state

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13 Id. at 1807, 424 N.E.2d at 498.
14 Id. at 1807 n.5, 424 N.E.2d at 498 n.5.
15 Id. at 1807, 424 N.E.2d at 498. Both the defendant and the prosecution were entitled to fourteen peremptory challenges. Mass. R. Crim. Proc. 20.
17 Id.
18 Id. at 1808 n.8, 424 N.E.2d at 498 n.8.
19 Id. at 1808, 424 N.E.2d at 498.
20 Id.
21 Id. at 1808, n.9, 424 N.E.2d at 498, n.9. The Court's decision is confusing on what procedure was adopted relative to the five males who were seated despite the defendant's objection. At one point the Court notes that on the next day of jury selection the defendant moved to have three of the six males excused by peremptory challenge and the trial court denied the motion because prior to the dismissal of the venire she had been given the opportunity to take that action and had not. Id. In the same section of its decision the Court claims that Reid took the position that she was precluded from exercising peremptory challenges against those six males and that this assumption was unfounded since she had never attempted to challenge them and the judge had made no ruling preventing her from doing so. Id. This confusion was left unresolved and the Court merely noted that it was not deciding the issue of whether a defendant should be allowed to rechallenge the panel. Id.
22 Id. at 1812, 424 N.E.2d at 500-01.
constitution required that peremptory challenges be granted. The unstated logic seemed to be that since the State had no duty to grant peremptory challenges it could place reasonable restrictions on what it granted.

It is surprising that the court extended its holding in Commonwealth v. Soares to the defendant. The Court's rationale for its decision in Commonwealth v. Soares, does not support such an extension. The Court in Soares repeatedly explained that its decision was based on Article 12 of the Declaration of Rights of the Massachusetts Constitution. That guarantee grants no right to the Commonwealth. Rather, the protection of Article 12 runs solely to the defendant. The Court in Reid simply ignores this distinction by holding that Soares prohibited discriminatory exercise of challenges by "litigants" rather than by the prosecution. The Court may have extended the rule to defendants as an exercise of its general powers of oversight over the trial courts. However, the failure to clearly delineate this rationale makes the decision in Reid difficult to explain.

After finding that the defendant improperly exercised her peremptory challenges the Court went on to discuss whether the trial court's remedy was appropriate. The Commonwealth at trial had moved to dismiss the entire panel and begin jury selection anew. The defendant took no position on the motion but moved after the jury was sworn for a mistrial. The Court ruled that a judge has wide discretion to fashion relief and that the defendant had no right to a mistrial since to rule otherwise would be to give a party the power to force a mistrial by its own misconduct. The Court left the fashioning of relief up to the discretion of the trial judge.

The Court did not have to address two inter-related issues which seem to rise inevitably from its decision. In Reid, the defense counsel did not attempt to justify his peremptory challenges. The Court must answer the

\[ \text{id. at 1810, 424 N.E.2d at 499.} \]

\[ \text{id. at 1811, n.15, 424 N.E.2d at 500 n.15.} \]

\[ \text{id. at 1812, 424 N.E.2d at 500.} \]

\[ \text{id. at 1811, n.8, 424 N.E.2d at 498 n.8.} \]

\[ \text{id. at 1818, 424 N.E.2d 504, the defense counsel admitted he was using his challenges to exclude blacks.} \]

\[ \text{id. at 1820, 424 N.E.2d at 506.} \]
question of how much of an explanation is sufficient. Will a claim by defense counsel that he challenged a potential juror because he “didn’t like the look in the eye” or the body language or the clothes or the hair cut of a juror be sufficient to justify a challenge even if it follows a discriminatory pattern? The trial judge must then enter the delicate area of weighing the credibility of defense counsel.

The problem for a litigant of explaining jury selection is particularly acute when applied to the defendant since it appears likely that a defense counsel can be faced with a conflict between his duty to explain her exercise of peremptory challenges and her attorney/client privilege. It could be very difficult for a defense counsel to reveal a jury selection procedure which was based on conversations with his client without revealing those confidences.

In short, there are substantial practical problems which must be worked out before the Court’s decision in Commonwealth v. Reid can be fully implemented in the superior courts.

§ 13.2. Elements of Manslaughter — Omission. In Commonwealth v. Gallison, the Supreme Judicial Court explored the border at which negligent omission resulting in death becomes “wanton and reckless” enough to constitute manslaughter, in the context of a parents’ failure to obtain medical care for a sick child who subsequently died.

The Gallison case involved the conviction of a mother for manslaughter of a two year old girl who died at home after being subjected to an “‘infectious process’, very likely pneumonia” during the severe blizzard in 1978. The Commonwealth offered two theories of manslaughter: 1) that the defendant had committed abuse on the child which resulted in death, or 2) that the defendant had omitted obtaining medical care for the child, which omission resulted in death. While finding the evidence of the abuse theory “more than merely speculative”, the Supreme Judicial Court did not rely on such theory in upholding the denial of the directed verdict motion. The Court based its ruling on the omission theory instead. In the words of the Court, “the evidence of manslaughter by omission was sufficient to per-

It should be noted that in practice all of these characteristics are used by competent trial counsel as to the basis for jury selection. See e.g. B. Bonora and E. Krauss Jury Work Systematic Techniques, National Jury Project 1979.

An additional problem is the potential that defense counsel may believe he is using non-discriminatory criteria of selection but because of an unconscious bias be applying them in a discriminatory manner.

This argument was raised in Reid in the superior court but not pressed on appeal.


1 Id. at 1261, 421 N.E.2d at 758-59. The father was also convicted, but he did not appeal.

3 Id. at 1267, 421 N.E.2d at 762.
suade the jury.'" For purposes of this discussion, therefore, only the omis-
sion theory's sufficiency will be considered.

Although the case was tried jointly with charges of abuse of the defend-
ant's other child, the Commonwealth's case as to the death of the daughter
"consisted primarily of two statements the defendant made to the [police]
 on the day of her arrest"; three months after the child's death. There was
no direct evidence introduced to show the condition of the girl's body or
cause of death. The Supreme Judicial Court did, however, hold that
evidence as to acts by the defendant in abuse of the son in the same "time
frame" were probative and admissible in the case concerning the daughter's
death. The defendant did not testify at the trial.

Her statements to the police, although "not consistent", indicated the
child became ill in February 1978, and had vomiting, diarrhea and high
fever - 101 degrees on February 5, up to 105 degrees on February 6, the day
of the blizzard. When the child also began shivering and shaking the
mother took the child into the kitchen, since the apartment was unheated
due to lack of oil. There the child collapsed, hitting her head, and stopped
breathing. The defendant found a heartbeat and attempted resuscitation,
aided by her husband when he returned from the store. There was no
phone in the house. The defendant stated she called an ambulance from a
neighbor's but was refused because of the storm. (The Commonwealth in-
troduced evidence to refute this.) The resuscitation failed and the child
"just went". The defendant also stated that the reason she had not taken
the child to the doctor was that the clinic would not give shots without prior
medical records; she further said that she had given the girl liquid aspirin
and bread in an attempt to control the vomiting. All these statements of
the defendant were made to the police on the day of her arrest, three months
after the girl's death.

The Supreme Judicial Court considered the question of the availability of
the charge of manslaughter for omission in two contexts, the defendant's

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1 Id. at 1268, 421 N.E.2d at 762.
2 Id. at 1264, 421 N.E.2d at 760.
3 Id. The body had never been recovered, having been put out in a trash container by the
defendant's husband six weeks after the death. Id.
4 Id. at 1274, 421 N.E.2d at 765.
5 Id. at 1266, 421 N.E.2d at 761.
6 Id. at 1264, 421 N.E.2d at 760.
7 Id.
8 Id.
9 Id.
10 Id.
11 Id. at 1265, 421 N.E.2d at 760.
12 Id.
13 Id. at 1264, 421 N.E.2d at 760.
14 Id.
15 Id. at 1264, 421 N.E.2d at 760.
16 Id. at 1265, 421 N.E.2d at 760.
motion for directed verdicts, and in regard to jury instructions and questions. In considering both these issues, the Supreme Judicial Court applied the ruling in Commonwealth v. Welansky, with respect to the standard by which the defendant’s conduct could be found “wanton or reckless”.

The Welansky case established three sub-elements necessary to support a finding of the “wanton and reckless” element of manslaughter by omission:

1. A duty to act;
2. A recognizable high likelihood of substantial harm from failure to do a specific act; and
3. Intentional failure to do that specific act.

In Gallison, the duty to act was clear. A parent has a general duty to “provide for the care and welfare of the child.” It is somewhat more difficult to see how the Supreme Judicial Court found the other two legs of the Welansky test satisfied.

To overcome a directed verdict motion, the Commonwealth must prove by evidence sufficient that minds “of ordinary intelligence and sagacity” can infer guilt beyond a reasonable doubt on each element. Furthermore, the inferences cannot be “too remote according to the usual course of events”; the process of drawing inferences must be a “rational” one.

In Gallison, the defense was based on good faith mistake of judgement in treating the child herself rather than obtaining medical help. Welansky creates an ostensibly objective test, although Welansky calls it a combination of objective and subjective factors by which sufficient recklessness can be found if an “ordinary normal man under the same circumstances would have realized the gravity of the danger”. In the context of Gallison, the standard in Welansky must be read to apply to the ordinary, normal “parent” of a “two year old”. Since the Commonwealth bears the burden of proof it must introduce evidence, of sufficient weight under the above standard, that the facts as known to the defendant subjectively, i.e., the child’s symptoms apparent to her, at some point created that “substantial risk of death” from failure to do the specific act that forms the second leg

18 Id. at 399, 55 N.E.2d at 910.
19 To an ordinary, normal person in the defendants circumstances. Id. at 398-99, 55 N.E.2d at 910.
20 Failure to do what the normal person would have done. Id. at 398, 55 N.E.2d at 910.
25 316 Mass. at 398, 55 N.E.2d at 910.
of the Welansky tripod, and that an "ordinary, normal parent" would have recognized that point. It further follows that the Commonwealth must prove not only that the defendant should have known the point at which she must act, but that a specific act was needed to avoid the harm, and that that act should have been known as well.

Yet, the Commonwealth introduced no specific evidence in Gallison to show that any particular point in the child's illness created that significant risk of death that would have been foreseen by an ordinary parent. Nor did it introduce evidence that the only act possible at any such point to save the child's life was the obtaining of medical attention, or indeed that medical attention would have or could have saved the child at all. It, of course, cannot be enough that such attention might have helped, it must be proven to the jury beyond a reasonable doubt that medical attention would have saved the life, and that the defendant should have known it.

Instead, the Court in Gallison seems to suggest that the jury can draw these conclusions from their own common experience. The Court specifically authorizes the jury to infer guilt on the causation issue. Yet, there was, of course, no requirement imposed that the jury have any experience with young children or their symptoms. Therefore, to allow the jury to draw conclusions regarding the meaning to the "average normal parent" of certain medical symptoms, absent medical evidence showing what those symptoms actually meant at any given time, or testimony by the parents as to how such symptoms would affect them, would be to invite the jury to speculate rather than draw rational conclusions.

It is interesting to note that with regard to failure to provide medical care there is apparently more protection given to a physician in a civil negligence case than to the less well trained parent in a criminal "wanton and reckless" manslaughter case. In tort, to hold a physician liable for negligence a jury must expect evidence to support conclusions of what constituted medical risk and what conduct was required of the medical profession in the community. Only in exceptional cases may a jury decide based on common knowledge and experience. Those exceptional cases must be those in which the "negligence and harmful results are sufficiently obvious as to lie within common knowledge." The only reported Massachusetts negligence cases in which the negligence and harmful results were "sufficiently obvious" to be in common experience were two involving dentists, one in 1945 and one in 1963. In both those cases the defendants had allowed foreign objects to fall into the patient's throat during treatment.

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30 318 Mass. at 181, 61 N.E.2d at 2 (tooth); 346 Mass. at 184, 190 N.E.2d at 676 (reamer
No single "commonly obvious" wrong like allowing foreign object into the throat was present in Gallison. The actual risk and cause of death could not have been "sufficiently obvious" in common experience since the prosecution's medical expert could not even give a certain cause of death, nor conclusively point to any specific action or failure as the cause, but merely "depicted the rapid deterioration of Jennifer's resistance to an 'infectious process', very likely pneumonia."

It is questionable whether the same evidence present in Gallison would have resulted in a finding of negligence if a doctor had treated the child as the defendant did. In Riggs v. Christie, the doctor was not liable where he had failed for several days to examine an eleven year old child who had undergone an appendectomy just days before, even though the doctor had been repeatedly told over the phone the child's symptoms, including weakness, increasing fever, abdominal pains so severe his legs were drawn up and his face distorted with pain, perspiration, and diarrhea. In that case the patient had a severe internal infection.

If the jury in a civil case such as Riggs was not allowed to rely on "common experience" to find liability, it seems illogical to allow the Gallison jury to so rely to find "wanton or reckless" conduct for manslaughter. Arguably, the standard for the civil case should be stricter, since physicians with their greater training should more readily be held capable of recognizing immediate life threatening conditions that need intervention. In any event, the Commonwealth ought to be required to offer evidence affirmatively proving causation and the specific factors by which a parent should recognize the risk of death from that cause, and the specific action necessary to avoid it.

In the context of the third leg of the Welansky test, the Commonwealth should be required to provide evidence to prove that the specific action not done was required, and that the defendant ought to have known it.

In sum, Gallison leaves serious questions as to the legal standard for sufficiency for evidence of manslaughter from "wanton and reckless" omission. The legs of the tripod of the Welansky test seem clear enough, what evidence is sufficient to meet them in an omission case is far less clear.

§ 13.3. Duplicitous Convictions. In Commonwealth v. Crocker, the Supreme Judicial Court returned to the rule articulated in Morey v. Com-
monwealth,2 and held that questions of the duplicitousness3 of charged offenses should be analyzed in terms of the relevant statutes, rather than the evidence presented at trial. The Court reversed the trend of its recent decisions in Commonwealth v. Catania4 and Commonwealth v. Cerveny,5 and explicitly overruled the holdings in those cases.6

In Crocker, the defendant had been convicted on three counts each of larceny over $100, under chapter 266, section 30, and uttering a forged check under chapter 267, section 5.7 The convictions all stemmed from evidence of the same set of facts: the defendant had passed three forged checks and received the proceeds.8

The Supreme Judicial Court explained that under the rule enunciated in Morey:

> The long prevailing test in this Commonwealth is whether each crime requires proof of an additional fact that the other does not. ... If so, neither crime is a lesser included offense of the other, and convictions on both are deemed to have been authorized by the Legislature and hence not duplicitous.9

Under the Morey test, the Court pointed out, defendant Crocker’s convictions were not duplicitous since uttering requires proof of use of a forged or altered commercial instrument, but no reliance or actual taking, whereas larceny by false pretense requires proof of a permanent taking of property based on reliance, but does not require use of a commercial instrument.10

The Court also pointed out that the legislative purpose is different for each offense.11 The policy behind the larceny statute is punishment of crimes against property.12 The policy behind the uttering statute is the protection of the integrity of commercial and other legal instruments.13

The Court concluded that to look at the evidence presented at trial to see if the same evidence was used to prove both crimes, as it had done in

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2 108 Mass. 433, 434 (1871).
3 The Supreme Judicial Court (and apparently the defendant and the Commonwealth) appears to mislabel the issue when it refers to “duplicitous offenses”. “Duplicity” is generally defined as “the technical fault of ... uniting ... two or more offenses in the same count of an indictment ...” BLACK’S LAW DICTIONARY (1979) at 452. The correct term for this issue in Crocker would appear to be that the offenses were “multiplicitous”, (constituting separate counts for the same criminal act), rather than “duplicitous”.
8 Id.
9 Id. at 1920-21, 424 N.E.2d at 528.
10 Id. at 1921-22, 424 N.E.2d at 528.
11 Id. at 1924, 424 N.E.2d at 529.
12 Id.
13 Id. at 1924, 424 N.E.2d at 529-30.
Catania and Cerveny, would “run a risk of unnecessary intrusion into the legislative prerogative to define crimes and fix punishments.”14 This is consistent with the ruling in Albernas v. United States,15 in which the U.S. Supreme Court recently reiterated the Morey-type rule it had articulated in Blockburger v. United States,16 and in which it applied the statutory analysis to determine that separate punishments were intended.

§ 13.4. Suppression and Exclusion of Evidence. In Commonwealth v. Benoit,1 the Supreme Judicial Court wound its way through a thicket of admissibility theories offered by the prosecution for the contents of a murder defendant’s suitcase and ordered a new trial with the evidence suppressed. In an opinion written by Justice Liacos, the Court successively rejected theories of: consent by the defendant, inventory search, use to impeach the defendant who testifies, inevitable discovery, and dissipation of the taint of improper conduct.2

The defendant was accused of the bludgeon murder of a woman whose body was found in a Revere hotel room registered to him.3 Defendant was arrested in Connecticut near the location where the victim’s missing car was found.4 Police in Connecticut conducted an inventory search of the suitcase defendant had with him when arrested, but seized nothing.5

The defendant waived extradition.6 His Connecticut court appointed counsel stated in court to the Massachusetts State Police Lieutenant that it was the defendant’s wish not to be questioned until he had counsel.7

During the trip back to Massachusetts the defendant’s suitcase was carried in the trunk of the cruiser.8 After advising defendant of his Miranda rights, which were repeated twice during the trip, the Lieutenant engaged the defendant in “small talk.”9 The Lieutenant told defendant they had a “very good case” against him, and that a bartender who had seen defendant with the victim on the night of the murder had described him as wearing tan pants.10 The defendant told the officer that he had tan pants in the suit-

14 Id. at 1922, 424 N.E.2d at 528-29.
16 284 U.S. 299 (1932).
2 Id. at 29-36, 415 N.E.2d at 820-24.
3 Id. at 27, 415 N.E.2d at 819.
4 Id. at 28, 415 N.E.2d 819-20.
5 Id. at 28, 415 N.E.2d at 819-20.
6 Id. at 28, 415 N.E.2d at 820.
7 Id.
8 Id.
9 Id.
10 Id. at 28-29, 415 N.E.2d at 820.
case, but that he had not worn them the night of the murder. The Lieutenant told the defendant he wanted to have blood tests and laboratory analysis performed on the suitcase, to which the defendant replied, "I understand." In Boston, police opened and searched the suitcase without a warrant and seized the tan pants and other clothing.

Defendant made motions to suppress both statements made between his arrest and booking in Massachusetts and the contents of the suitcase. The trial judge ruled the statements during the trip suppressed, being in violation of defendant's right to counsel. The judge refused to suppress the tan pants and other articles from the suitcase because inevitably they would have been discovered in the process of a lawful later search.

The Supreme Judicial Court held that statements obtained in violation of defendant's right to counsel could not be used to establish probable cause, stating that the reasoning in Commonwealth v. White concerning fifth amendment violations was equally applicable to a sixth amendment case. Additionally, the Court held that under the principles set out by the United States Supreme Court in Arkansas v. Sanders and United States v. Chadwick police must obtain a warrant to execute an evidence search of closed luggage once they have reduced it to their exclusive control. The Court noted that there was no finding below that the defendant implied consent, and relying on Commonwealth v. Moon refused to disturb such lack of a subsidiary finding, since it was not clearly erroneous.

The Supreme Judicial Court on these facts rejected the "dissipation of taint" argument derived from Nardone v. United States and Wong Sun v. United States, stating that the theory can only be valid where the government can demonstrate the improper government conduct "was not a sine quo non or 'but for' cause of the discovery of the evidence." The Court also rejected the prosecution's "inevitable discovery" theory. Without an ultimate ruling on the validity of the theory, the Court held that if such a
theory is valid, it would not apply where its effect (as here) would be to "read out of the Constitution the requirement that the police follow certain procedures — in this case, the warrant requirement of the Fourth Amendment."26 Furthermore, the Court rejected the theory of "inventory search" where the record displayed no legitimate purpose for the search other than the seizure of evidence.27

Finally, the Court refused to allow the tan pants to be used to impeach the defendant who elects to testify, as suggested by United States v. Havens,28 since the Commonwealth had initially introduced the pants not for impeachment but as part of its case in chief.29

In sum, Benoit represents a concise rundown of the currently accepted theories for exclusion of illegally obtained evidence and, therefore, should be of central importance to the criminal law in future Survey years.

STUDENT COMMENTS†

§ 13.5. Plea Bargaining.* Plea bargaining, controversial and commonplace, has been characterized as the illegitimate child of the American criminal justice system, traditionally secreted yet an essential family member.1 The practice results from the broad latitude accorded to prosecutorial discretion,2 coupled with the criminal defendant's ability to enter a guilty plea.3 Plea bargaining normally refers to a series of negotiations between a

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26 Id. at 35, 415 N.E.2d at 823.
27 Id. at 35-36, 415 N.E.2d at 823-24.
28 446 U.S. 620 (1980).
† Stephen V. Gimigliano, Evans Huber, Gregory Limoncelli, Mark Vincent Nuccio, Mitchell P. Portnoy.
* By Mitchell P. Portnoy, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

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2 Guilty pleas account for the overwhelming majority of criminal convictions in the United States. Brady v. United States, 397 U.S. 742, 752 (1970); Prosecutorial Discretion, supra note
criminal defendant, his lawyer, and the prosecutor. These negotiations, if successful, will be consummated by an agreement in which the prosecutor promises to make certain concessions dealing with outstanding charges against the defendant, potential charges which properly could be brought, or sentence recommendations vis-a-vis whichever charges ultimately are pursued. Typically, the prosecutor will permit the defendant to plead guilty to a lesser included offense in lieu of the original charge, or to plead guilty to one charge in exchange for the dismissal of others which are pending. Regardless of the specifics of the prosecutor’s bargain, the defendant virtually always is required to enter a guilty plea to some specified charge.

Despite the ubiquity of plea bargaining in American criminal adjudication, for a century following the Civil War it lacked a definitive judicial

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MASS. R. CRIM. P. 12(b) provides:

(b) Plea Conditioned Upon an Agreement.

(1) Formation of Agreement; Substance. The defendant and his counsel or the defendant when acting pro se may engage in discussions with the prosecutor as to any recommendation to be made to a judge or any other action to be taken by the prosecutor upon the tender of a plea of guilty or nolo contendere to a charged offense or to a lesser included offense. The agreement of the prosecutor may include:

(A) Charge concessions.

(B) Recommendation of a particular sentence or type of punishment with the specific understanding that the recommendation shall not be binding upon the court.

(C) Recommendation of a particular sentence or type of punishment with the specific understanding that the defendant shall reserve the right to request a lesser sentence or different type of punishment.

(D) A general recommendation of incarceration without regard to a specific term or institution.

(E) Recommendation of a particular disposition other than incarceration.

(F) Agreement not to oppose the request of the defendant for a particular sentence or other disposition.

(G) Agreement to make no recommendation or to take no action.

(H) Any other type of agreement involving recommendations or actions.

(2) Notice of Agreement. If defense counsel or the prosecutor has knowledge of any agreement that was made contingent upon the defendant’s plea, he shall inform the judge thereof prior to the tender of the plea.

See also Fed. R. Crim. P. 11(e).


7 Alschuler, Plea Bargaining and Its History, 13 Law & Soc'y Rev. 211, 213 (1979) (plea
determination of its permissibility under the federal constitution. This uncertainty was ended in the early 1970's, however, when the United States Supreme Court decided two cases which established both the constitutionality and desirability of the bargaining process. The first decision, *Brady v. United States*, was a necessary prerequisite to the ultimate recognition of plea bargains. *Brady* and its companion cases reaffirmed prior case law which recognized that guilty pleas were grave and solemn admissions of guilt, but nevertheless were permitted if made voluntarily, knowingly and intelligently. Moreover, the *Brady* Court also concluded that even though defendants often would rather accept the certainty of a lesser penalty by foregoing trial than risk receiving a harsher sentence after a trial conviction, that circumstance does not invalidate an otherwise proper

bargaining described as the exchange of official concessions for the act of self-conviction).  

* See id. at 223-27. Conditions for wholesale plea bargaining were not always favorable. In fact, historically there had been a reluctance to permit trial by confession, with the common law favoring a trial on the merits instead. *Id.* at 214-21. Notwithstanding this traditional preference, the frequency of bargaining increased in the century following the Civil War. *Id.* at 223-25. Its most prolific increase, however, has been relatively recent. In part it has been attributed to the "due process revolution" of the Warren Court, in which emerging procedural rights of criminal defendants created substantial strains on prosecutorial and judicial resources. *Id.* at 235-40. To alleviate this mounting pressure, prosecutors relied more heavily on plea negotiations, and consequently were forced to make increasing concessions to criminal defendants in return. *Id.* *Cf.* Santobello v. New York, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities); Commonwealth v. O'Neal, 367 Mass. 440, 444-45, 327 N.E.2d 662, 665 (1975) (plea bargaining is a necessary aspect of criminal justice system).

* See Note, *supra* note 4, at 167. Such recognition, however, did not eliminate criticism of the bargaining process. See e.g., Comment, *supra* note 4, at 753 (present criticism ranges from continued doubt as to its constitutionality to claims that an unjust legal system is promoted); *Prosecutorial Discretion, supra* note 2, at 28-29. *Cf.* Bordenkircher, 434 U.S. at 361-62 ("Whatever might be the situation in an ideal world," plea bargaining is part of the United States criminal justice system.). *See generally Special Issue on Plea Bargaining, 13 LAW & SOC'Y REV. 189 (1979).

12 *Brady*, 397 U.S. at 748.

A guilty plea results in the waiver of several constitutional rights. *Brady*, 397 U.S. at 748; Commonwealth v. Morrow, 363 Mass. 601, 603-04, 296 N.E.2d 468, 472 (1973). Justice Douglas articulated perhaps the most extensive list of these affected rights: 1) trial by jury; 2) confront one's accusers; 3) present witnesses in one's defense; 4) remain silent; and 5) be convicted only if proof presented is convincing beyond all reasonable doubt. Santobello v. New York, 404 U.S. 257, 264 (1971) (Douglas, J., concurring).
guilty plea. 14 One year after Brady, the Supreme Court expressly legitimated the practice of plea bargaining 15 in Santobello v. New York. 16 In that case, the Court explained that plea bargaining is an essential aspect of the criminal justice system 17 which, if properly administered, benefits defendants, prosecutors, and society. 18 The Santobello Court noted, however, that acceptance of the practice presupposes it is conducted fairly. 19 The Court consequently held that when a defendant’s plea results from promises or agreements from the prosecution, courts must ensure that these promises are fulfilled. 20

Even after Brady and Santobello established the validity of plea bargaining, courts were left with the task of demarcating the specific parameters in which the bargaining process could operate. In particular, it was not clear to what extent the government could go in order to encourage or otherwise induce a defendant to enter a guilty plea. 21 This question ultimately reached the Supreme Court, which answered it in two sets of decisions. The first set involved questions of judicial and prosecutorial vindictiveness. In North Carolina v. Pearce, 22 the defendant succeeded in overturning his conviction, only to be reconvicted after a new trial. The defendant then received a

14 Brady, 397 U.S. at 749-53; accord Commonwealth v. Morrow, 363 Mass. 601, 606-07, 296 N.E.2d 468, 474 (1973). In Brady, the defendant challenged a federal kidnapping statute which, by permitting a death penalty only after jury trials, allegedly coerced him into pleading guilty. 397 U.S. at 743. The Supreme Court upheld the statute and also, by analogy, acknowledged the validity of plea bargaining. Id. at 749-55.
16 404 U.S. 257 (1971). The state prosecutor in Santobello agreed to make no recommendation as to a sentence, if the defendant would plead guilty to a lesser included offense. Id. at 258. The defendant accordingly changed his plea to guilty. Id. A delay of seven months ensued prior to sentencing, by which time the judge, prosecutor and defense counsel all had been replaced. Id. at 258-59. The new prosecutor, apparently ignorant of the bargain, recommended that the defendant receive a maximum sentence. Id. at 259. Although the new trial judge, after a defense objection, disclaimed any reliance on the recommendation, the maximum sentence nevertheless was imposed. Id. at 259-60. The Supreme Court, faulting the prosecution for its conduct, ordered the case remanded so that the prejudice created could be undone. Id. at 262-63.
18 Santobello, 404 U.S. at 260-61.
19 Id. at 261.
20 Id. at 262. The Court did not specify the precise source from which its conclusion was derived, but because the Court vacated a state court conviction involving a state statute, it is clear that the source was the federal constitution. Cooper v. United States, 594 F.2d 12, 15 & n.3 (4th Cir. 1979); Westen & Westin, supra note 2, at 518 n.161; Comment, supra note 4, at 758-59.
21 Brady identified some of the constitutional limits imposed on efforts to induce guilty pleas. For example, actual or threatened physical harm, or debilitating mental coercion, are impermissible inducements. 397 U.S. at 750.
harsher sentence than initially had been imposed. The Supreme Court disapproved this result, explaining that while a harsher sentence following retrial was not unconstitutional per se, due process forbade judicial vindictiveness from playing any part, actual or potential, in the sentencing decision. To assure the absence of any such retaliation, the Court introduced a blanket rule forbidding a harsher sentence after retrial, unless warranted by the defendant’s conduct subsequent to the original sentence proceeding.

Unlike Pearce, which involved potential vindictiveness by a trial judge, Blackledge v. Perry spotlighted the prosecution. In Perry, a convicted defendant chose to exercise his statutory right to a trial de novo in a superior court. The prosecutor responded to the defendant’s decision by obtaining a felony indictment against him in place of the misdemeanor charge that originally had been brought. Again the Supreme Court would not permit this sequence of events, relying on the principles first enunciated in Pearce. Due process, according to the Court, requires that a defendant be free of the fear of vindictive consequences when choosing to exercise a given legal right. Consequently, the Court decided that the risk of retaliation against the defendant was sufficient to warrant a blanket rule analogous to that imposed in Pearce, and barred the introduction of more serious charges in the new trial.

In contrast to the decisions in Pearce and Perry, with their emphasis on retaliatory motives, is the Supreme Court’s decision in Bordenkircher v.

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33 Id. at 713-15.
34 Id. at 723. The Court explained that modern thought on penology favored punishment tailored to both the crime and the criminal. Id.
35 Id. at 723-26.
36 Id.
37 Id. at 726.
39 In the interim between Pearce and Perry, the Supreme Court examined questions of vindictiveness arising after a trial de novo in a superior court, Colten v. Kentucky, 407 U.S. 104 (1972), and after retrial in a system which entrusts the sentencing responsibility to a jury. Chaffin v. Stynchcombe, 412 U.S. 17 (1973). In neither case did the Court find the need for a Pearce prophylactic rule. See Colten, 407 U.S. at 119; Chaffin, 412 U.S. at 28 n.15.
40 417 U.S. at 22. The charge resulted from an altercation between the defendant and another inmate during a time when the defendant was incarcerated in a state penitentiary for an unrelated conviction. Id.
41 Id. at 23. The defendant chose to plead guilty to this enhanced charge, anticipating a sentence that could be served concurrently with the one imposed when originally incarcerated, rather than consecutively as had been imposed by the inferior court. Id. at 23 n.2.
42 See id. at 27.
43 Id. at 27-29. The Court noted, however, that more serious charges properly could be brought if the state demonstrates it would have been impossible to proceed originally on such a charge. Id. at 29 n.7. For example, enhanced charges are permitted where, subsequent to a trial for assault, the victim dies. Id.
Hayes.\textsuperscript{14} The defendant in Bordenkircher and his attorney, after arraignment, met with the prosecutor to discuss a possible plea arrangement.\textsuperscript{15} The prosecutor offered to recommend a certain sentence in exchange for a guilty plea, but also warned the defendant that if the offer were rejected the prosecutor would seek an additional indictment for recidivism.\textsuperscript{16} The defendant chose to stand trial.\textsuperscript{17} The prosecutor, as he had warned, obtained the additional indictment and the defendant was convicted on both counts.\textsuperscript{18}

The Supreme Court held, in Bordenkircher, that the prosecutor's conduct did not offend the Due Process Clause.\textsuperscript{19} The Court clarified the nature of the issue presented, emphasizing that although the actual indictment was not obtained until after plea negotiations had ceased, the prosecutor had informed the defendant of this potential result during the negotiations.\textsuperscript{20} Such disclosure left the defendant, according to the Court, completely aware of all relevant considerations prior to choosing to go to trial.\textsuperscript{21} As a practical matter, the Court explained, this situation was similar to one in which the additional indictment had been procured prior to negotiations, with the prosecutor offering to dismiss the latter charge in return for a guilty plea on the original charge.\textsuperscript{22} The Court asserted that the question of retaliatory motive was inapposite in the plea bargaining context.\textsuperscript{23} The Court observed there was a mutuality of advantage to both prosecutors and defendants in this context which necessarily permitted pressure to be placed on defendants to induce them to plead guilty.\textsuperscript{24} The prosecutor, explained the Court, did no more than to present a defendant with the unpleasant alternatives of either foregoing trial or facing additional and legitimate charges, a presentation which did not violate the fourteenth amendment.\textsuperscript{25}

\textsuperscript{14} 434 U.S. 357 (1978).
\textsuperscript{15} Id. at 358.
\textsuperscript{16} Id. at 358-59.
\textsuperscript{17} Id. at 359.
\textsuperscript{18} Id.
\textsuperscript{19} Id. at 365.
\textsuperscript{20} Id. at 360.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 360-61. In a dissent, Justice Blackmun argued that the sequence of events in Bordenkircher should be discouraged in favor of prosecutorial overcharging prior to the initiation of any plea negotiations. Bordenkircher, 434 U.S. at 368 (Blackmun, J., dissenting). Overcharging results when prosecutors deliberately inflate the original charges, in gravity or number, in order to bolster their bargaining position, and later make artificial prosecutorial concessions. Prosecutorial Discretion, supra note 2, at 37. Justice Blackmun contended that important policy considerations, notably increased visibility of the bargaining process, thereby would be promoted. Bordenkircher, 434 U.S. at 368 n.2 (Blackmun, J., dissenting).
\textsuperscript{23} Bordenkircher, 434 U.S. at 363.
\textsuperscript{24} Id. at 363-64.
\textsuperscript{25} Id. at 365.
During the Survey year the Massachusetts Supreme Judicial Court, in Commonwealth v. Tirrell,\(^4\) considered how the parameters of plea bargaining were affected by Brady, Santobello and the trilogy of vindictiveness cases. The defendant in Tirrell was indicted on charges of arson, breaking and entering, and larceny.\(^7\) At the outset of plea negotiations, the prosecutor advised defense counsel that he would recommend a specified, lenient sentence in exchange for guilty pleas from the defendant on all of the indictments.\(^4\) When defense counsel inquired what the sentence recommendation would be if the defendant declined to enter guilty pleas, the prosecutor responded that his proposed recommendation was firm, and would be made whether the defendant pleaded guilty or was convicted at trial.\(^4\)

The defendant thereupon opted to go to trial.\(^5\) After this intention became apparent to the prosecutor,\(^1\) he informed defense counsel that his original offer was based on an understanding that the defendant would not stand trial, and that a harsher sentence would be recommended if there were a conviction, notwithstanding the original assurance that had been made.\(^2\) The prosecutor added, however, that the original offer would remain open if the defendant chose to enter a guilty plea.\(^3\) Defense counsel characterized his client's reaction to this threat of a harsher sentence recommendation as one of panic, which resulted in the defendant's decision to enter guilty pleas on all of the charges.\(^4\)

One day after entering these guilty pleas, the defendant moved to withdraw them.\(^5\) After an evidentiary hearing, however, the trial judge denied the defendant's motion.\(^4\) Following an intermediate appeal,\(^7\) the defendant presented three principal issues to the Supreme Judicial Court.\(^8\)

\(^7\) Id. at 335, 416 N.E.2d at 1357-58.
\(^8\) Id. at 336, 416 N.E.2d at 1358.
\(^9\) Id.
\(^1\) See id. at 336-37, 416 N.E.2d at 1358.
\(^2\) Id.
\(^3\) Id. The prosecutor based his original offer on his belief that, given the strength of the Commonwealth's case, the defendant would plead guilty. Id. He added that he was angered by "dilatory" motions filed by the defendant, but he maintained his decision to withdraw his original promise was based solely on his reconsideration of the defendant's attitude. Id.
\(^4\) Id. at 337, 416 N.E.2d at 1359.
\(^5\) Id. at 337, 416 N.E.2d at 1358-59. The trial judge imposed sentence in accordance with the prosecutor's recommendation. See id. at 337, 416 N.E.2d at 1359. The guilty plea was accepted in compliance with MASS. R. CRIM. P. 12. 1981 Mass. Adv. Sh. at 337, 416 N.E.2d at 1359.
\(^6\) See id. at 335, 337, 416 N.E.2d at 1357, 1359.
\(^7\) Id. at 335, 337, 416 N.E.2d at 1358, 359. A motion to reconsider also was denied by the trial judge. Id. at 335, 416 N.E.2d at 1358.
The crux of the dispute, according to the Court, was what limits due process, as a matter of federal constitutional law, imposed on possible prosecutorial vindictiveness. In addition, the Court addressed the voluntariness of the defendant's pleas, and considered whether contract law principles were applicable in this circumstance. The Court ultimately rejected the defendant's arguments in all three of these areas, and affirmed the trial judge's refusal to permit the defendant to withdraw his guilty pleas.

The Supreme Judicial Court began its analysis by examining the extent to which prosecutorial vindictiveness in plea bargaining might exceed the limits imposed by due process. The Court presented this question as one of whether Tirrell should be controlled by Pearce and Perry, or by Bordenkircher instead. The Court rejected reliance on the first two of these three decisions, for they neither involved plea bargains nor replicated the voluntariness issue present in Tirrell. The Court explained that Pearce involved an abuse of sentencing powers by a trial judge. No similar claim had been made in Tirrell. Perry, the Court conceded, involved facts which more closely resembled the situation in Tirrell. The Court nevertheless distinguished Perry on the basis of what the Court perceived as a substantive difference between the prosecutor's augmentation of actual charges and sentence recommendations. Pearce and Perry, according to the Court, addressed retaliatory behavior, not the voluntariness of a bargained guilty plea. To reinforce this distinction, the Supreme Judicial Court relied extensively on Bordenkircher v. Hayes. The Court emphasized that Bordenkircher contemplated and accepted the possibility that prosecutorial

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69 Two additional issues also were presented to the Supreme Judicial Court, but the Court adopted the reasoning and conclusions of the Appeals Court without further elaboration. 1981 Mass. Adv. Sh. at 338 & n.4, 416 N.E.2d at 1359 & n.4. One of these two issues concerned an alleged undisclosed agreement for leniency between the prosecution and the defendant's accomplice, in exchange for testimony against the defendant. The Appeals Court upheld the trial judge's finding that no such arrangement existed. 1980 Mass. App. Ct. Adv. Sh. at 1224-25, 406 N.E.2d at 690-91. The second issue was whether the defendant's guilty plea constituted a waiver of his claim against the Commonwealth's conduct. Id. at 1233-34, 406 N.E.2d at 696.

60 1981 Mass. Adv. Sh. at 338, 416 N.E.2d at 1359. The Court explained that vindictiveness, in this context, was defined to encompass both an actual retaliatory motive and the reasonable appearance of the same. Id. at 340 n.8, 416 N.E.2d at 1360 n.8.

61 See id. at 338, 416 N.E.2d at 1359.

62 Id.

63 Id. at 339-40, 416 N.E.2d at 1360.

64 Id. at 339, 416 N.E.2d at 1359-60. See also Letters v. Commonwealth, 346 Mass. 403, 193 N.E.2d 578 (1963) (trial judge coerced guilty plea by threatening to impose a more severe sentence if defendant stood trial).


66 Id.

67 Id. at 340, 416 N.E.2d at 1360.

68 See id. at 340-42, 416 N.E.2d at 1360-61.
inducements might include the risk of a harsher penalty for a defendant who declined to enter into a plea bargain.66

The Tirrell Court next considered the questioned voluntariness of the defendant's guilty plea. The Court noted that while only voluntary guilty pleas could be accepted by a court,67 neither the Supreme Judicial Court nor the United States Supreme Court insisted that the defendant's decision to plead guilty be made in an environment completely free from any psychological or emotional pressure.68 Rather, the Supreme Judicial Court explained, plea bargaining inherently involves the presence of difficult alternatives for a defendant,71 who must choose between a certain recommendation of sentence leniency and a risk of a harsher sentence after a trial conviction.72 The Court added that in weighing these alternatives a defendant should consider the strength of the Commonwealth's case, an unknowable reaction by a factfinder, and the prejudice of a prior criminal record.73 The Court held that absent some demonstration of the defendant's particular vulnerability to the pressure present in Tirrell, that pressure alone was insufficient to invalidate a guilty plea.74 The Court found no such demonstration, and consequently upheld the trial judge's refusal to reconsider his acceptance of the entered pleas.75

66 Id. at 341, 416 N.E.2d at 1361.
67 Id. at 342, 416 N.E.2d at 1361.
71 1981 Mass. Adv. Sh. at 342, 416 N.E.2d at 1361. The Supreme Judicial Court referred to its decision in Commonwealth v. Leate, 367 Mass. 689, 327 N.E.2d 866 (1975), where it held that the United States Constitution cannot require that a defendant's plea, in order to stand, must have been made "freely" in the sense of being compelled by fear of dire consequence if he should stand trial. . . . What the Constitution does require is that, under the inevitable pressures and uncertainties, the defendant, guided by his counsel, shall have a fair understanding of the alternatives in the degree his intelligence permits, and make a choice in that light. 367 Mass. at 694, 327 N.E.2d at 869 (citations omitted).
73 Id. The Supreme Judicial Court quoted from Brady v. United States, 397 U.S. 742, 750 (1970), in which the Supreme Court characterized as sufficient to invalidate a guilty plea pressure whereby the defendant becomes "so gripped by fear of the . . . penalty or hope of leniency that he . . . could not . . . rationally weigh the advantages of going to trial against the advantages of pleading guilty." 1981 Mass. Adv. Sh. at 342, 416 N.E.2d at 1361.
74 As part of the defendant's assessment of the strength of the prosecution's case against him, the fact that in retrospect the assessment was imprecise is not enough per se to demonstrate that the guilty plea was not made intelligently. See, e.g., McMann v. Richardson, 397 U.S. 759 (1970).
76 Id. at 342-44, 416 N.E.2d at 1361-62. The Supreme Judicial Court noted that the trial judge did not make specific findings regarding the defendant's voluntariness on the motion to reconsider. Id. at 343 n.10, 416 N.E.2d at 1361 n.10. This failure, according to the Court, apparently contravened the requirements of MASS. R. CRIM. P. 30(b). 1981 Mass. Adv. Sh. at 343.
Finally, the Supreme Judicial Court considered the contract aspect of the plea negotiations. The Court agreed with the defendant’s contention that plea bargains often are analyzed using contract law principles. The Court noted, however, that the Commonwealth would not be contractually or honor bound to abide by its original representation unless the defendant had relied on it. The Court distinguished both Santobello and a prior Massachusetts decision as cases involving demonstrated reliance. In both of those instances, the defendant actually entered guilty pleas in accordance with the agreement, only to discover that the prosecution reneged on its promise. The Court in Tirrell, however, found no similar detrimental reliance, because the ultimate sentence recommendation was identical to that which originally had been proposed. The Court, therefore, concluded that the bargaining process in Tirrell was proper, since the prosecutor acted according to his original promise, unlike a situation wherein the defendant is induced to plead guilty, after which the prosecutor refuses to keep his word.

Justice Kaplan dissented in Tirrell and explained that the defendant should be allowed to withdraw his plea and face the risks associated with trial. Justice Kaplan refused to speculate as to the existence of demonstrable detrimental reliance, because he maintained such an analysis bypasses the true injustice present in the case.
riding principle at issue in Tirrell was whether the Commonwealth should be required to abide by its commitments, however foolish in hindsight they may appear to be.\textsuperscript{46} He favored not permitting the Commonwealth to benefit by threatening to change its commitments, even when not called upon actually to implement that change.\textsuperscript{47} Such an insistence by the Court, Justice Kaplan concluded, would not render inoperable the plea bargaining process.\textsuperscript{48}

The result reached by the Supreme Judicial Court in Tirrell, rejecting allegations of prosecutorial vindictiveness, signifies a limited extension of the Bordenkircher decision. In this latter case, the defendant completely understood the prosecutor's intentions prior to engaging in plea negotiations.\textsuperscript{49} The Supreme Court accordingly characterized the prosecutor's conduct as properly within his discretion to refrain from prosecuting on every conceivable charge.\textsuperscript{50} The factual sequence in Tirrell cannot be characterized similarly. Rather, the prosecutor's ultimate intention, albeit due to his misperception of the defendant's plans, remained undisclosed until the original negotiations had concluded with the defendant choosing to proceed to trial.\textsuperscript{51} The prosecutor did considerably more than merely present the defendant with unpleasant alternatives.\textsuperscript{52} The Supreme Judicial Court permitted the prosecutor to treat as tentative what ostensibly had been a final and informed choice by the defendant to stand trial. Relying on Tirrell, the Court presumably will allow prosecutors to increase the ante until either the defendant succumbs to the mounting pressure or considerations of voluntariness\textsuperscript{53} or detrimental reliance\textsuperscript{54} are interposed.

The sequence of plea negotiations in Tirrell also clouds consideration of the Supreme Judicial Court's voluntariness analysis. Tirrell adheres to existing Supreme Court precedent, but only if the sequence of events present in the case is found to be inconsequential. The Supreme Court precedent, exemplified by Brady and its progeny,\textsuperscript{55} examines whether the defendant, in choosing to enter a guilty plea, could voluntarily and intelligently weigh his alternatives.\textsuperscript{56} The Court held there is no constitutional infirmity, absent a factual showing of peculiar susceptibility, with a process which pressures a

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id. at 346, 416 N.E.2d at 1363.
\textsuperscript{49} Bordenkircher, 434 U.S. at 360.
\textsuperscript{50} See id. at 360-61. See also Brady, 397 U.S. at 750-53.
\textsuperscript{52} See supra text accompanying note 45.
\textsuperscript{55} Id.; Bordenkircher v. Hayes, 434 U.S. 357 (1978).
\textsuperscript{56} Brady, 397 U.S. at 748; see Bordenkircher, 434 U.S. at 362; Santobello, 404 U.S. at 261.
defendant into choosing between pleading guilty with lesser sanctions and standing trial while risking more serious penalties. 97 The Supreme Judicial Court, applying Brady and relying on an accumulated lower court record, was unconvinced by the defendant’s claim of such vulnerability. 98 Yet Tirrell also introduces a unique and additional pressure, one which permits a prosecutor to wear down the defendant gradually by intermittently increasing the latter’s risk. By approving the negotiation sequence present in Tirrell, the Supreme Judicial Court may be indicating that once any type of bargaining coercion is permitted, a generous variety of techniques also will be allowed.99

The final issue examined by the Court concerned the contract law aspect of the defendant’s claim. In a brief analysis the Supreme Judicial Court advanced two possible grounds upon which the Commonwealth might be held to the prosecutor’s unilateral promise — the Commonwealth might be bound by contract or by honor.100 Yet immediately after identifying these two distinct theories, the Court proceeded to merge them into one. The Court stated that the application of either theory was contingent upon the defendant having relied detrimentally on the prosecutorial promise.101 Although the Court’s position may be well-founded based upon contract law principles,102 this same position may be curiously anomalous in the context of the concept of “honor,” which has received some support as a legitimate consideration in judicial determinations.103 This theory, whereby the sovereign would be held to a heightened standard, could be used to safeguard an individual’s reasonable expectations when governmentally induced.104 By imposing detrimental reliance as a prerequisite to upholding a commitment of honor, the Court strips this consideration of any independent vitality.

97 See, e.g., Brady, 397 U.S. at 750-51.
99 But cf. Bordenkircher, 434 U.S. at 365 & n.9 (unspecified constitutional limits restrain the breadth of prosecutorial conduct).
102 See Note, supra note 1, at 604-05.
103 See Cooper v. United States, 594 F.2d 12, 15-20 (4th Cir. 1979); see also United States v. McIntosh, 612 F.2d 835, 837 (4th Cir. 1979); Note, supra note 4, at 173-75.
104 See supra note 103. Such a standard is useful because “it seems strikingly cruel to allow the state to encourage false hopes [by the defendant] and then destroy them at will.” Westen & Westin, supra note 2, at 526. Indeed, the Supreme Judicial Court has recognized the need to impose a higher ethical standard on governmental action. See supra note 79.
Commonwealth v. Tirrell consequently should be viewed as a conscious decision by the Supreme Judicial Court to provide maximum flexibility in the plea bargaining process. The Court seems ready to permit prosecutors to utilize their discretion in plea bargaining as broadly as they currently exercise it in other, less controversial, contexts. Still, this prosecutorial ability is not limitless, as the Court so indicated. Once the prosecutor in Tirrell demonstrated his authority regarding sentence recommendations, the defendant retreated from his decision to stand trial rather than test the extent of the prosecutorial powers. If the defendant instead had not been intimidated, and was given a harsher sentence recommendation following a trial conviction, the Court indicated it might take a different posture. Precisely what that posture might be, and whether it will hinge on considerations of vindictiveness or detrimental reliance, is left to be resolved by future litigation.

§ 13.6. Warrantless Wiretaps.* The purpose of the fourth amendment's prohibition on unreasonable searches and seizures is to ensure that private individuals may conduct their personal affairs free from unreasonable governmental intrusion. The reasonableness of a particular governmental intrusion will depend upon the context in which it is made. The intrusion will be constitutionally deficient unless it is made pursuant to procedures designed to insure compliance with constitutional mandates, such as the requirement of a neutral determination of probable cause prior to the intrusion. There are, however, certain situations in which governmental intrusions rising to the level of a search may be made with justification less than that of probable cause, and without a detached, neutral determination that a warrant should issue. One such situation is the electronic interception, by law enforcement agencies, of the communications of those suspected of engaging in crime.

In Massachusetts, the legislature has balanced the competing needs of effective law enforcement on the one hand, and the citizens' right of privacy

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§ 13.6. 1 Terry v. Ohio, 392 U.S. 1, 9 (1968).
2 Id.
4 There are a number of exceptions to the fourth amendment requirement that searches and seizures be made pursuant to a warrant. The practice of "stop and frisk," certain permissible automobile searches, and the doctrines of "exigent circumstances" and "plain view" are all examples of this. See Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Chambers v. Maroney, 399 U.S. 42 (1970) (permissible warranties searches of automobiles); Michigan v. Tyler, 436 U.S. 499 (1978) (exigent circumstances of case allowed warrantless search); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view).
on the other. The Legislature has concluded that, in the context of law enforcement through the use of wiretaps, "the unrestricted use of modern electronic surveillance devices [poses] grave dangers to the privacy of all citizens of the commonwealth." Therefore, the use of such devices by private citizens is prohibited and is strictly regulated when engaged in by law enforcement officials. One situation in which the governmental need to use such a technique is significant enough to outweigh the "grave danger" to individual privacy is that of combating organized crime. Because the investigation of organized crime presents difficulties of detection and prevention which many other criminal acts do not, the Massachusetts Legislature has enacted chapter 272, section 99. This statute exempts the electronic interceptions of law enforcement officers investigating "designated offenses," including offenses "in connection with organized crime" from its general prohibitions of wiretapping.

During the Survey year, the Supreme Judicial Court, in companion cases, addressed the issues of the appropriate standard of suspicion which must be met to justify warrantless surveillance under chapter 272 section 99, the proper definition of "organized crime" for the purpose of that statute's exception for designated offenses, and the extent to which article 14 of the Massachusetts Declaration of Rights affords protection against unreasonable searches and seizures. In addition, the Court addressed the issue of the extent to which the exclusionary rule applies to conversations recorded in violation of the statute. In Commonwealth v. Thorpe, and Commonwealth v. Jarabek, the Court decided, inter alia, that 1) for the purposes of chapter 272, section 99, "organized crime" refers to criminal activity which constitutes "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services;" 5

5 G.L. c. 272, § 99A.
6 Id.
7 Id.
8 Id.
9 Id. The legislature has pointed out that because of the insulation and secrecy of organized crime activities, "[n]ormal investigative procedures are not effective in the investigation of illegal acts committed by organized crime." Id.
10 G.L. c. 272, § 99B(4).
11 G.L. c. 272, § 99B(7).
14 The Court also held, in Commonwealth v. Jarabek, 1981 Mass. Adv. Sh. 1849, 424 N.E.2d 491, that where evidence is obtained for a criminal prosecution as a result of a combined federal state investigative effort, the legality of the investigating officers' conduct, for purposes of determining the admissibility of evidence, is to be judged by the state standard if that standard is stricter than the federal one. Id. at 1853, 424 N.E.2d at 493.
15 Id. at 1833, 424 N.E.2d at 254.
2) warrantless electronic surveillance is permissible only where there is "a reasonable suspicion that [such activities] would disclose or lead to evidence of a designated offense (e.g. organized crime)"16

3) warrantless electronic surveillance does not violate the right to be free from unreasonable searches and seizures, as guaranteed by art. 14 of the Massachusetts Declaration of Rights, where such surveillance is carried out by a police officer known to the other party as such, in conversation with that party;17 and 4) a witness's personal recollection of conversations which were illegally recorded will not be held inadmissible by virtue of that illegality.18

In Thorpe, the defendant was indicted on charges of attempted corruption of a municipal official in violation of chapter 268A, section 2(a)(2).19

The indictment was based in large part upon evidence gathered through the warrantless taping of telephone and face-to-face conversations between Thorpe and McCue, the officer whom Thorpe was attempting to corrupt.20

Through the recorded conversations, Thorpe and McCue negotiated a deal by which Thorpe was to sell McCue a copy of an upcoming police sergeant’s examination.21 In the course of negotiating the deal, McCue clandestinely recorded approximately eight telephone conversations and two face-to-face conversations with Thorpe.22 No attempt to secure a warrant was made.23

Upon indictment, Thorpe moved by potential motion to suppress the tape recordings, and when that motion was denied he brought an interlocutory appeal which the Supreme Judicial Court granted leave for.24 Thorpe alleged on appeal, that the tape recordings should be suppressed because 1) he was not engaged in organized crime within the meaning of the statute and the burden was on the Commonwealth to demonstrate probable cause that he was so engaged before using electronic surveillance,25 and 2) his right to be free from unreasonable search and seizure under article 14 of the Massachusetts Declaration of Rights was violated by warrantless electronic surveillance whether it was supported by probable cause or not.26

In ruling against the appellant on both issues, the Thorpe Court first addressed the question of what activities the Commonwealth generally would be required to show in order to demonstrate the existence of "organized

16 Id. at 1837, 424 N.E.2d at 256.
17 Id. at 1841, 424 N.E.2d at 258.
20 Id. at 1834, 424 N.E.2d at 255.
21 Id. at 1829, 424 N.E.2d at 252.
22 Id.
23 Id.
24 Id. at 1828, 424 N.E.2d at 251.
25 Id. at 1831, 1835, 424 N.E.2d at 253, 255.
26 Id. at 1838, 424 N.E.2d at 256-57.
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crime.” Concluding that the lengthy discussion of organized crime which the legislature inserted in its preamble to chapter 272, section 99 would be unworkable if applied as a “definition” of organized crime,27 the Court nevertheless selected particular language out of that preamble. The Court held that, for the purposes of the statutory exception to the prohibition of electronic surveillance, the Commonwealth would not be required to show that the activities they sought to investigate involved “brutal and violent tactics,”28 or that “‘legitimate business activities’ were being infiltrated.”29 Rather, the existence of organized crime may be shown by “‘a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services.’”30

The Court next addressed the question of the appropriate burden that the Commonwealth should be required to sustain in demonstrating the existence of organized crime, for the purposes of the statutory exception.31 Stating that the burden of demonstrating the exception’s applicability is on the Commonwealth,32 the Court considered, and rejected, two opposing suggestions before selecting a middle ground on this issue. The defendant, Thorpe, had urged that the Commonwealth be required to demonstrate probable cause as a prerequisite to applicability of the exception.33 The

27 Id. at 1833, 424 N.E.2d at 254. The preamble to G.L. c. 272, § 99 states:

“The general court finds that organized crime exists within the commonwealth and that the increasing activities of organized crime constitute a grave danger to the public welfare and safety. Organized crime, as it exists in the commonwealth today, consists of a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services. In supplying these goods and services organized crime commits unlawful acts and employs brutal and violent tactics. Organized crime is infiltrating legitimate business activities and depriving honest businessmen of the right to make a living.

The general court further finds that because organized crime carries on its activities through layers of insulation and behind a wall of secrecy, government has been unsuccessful in curtailing and eliminating it. Normal investigative procedures are not effective in the investigation of illegal acts committed by organized crime. Therefore, law enforcement officials must be permitted to use modern methods of electronic surveillance, under strict judicial supervision, when investigating these organized criminal activities.

The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.”

28 Id.
29 Id.
30 Id.
31 Id. at 1835-37, 424 N.E.2d at 255-56.
32 Id. at 1835, 424 N.E.2d at 255.
33 Id.
Court concluded that the legislature did not intend that such a stringent standard be applied. The Court also rejected the Commonwealth's suggestion that law enforcement officials' good faith belief about the existence of organized criminal activity would be sufficient, apparently because of the perceived legislative intent that such activity should be narrowly circumscribed. Instead, the Court held that the Commonwealth would have to show a "reasonable suspicion" of organized crime: a standard which would be "met by a showing of articulable facts from which a reasonable person could conclude that interception would lead to evidence of ... [organized crime]."

Having established the definition of organized crime, and the standard of proof which could trigger authorization of surveillance, the Thorpe Court considered the specific facts of the case. Pointing out that the "reasonable suspicion of organized crime" standard could only be assessed on the basis of facts available to law officers prior to the recorded conversations, the Court reached the conclusion that the pre-surveillance evidence met that standard. While admitting that "[t]he only pre-surveillance evidence of organized crime ... [available] consists of McCue's testimony ... [that] Thorpe said the examination was available to him 'through an organization headed by a woman,'" the Court came to the "inescapable" inference that a "certain amount of discipline and organization would be required to acquire and supply the examinations illicitly."

Finally, the Thorpe Court considered the question of whether warrantless electronic surveillance is unreasonable per se. Since the recording of conversations with the consent of one of the parties to the conversation has been adjudged not to be violative of the federal Constitution, the Court would have had to adopt a more stringent standard with respect to freedom from unreasonable searches in the state Constitutional mandates. It declined to do so. Instead, the Court confined itself to the facts of the case in maintaining that because expectations of privacy are diminished when one speaks to a known police officer, no violation of the state constitution had occurred. The Court did state, however, that in the future it would be wise if law enforcement officers secured a warrant before proceeding with such

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34 Id.
35 Id.
36 Id. at 1837, 424 N.E.2d at 256.
37 Id. at 1835, 424 N.E.2d at 255.
38 Id.
39 Id. at 1837, 424 N.E.2d at 256.
42 Id. at 1842, 424 N.E.2d at 259.
surveillance, suggesting that the applicability of this portion of the decision is very narrow.

The dissenting opinion of Justice Liacos strongly objected to the majority’s definition of "organized crime." Justice Liacos maintained that the majority ignored both the language of chapter 272, section 99, and the legislative history of that statute, in reaching its conclusion. The dissent stated that, by ignoring some of the language of the preamble the majority created a definition of "organized crime" which was far too broad; one which would "permit broad electronic surveillance in areas never intended by ... [the] legislature in the enactment of G.L. c. 272, § 99." Rather than fashioning such a broad definition, Justice Liacos suggested that "organized crime," for the purposes of the statute, be limited to "those notorious and readily recognized highly structured criminal syndicate[s] composed of professional criminals who primarily rely on unlawful activity as a way of life ... and not to criminal conspiracies, generally." The dissenting Justice also argued that the language of the entire preamble was to be given effect, if possible, in determining whether organized crime was implicated. The Commonwealth would not be required to demonstrate that each of the descriptions of the preamble fit the activity in question, however. Rather, the dissent maintained, it would simply have to show a "connection" between the "designated offense" and any of the criminal groups described in the preamble as being engaged in organized crime.

While the Thorpe decision may be questioned with respect to its definition of organized crime, far more serious criticisms can be levelled at the next two conclusions of the opinion. The conclusion that the Commonwealth need only entertain reasonable suspicion of organized crime before proceeding with warrantless surveillance is troubling. First, such a conclusion seems plainly inconsistent with the Court’s own statement that "the Legislature proceeded on the premise that electronic surveillance is anathema except within certain narrowly prescribed boundaries." The conclusion is inconsistent because "reasonable suspicion" is less restrictive a standard than "probable cause," and the choice of the former standard over the latter could hardly be said to be "narrowly prescribing" the boundaries of permissible warrantless electronic surveillance. Moreover, the

43 Id.
44 Id. at 1842-48, 424 N.E.2d at 259-62.
45 Id. at 1843, 424 N.E.2d at 259.
46 Id.
47 Id. at 1846, 424 N.E.2d at 260.
48 Id. at 1848, 424 N.E.2d at 262.
49 See n.29, supra.
51 Id. at 1835, 424 N.E.2d at 255.
Court did not seem to acknowledge that part of the legislative preamble which requires "strict judicial supervision," since the standard adopted by the Court leaves substantial discretion to law enforcement agencies.

Furthermore, the Court's reliance on *Terry v. Ohio*,\textsuperscript{12} at least in part, for the proposition that reasonable suspicion is the appropriate standard to trigger warrantless surveillance,\textsuperscript{13} is misplaced. The *Terry* Court adopted the reasonable suspicion standard in "stop and frisk" situations\textsuperscript{54} for two reasons. First, the intrusion involved in a stop-and-frisk situation is less significant than that which is involved in a full-blown search.\textsuperscript{55} Second, the immediacy of the situation and potential danger to the officer can be alleviated by the adoption of such a standard.\textsuperscript{56} Neither of those justifications is available to demonstrate why law enforcement officers should be able to invade a person's legitimate expectation of privacy without a warrant, and on less than probable cause, in situations such as those presented by the *Thorpe* case. The other case on which the Court apparently relies for this proposition, *Commonwealth v. Silva*\textsuperscript{17} is equally inappropriate. *Silva*, which involved an automobile search for weapons, does not explain, any more than *Terry* does, why serious intrusions should be permitted on less than probable cause, when no danger to the investigating officer is present, and the intrusion is a more significant one than that involved in a simple "frisk."

The *Thorpe* Court's application of the organized crime definition and the reasonable suspicion standard of chapter 272, section 99 to the facts of the *Thorpe* case is just as questionable as the adoption of those legal tests themselves. The court determined that Thorpe's single statement, that the police sergeant's examination "was available to him through an organization headed by a woman,"\textsuperscript{39} was sufficient to establish a reasonable suspicion of organized crime as the Court defined those terms. Even assuming that the Court's definition of organized crime\textsuperscript{9} is the one which the legislature intended, it is hard to see how Thorpe's statement alone, without any other evidence, could generate reasonable suspicion of "a continuing conspiracy among highly organized and disciplined groups."\textsuperscript{40} The Court, however, did not make such an assertion; rather, it reasoned that the "inescapable inference" from Thorpe's statement is that a "certain amount"

\textsuperscript{12} 392 U.S. 1, 21 (1968).
\textsuperscript{13} 1981 Mass. Adv. Sh. at 1837, 424 N.E.2d at 256.
\textsuperscript{14} *Terry* v. *Ohio*, 392 U.S. 1, 12 (1968).
\textsuperscript{15} *Id.* at 26.
\textsuperscript{16} *Id.* at 23-24.
\textsuperscript{17} 366 Mass. 402 (1974).
\textsuperscript{19} See *Id.* at 1833, 424 N.E.2d at 254.
\textsuperscript{20} *Id.*
of discipline and organization would be required to acquire the police examination. 61 The Court's own definition of organized crime would lead one to suspect that organized criminals are "highly organized and disciplined;" its subsequent "inescapable inference" leads one to believe that "a certain amount of discipline" satisfies this standard. Even assuming that the Court's original definition is correct, this application of it does, as the dissent correctly pointed out, have the unfortunate effect of "substantially strip[ping] the [wiretapping] statute of its intended restrictive effect." 62

The Jarabek decision helps clarify the meaning which the Supreme Judicial Court attaches to the chapter 272, section 99 definition of organized crime. The decision also addresses the issue of whether personal testimony with respect to illegally recorded conversations is admissible. Jarabek involved the defendant, Jarabek, an elected school committee official, as well as Miara, the president of a corporation that had contracted to install a security fence at a school. 63 Miara had been approached by Alecrim, an assistant superintendent at the school, with a coercive suggestion that Miara "contribute" funds to Jarabek's re-election campaign. 64 Miara contacted law enforcement authorities, with whom he agreed to record any conversations he might have with either Alecrim or Jarabek. 65 At trial, the defendants moved to suppress both the recordings and any testimony concerning the conversations which Miara could provide. 66 The trial judge's suppression of both the recordings and Miara's personal testimony was the principal issue which the Jarabek Court addressed. 67

While the Jarabek Court did not discuss the issue of whether Alecrim's and Jarabek's activities provided evidence of "organized crime" at great length, it did affirm the trial judge's suppression of the recordings as violative of chapter 272, section 99. 68 Furthermore, the Court's characterization of the defendant's activities suggests rough guidelines in determining whether organized crime exists for the purposes of the statute. The Court referred to the actions of Alecrim and Jarabek as "a scheme by two municipal officials to extort a kickback from a single contractor." 69 When compared to the Court's repeated characterization of Thorpe's activities as those of an "organization," 70 as well as its assumption that the

61 Id. at 1837, 424 N.E.2d at 256. 
62 Id. at 1845, 424 N.E.2d at 260. (Liacos, J., dissenting). 
64 Id. at 1850, 424 N.E.2d at 492. 
65 Id. at 1851, 424 N.E.2d at 492. 
66 Id. at 1850, 424 N.E.2d at 491. 
67 Id. 
68 Id. at 1852-53, 424 N.E.2d at 493. 
69 Id. at 1853, 424 N.E.2d at 493. 
activities of Thorpe's "organization" were of an ongoing or "continuing" nature, it seems that the Court would have law enforcement officials look primarily for two things when considering the question of whether there is evidence of organized crime. First, the number of people involved in the activity is significant. There cannot be an exact formulation of the dividing line between organized and non-organized criminal activity, but it is somewhere between "two people" and "an organization." Second, the ongoing nature of the activity is significant. The Court indicated that Jarabek's activities were an isolated criminal incident, rather than part of a continuous criminal process which seemed to be indicated in Thorpe.

In addition to helping clarify the Thorpe definition of organized crime, the Jarabek Court addressed the issue of whether Miara's personal testimony of the content of the illegally recorded conversations should be suppressed. Relying primarily on what it perceived to be the legislature's intent with respect to this issue, the Jarabek Court held that such testimony was admissible. If the Court had confined itself to this holding, there would be no viable grounds on which to dispute its holding, in view of applicable federal law. The Court went further, however, by stating that while live testimony of a party to an illegally recorded conversation will not be suppressed, any evidence that the conversation was so recorded will be suppressed. While indicating that this suppression will further the legislative goal of discouraging unauthorized interceptions, the Court failed to establish a rule that will most effectively deter such intrusions.

In many situations, the testimony of a person who obtains his information through illegal means will be suppressed. While such suppression will have significant beneficial effects for the person against whom the evidence was intended to be used, the fact that such an illegal intrusion occurred remains an affront to their individual privacy. Suppression of the fact that a conversation was illegally recorded, as opposed to suppression of the con-

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71 See Id. at 1837, 424 N.E.2d at 256.
75 Id. at 1856, 424 N.E.2d at 495.
76 Unless it comes within the exclusionary rule (see n.75, infra) live testimony as to a conversation by one of the parties is admissible, since the other party has no guarantee that the testifying party will not remember the conversation and repeat it if he so desires. See United States v. White, 401 U.S. 745, 751-53 (1971); Hoffa v. United States, 385 U.S. 294, 302-03 (1966).
78 Id.
79 The "fruit of the poisonous tree" doctrine, enunciated in Nardone v. United States, 308 U.S. 338 (1939), provides that evidence which normally would be admissible will be excluded if obtained as a result of illegal activity.
tents of the conversation, would hardly remove its offensiveness to individual parties involved. If the Court truly feels that secret interceptions of conversations are offensive to individual privacy, it should exclude evidence of that conversation, whether recorded or personally recalled by a party to that conversation altogether. If it does not, there is no disincentive to illegally recording a conversation in which one of the parties is a potential witness for the government: if the recording is later held illegal (and therefore inadmissible), the recording party is in no worse a position than if it had never recorded in the first place. Thus, while the Court's determination that "if the Legislature had intended to take the unusual step of suppressing the untainted and independent live testimony of a party to . . . [an illegally recorded] conversation, it would have spoken more clearly"1 seems sound, its holding that all evidence of such illegal activity must be suppressed hardly removes such activity's offensiveness to those affected by it.

The Supreme Judicial Court, in Thorpe and Jarabek, attempted to resolve some of the important issues raised in the area of warrantless electronic surveillance. With respect to the holdings of these cases which have general applicability the conclusions concerning the reasonable suspicion standard and the rule regarding admissibility of live testimony of the contents of illegally recorded conversations, the Court's standards are workable, although their prudence may be disputed. Yet, because of the vagueness of the definition of "organized crime" for the purposes of chapter 272, section 99, further refinement in decisional law will be needed before law enforcement officials and practicing attorneys will have a full understanding of the types of activities which will provide sufficient evidence of chapter 272, section 99(B)(7) "designated offense."

§ 13.7. Search and Seizure — Voluntary Consent to a Blood Test. The taking of a blood sample by police to test for the presence of alcohol is a search within the meaning of the fourth amendment.2 Any fourth amendment search is generally considered invalid when made without a search warrant.3 There are, however, established exceptions to this rule. A search conducted incident to a valid arrest4 or a search conducted pursuant to "ex-

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1 Id. at 1856, 424 N.E.2d at 494-95.
2 By Mark Vincent Nuccio, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.
3 Schmerber v. California, 384 U.S. 757, 767 (1966). The fourth amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. Const. Am., 4 (emphasis added).
5 Chimel, 395 U.S. at 762-63.
igent circumstances,"' which makes obtaining a search warrant unreasonable under the circumstances, are exceptions to the warrant requirement. Exigent circumstances exist in situations such as where a movable vehicle is involved or where police are in hot pursuit of a suspect. The warrant requirement is also excepted if the prosecution later proves that a proper consent to the search was obtained. In such cases, the prosecution must show that the consent was voluntary, and not given merely in acquiescence to apparent lawful authority. Thus, because the taking of a blood sample is a search within the meaning of the fourth amendment, it follows that where police desire to take a blood sample they must do so armed with a search warrant, or under exigent circumstances, or with the permission of the suspect.

To meet the constitutional requirement of voluntary consent, Massachusetts and numerous other states enacted "implied consent" statutes. These statutes create a legal presumption that a motorist arrested for driving while under the influence of intoxicating liquors consents to a blood or breath test for alcohol. The Massachusetts version provides in relevant part "[w]hoever operates a motor vehicle ... shall be deemed to have consented to submit to a chemical test or analysis of his breath or blood in the event that he is arrested for operating under the influence of intoxicating liquors ..." The implied consent statute, therefore, applies only where a driver is under arrest for operating under the influence of intoxicating liquors, not under circumstances where the driver is unarrested.

Prior to the Survey year, the Supreme Judicial Court had not considered the question whether consent is valid in the blood sample search context without an arrest. The Court, however, had addressed the general issue of

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4 Coolidge, 403 U.S. at 455. See also Carroll v. United States, 267 U.S. 132, 149 (1925).
9 See Schmerber, 384 U.S. at 767.
11 See, e.g., G.L. c. 90, § 24(1)(f).
12 G.L. c. 90, § 24(1)(f) (emphasis added). The statute also authorizes the revocation of a driver's license if he refuses to submit to the test. Id. In Massachusetts, a refusal to submit to the test generally is not admissible as evidence against the driver in a civil or criminal proceeding. Id. Such a refusal would, however, be admissible in a proceeding arising out of the registrar's suspension of the license. Id.
voluntary consent in other fourth amendment search settings. In *Commonwealth v. Aguiar*, the Court held that the question of voluntariness was one of fact to be determined from the totality of the circumstances in a given case. In *Commonwealth v. Walker*, the Court held that when the prosecution relies on consent as the basis for conducting a warrantless search, it must show that the consent was "unfettered by coercion, express or implied, and also something more than 'mere acquiescence to a claim of lawful authority.'"  

Finally, in 1981 the Supreme Judicial Court considered the voluntariness issue where consent is given by an unarrested driver involved in an accident for the administration of a blood test to check for alcohol content. In *Commonwealth v. Angivoni*, the Court identified a variety of factors suggesting that the consent given was not voluntary. The factors were: (1) a registry of motor vehicle inspector's failure to inform the driver that the accident had caused a fatality; (2) an inspector's failure to tell the driver that he could refuse to take the blood test; (3) the presence of a uniformed police officer during an inspector's request that the driver submit to a blood test; and (4) the diminished ability of the driver to reason effectively when making his decision whether to submit to the blood test, by reason of intoxication or injury. These factors, combined with the deference the Court gave to the trial judge's decision to allow the driver's motion to suppress, resulted in the Court's holding that the consent was not voluntary as a matter of law.

In *Angivoni*, the defendant was the driver of a car involved in an accident where a passenger in the other vehicle was killed. The defendant was taken by ambulance from the scene of the accident to a hospital. Hospital records indicated that upon his arrival the defendant was alert and rational. Shortly after the defendant was delivered to the hospital, a registry of motor vehicles inspector arrived to conduct the routine investiga-

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13 *Mass. 490, 350 N.E.2d 436 (1976).*
16 *Id. at 555, 350 N.E.2d at 685 (citing Bumper v. North Carolina, 391 U.S. 543, 549 (1968)). The Supreme Judicial Court's test for voluntariness is consistent with the structures set by the United States Supreme Court, as the question of voluntariness is one of constitutional dimension. See id.*
18 *Id. at 559-60, 417 N.E.2d at 425.*
19 *Id. at 560, 417 N.E.2d at 425.*
20 *Id. at 556, 417 N.E.2d at 423.*
21 *Id.*
22 *Id. at 557, 417 N.E.2d at 424.*
tion which follows all highway accidents causing fatalities. The inspector found that the defendant had difficulty speaking and that he was being treated for a variety of injuries. Clad in civilian attire, the inspector identified himself to the defendant and began asking him the standard investigatory questions. The inspector obtained the answers to certain questions although it was difficult for him to understand the defendant's words. Asked whether he had been drinking, the defendant replied in the negative. The defendant then was asked if he would consent to a blood test and he responded affirmatively. The inspector next inquired about the cause of the accident. The defendant replied, "I don't know, I am incoherent." The questioning then ceased. During the course of the questioning the defendant was never informed that someone was killed in the accident, that he was not obliged to consent to the blood test, or that the results of such a test could be used against him in court. Moreover, he was never placed under arrest.

The defendant subsequently was charged with negligently operating an automobile so as to endanger the public safety, operating an automobile while under the influence of intoxicating liquor, and homicide by motor vehicle. At trial, the prosecution sought to introduce into evidence the results of the blood test. The defendant moved to suppress the results of the blood test on the grounds that he had not voluntarily consented to the test. The trial court sustained the defendant's motion to suppress. The trial judge concluded that the prosecution had failed to meet its burden of proof. The judge found that the allocation of the burden was dispositive of the consent issue because the question was so close.

35 Id. at 556, 417 N.E.2d at 423. Such investigations were routine whenever a motor vehicle accident resulted in a fatality. Id.
36 Id. The medical record disclosed that the defendant was missing two teeth, two others were loose, and that he had a cut on his lower lip which required stitching. Id.
37 Id.
38 Id. at 556, 417 N.E.2d at 423.
39 Id. at 557, 417 N.E.2d at 423.
40 Id.
41 Id. The first medication received by the defendant seems to have been administered after the questioning had concluded. Id.
42 Id.
43 Id., 417 N.E.2d at 423-24.
44 Id.
45 Id. at 556 n.1, 417 N.E.2d at 423 n.1.
46 Id. at 556, 417 N.E.2d at 423.
47 Id.
48 Id.
49 Id. at 557, 417 N.E.2d at 424.
50 Id.
filed an interlocutory appeal with the Supreme Judicial Court on the question of voluntariness, maintaining that the defendant’s consent was voluntary as a matter of law.\textsuperscript{41}

In deciding the case, the Supreme Judicial Court first noted the trial court’s findings of fact and conclusions of law.\textsuperscript{42} The Court then began its analysis by acknowledging that under the United States Supreme Court’s decision in \textit{Schmerber v. California}\textsuperscript{43} the taking of a blood test by police constitutes a search within the meaning of the fourth amendment.\textsuperscript{44} The Court observed that under \textit{Schmerber} police are permitted to take a blood test provided they have probable cause and a search warrant, or exigent circumstances exist which justify the lack of a warrant.\textsuperscript{45} The Court further stated that consent was an equally valid alternative to obtaining a search warrant in such cases.\textsuperscript{46} When relying on consent to justify a warrantless search, however, the Court pointed out that the prosecution had the burden of establishing that the consent was free from coercion, express or implied.\textsuperscript{47} The Court also noted that the voluntariness of a consent was a question of fact to be determined in light of the circumstances present in each case.\textsuperscript{48} In analyzing the defendant’s consent as a question of fact, the Court was guided by a presumption against the waiver of constitutional rights and gave substantial deference to the trial court’s findings and conclusions.\textsuperscript{49} In reviewing the circumstances surrounding the consent in this case, the Court found ample support in the record to warrant the trial court’s determination that the consent was not voluntary.\textsuperscript{50}

\textsuperscript{41} Id. at 555-60, 417 N.E.2d at 423-25.
\textsuperscript{42} Id. at 556-57, 417 N.E.2d at 423-24.
\textsuperscript{43} 384 U.S. 757 (1966).
\textsuperscript{44} 1981 Mass. Adv. Sh. at 557, 417 N.E.2d at 424.
\textsuperscript{45} Id. The Supreme Judicial Court noted that the trial judge found that the defendant was not under arrest and there was no probable cause to believe that he was under the influence of alcohol. \textit{Id.} at 559 n.2, 417 N.E.2d at 424 n.2. Absent an arrest, the trial judge ruled that G.L. c. 90, § 24(1)(e) was inapplicable and ruled further that, absent probable cause, the taking of a blood sample could not be justified by the “exigent circumstances” theory discussed in \textit{Schmerber}. \textit{Id.} The court also noted that since neither party had contested the findings and conclusions of the trial judge, they were not an issue on appeal. \textit{Id.}
\textsuperscript{46} Id. at 557, 417 N.E.2d at 424.
\textsuperscript{47} Id. at 557-58, 417 N.E.2d at 424.
\textsuperscript{49} 1981 Mass. Adv. Sh. at 558, 417 N.E.2d at 424. The Court did, however, reject the defendant’s argument that issues of voluntariness were exclusively questions of fact which were beyond the review of the Court unless the trial court had clearly erred. \textit{Id.} at 558 n.3, 417 N.E.2d at 424 n.3.
\textsuperscript{50} Id. at 559, 417 N.E.2d at 425. The Court pointed out that the trial judge had misstated the Commonwealth’s burden that consent be “knowing.” \textit{Id.} at 559 n.4, 417 N.E.2d at 425 n.4. On this matter, the Court concluded that the word “knowing” was inadvertently included and,
In reaching its conclusion that the consent was not voluntary, the Court evaluated several factors germane to this case. First, the inspector never told the defendant that a passenger in the other car involved in the accident was killed.\textsuperscript{51} Second, the inspector failed to tell the defendant that he did not have to take the blood test.\textsuperscript{52} Third, when the inspector asked the defendant for his consent there was a uniformed police officer present.\textsuperscript{53} Lastly, by reason of intoxication or injury or emotional trauma, the defendant may have been incapable of making a reasoned decision whether to consent.\textsuperscript{54} While no single factor was deemed dispositive of the consent issue, the Court stated all the factors combined supported the trial court’s decision to suppress the blood test results.\textsuperscript{55} The Court believed that this collection of factors suggested either that the defendant felt he could not refuse to submit to the blood test, or that his reasoning was impaired.\textsuperscript{56} The Court was not persuaded by the Commonwealth’s argument that it was inconsistent for the defendant to have been reported alert and rational upon his entry to the hospital and later to have become incapable of rendering a valid consent.\textsuperscript{57} In light of the four factors indicating nonvoluntariness listed above,\textsuperscript{18} the Court was unwilling to hold that as a matter of law the defendant’s consent was voluntary.\textsuperscript{59} Accordingly, the Court affirmed the ruling of the trial court which granted the motion to suppress the results of the blood test.\textsuperscript{60}

The \textit{Angivoni} decision may have limited application in the future because its fact situation will rarely appear. Ordinarily, a person will be asked to submit to a blood test only after arrested.\textsuperscript{61} Normally, when a driver operates his car erratically or has a distinct odor of alcohol on his breath when pulled over for another traffic violation, a police officer will have sufficient probable cause to arrest the driver for operating under the influence.\textsuperscript{62} Under the Massachusetts implied consent statute, an arrested driver implicitly consents to take a blood test and his refusal will result in a
suspension of his driver's license. The absence of an arrest makes the situation presented by Angivoni unusual. Had the defendant been under arrest at the time he consented to take the blood test, the prosecution likely would have encountered little trouble in proving that his consent was valid, since after a driver is arrested a legal presumption exists in favor of a valid consent to the taking of a blood test. The Angivoni decision, therefore, is applicable to those rare cases where, for some reason, the driver is not arrested. In the absence of an arrest, Angivoni instructs that the validity test which applies to fourth amendment consents generally should be employed to test the validity of a consent to take a blood test. The Court employed the traditional "totality of the circumstances" test in determining whether the defendant had voluntarily consented to the warrantless "search," in this case a blood test for alcohol content, and reaffirmed that the prosecution has the burden of proving such consent was voluntary. The decision, however, does not go far enough. The Court failed to identify and discuss the distinguishing feature of blood test search cases: in each case, the defendant is suspected of being intoxicated.

The continual presence of the intoxication factor when a court analyzes the blood test search circumstances may lead to inconsistent results. Where an unarrested driver consents to take a blood test, intoxication may have hampered his ability to make a rational judgment whether or not to waive his constitutional right under the fourth amendment. The presence of factors suggesting involuntariness of the consent in Angivoni, beyond the intoxication factor, prevented the Court from recognizing the need to address the narrower question of how much weight a court should give to the likelihood that the defendant was intoxicated when he consented.

The Court has addressed this issue, of how much weight to accord to the intoxication factor, in another context. In cases where the prosecution sought to show that an intoxicated person voluntarily waived his fifth amendment, as opposed to fourth amendment, rights the intoxication factor is dispositive of nonconsent. In Commonwealth v. Hosey, the Court held that once police became aware that an arrestee was not in control of his faculties, all questioning should stop until he was clearly capable of responding intelligently. Similarly, in Commonwealth v. White, the
Court held that where an arrestee is unable to answer questions reasonably, "the more prudent and constitutionally preferable course" is for police to cease the interrogation until the arrestee has regained his ability to answer in a reasonable fashion. While the Angivoni court, by citing Hosey and White, acknowledged that intoxication was of special significance in the fifth amendment context, in the fourth amendment context the Court counted intoxication as only one, among several, factors which indicated that the consent was not voluntary without addressing its special significance.

By failing to acknowledge that fourth and fifth amendment analysis should be the same with respect to the intoxication factor lower courts may well reach inconsistent results. To suppress the evidence, the defense may be raised that the consent was not voluntary because the defendant was inebriated. Ironically, the blood test, if positive, would confirm the defendant's intoxicated condition. Faced with this enigma, trial courts receive little guidance from Angivoni. It is submitted that defendants should enjoy a presumption against voluntary consent under this rare set of facts where the driver is unarrested. This presumption would force police to have probable cause to arrest before asking a driver to consent to a blood test. Under Angivoni, however, this presumption is not established. Thus, police may ask any driver to consent to a blood test, regardless of whether the driver shows the slightest signs of intoxication. Allowing a police officer to ask an unarrested driver to submit to a blood test opens the door for all sorts of harassment which the Court could have prevented by heightening its scrutiny of the intoxication factor in Angivoni.

§ 13.8. Interracial Rape — Racial Prejudice — Voir Dire Questioning of Prospective Jurors.* The due process clause of the Fourteenth Amendment requires the Commonwealth to ensure that the essential demands of fairness in criminal trials are met. This responsibility extends to impaneling an impartial jury. The Sixth Amendment, as applicable to the States

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§ 13.8. 1 The due process clause of the Fourteenth Amendment provides: "[No State shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.


3 U.S. Const. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.

Id.
through the Fourteenth Amendment, guarantees an impartial jury to a criminal defendant in a state court. The procedure of *voir dire* questioning of prospective jurors is designed to secure an impartial jury by removing those jurors who might not be impartial. Accordingly, when a black individual is charged with the commission of a crime of violence, particularly rape, against a white victim, the defense will probably move for specific *voir dire* interrogation of the jury regarding racial prejudice.

During the *Survey* year the Supreme Judicial Court in *Commonwealth v. Sanders*, an interracial rape case, explained when jurors must be interrogated specifically with respect to racial prejudice. In *Sanders*, the defendant, a black man, was convicted of rape, armed robbery, and other charges arising out of the rape and stabbing of a white woman in her apartment on the night of August 30, 1978. The Supreme Judicial Court stated that, although interracial rape may be a classic catalyst of racial prejudice, interrogation of jurors as to their racial prejudice was not constitutionally mandated in such a case. The Court held, however, that as a matter of law interracial rape cases present a substantial risk that extraneous issues would

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4 Duncan v. Louisiana, 391 U.S. 145, 149 (1968). The Court stated:

Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment’s guarantee.

*Id.*

The Court also noted that:

[I]n the American States, as in the federal judicial system, a general grant of jury trial for serious offenses is a fundamental right....

*Id.* at 158.


6 The personal crimes of violence (rape, personal robbery, and assault) all bring the victim into direct contact with the offender. United States National Criminal Justice Information and Statistics Service, *Criminal Victimization Surveys in Boston* 2 (July 1977) [hereinafter cited as *Criminal Victimization Surveys in Boston*].

7 The First Circuit Court of Appeals in *Dukes v. Waitkevitch*, 536 F.2d 469 (1st Cir. 1976), *cert. denied*, 429 U.S. 932 (1976), noted that “interracial rape may be a classic catalyst of racial prejudice.” *Id.* at 471.


9 In the city of Boston, black offender/white victim rape comprises approximately 36% of all rapes where the victim is white. *Criminal Victimization Surveys in Boston, supra* note 6, at 14 table 10. Rape, one of the most serious and least common of all crimes measured by the surveys, is carnal knowledge through the use of force or the threat of force, excluding statutory rape (without force). *Id.* at 2. Both completed and attempted acts were included in the survey, and incidents of both homosexual and heterosexual rape were counted. *Id.*


11 *Id.* at 1239, 421 N.E.2d at 438 (citing *Dukes v. Waitkevitch*, 536 F.2d at 471 (1st Cir. 1976), *cert. denied*, 429 U.S. 932 (1976)).

12 *Id.*
influence the jury.\textsuperscript{13} Thus, the Court continued, such cases were within Massachusetts General Law chapter 234, section 28, paragraph two, which regulates the examination of jurors where considerations exist that may cause a decision to be made in whole or in part upon issues extraneous to the case.\textsuperscript{14} The Court directed that in interracial rape trials after Sanders, jurors were to be examined pursuant to the statute, with respect to racial prejudice.\textsuperscript{15} Such examinations must take place individually and outside the presence of other persons about to be called as jurors or already called.\textsuperscript{16} In reaching its decision the Court declared that neither the United States nor the Massachusetts Constitutions require the questioning of jurors specifically about racial prejudice in interracial rape cases.\textsuperscript{17} In so ruling, the Supreme Judicial Court expressly distinguished Sanders from Ham v. South Carolina\textsuperscript{18} and Ristaino v. Ross.\textsuperscript{19} In Ham, the United States Supreme Court held that a trial judge’s failure, on motion of the defendant, to question veniremen specifically about racial prejudice had denied the defendant due process of law.\textsuperscript{20} Ham involved a Negro tried in South Carolina courts for possession of marihuana.\textsuperscript{21} Ham, the defendant, was

\textsuperscript{13} Id.
\textsuperscript{14} Id. G.L. c. 234, § 28 reads as follows:
Upon motion of either party, the court shall, or the parties or their attorneys may under the direction of the court, examine on oath a person who is called as a juror therein, to learn whether he is related to either party or has any interest in the case, or has expressed or formed an opinion, or is sensible of any bias or prejudice, therein; and the objecting party may introduce other competent evidence in support of the objection. If the court finds that the juror does not stand indifferent in the case, another shall be called in his stead.

For the purpose of determining whether a juror stands indifferent in the case, if it appears that, as a result of the impact of considerations which may cause a decision or decisions to be made in whole or in part upon issues extraneous to the case, including, but not limited to, community attitudes, possible exposure to potentially prejudicial material or possible preconceived opinions toward the credibility of certain classes of persons, the juror may not stand indifferent, the court shall, or the parties or their attorneys may, with the permission and under the direction of the court, examine the juror specifically with respect to such considerations, attitudes, exposure, opinions or any other matters which may, as aforesaid, cause a decision or decisions to be made in whole or in part upon issues extraneous to the issues in the case. Such examination may include a brief statement of the facts of the case, to the extent the facts are appropriate and relevant to the issue of such examination, and shall be conducted individually and outside the presence of other persons about to be called as jurors or already called.
\textsuperscript{16} Id. (citing G.L. c. 234, § 28).
\textsuperscript{17} Id. at 1239, 421 N.E.2d at 438.
\textsuperscript{18} 409 U.S. 524 (1973).
\textsuperscript{19} 424 U.S. 589 (1976).
\textsuperscript{20} Ham, 409 U.S. at 527.
\textsuperscript{21} Id. at 524.
well known in the locale of his trial as a civil rights activist. Ham's defense at his trial was that law enforcement officials had framed him on the narcotics charge to "get him" for his civil rights activities. The trial judge denied Ham's request that the court-conducted voir dire include questions specifically directed to racial prejudice. The defendant was convicted of possession of marihuana in violation of a South Carolina state law. On appeal, Ham's conviction was affirmed by a divided South Carolina Supreme Court. The Supreme Court reversed the judgment of conviction because Ham's due process rights were violated. The Court stated that Ham should have been permitted to have jurors interrogated, during voir dire, on the issue of racial bias.

While Ham established that a specific inquiry of prospective jurors regarding their racial bias was required where the defendant would otherwise be denied the essential demands of fairness, in Ristaino v. Ross, the U.S. Supreme Court limited the application of the Ham rule to special factual circumstances. Specifically, in Ross the Supreme Court determined that the ethnic identities of the defendant and victim, without other factors underscoring the racial elements of the case and their specific prejudicial application to the defendant, are insufficient to invoke the special precautions of the Ham case. In order to implicate the Ham rule, racial issues must be inextricably bound up with the conduct of the trial.

In addressing the question of when the Ham rule applied, the Supreme Judicial Court interpreted Ham to require a suggestion that the defendant

22 Id. at 525.
23 Id.
24 Id. at 526. The questions proposed by Ham regarding racial bias were:
1. Would you fairly try this case on the basis of the evidence and disregarding the defendant's race?
2. You have no prejudice against negroes? Against black people? You would not be influenced by the use of the term 'black'?

Id. at 525 n.2.
25 Id. at 524. The law was South Carolina Code § 32-1506 (1962). Id. at 524 n.1.
26 Id. at 525 (citing State v. Ham, 256 S.C. 1, 180 S.E.2d 628 (1971)).
27 Id. at 527.
28 Id. (citing Groppi v. Wisconsin, 400 U.S. 505, 508 (1971); Bell v. Burson, 402 U.S. 535, 541 (1971)).
29 Id. at 526-27.
31 Id. at 596. The Court noted:
Ham did not announce a requirement of universal applicability. Rather, it reflected an assessment of whether under all the circumstances presented there was a constitutionally significant likelihood that, absent questioning about racial prejudice, the jurors would not be as 'indifferent as [they stand] unsworne.'
Id. (quoting Coke on Littleton 155b (19th ed. 1832)).
32 Id. at 597.
33 Id.
was well known for activities that might subject him to racial animosity, or that the police were racially motivated in seeking the defendant's prosecution and conviction. In essence, the defendant must be a "special target for racial prejudice." The Supreme Judicial Court found that the defendant in Sanders was not such a target.

Although the Supreme Judicial Court held that voir dire questioning directed to racial prejudice was not constitutionally required in Sanders, the Court found that interracial rape cases presented a substantial risk that extraneous issues would influence the jury. In order to protect the defendant from jury bias in an interracial rape case, the Supreme Judicial Court ruled that, as a matter of law, prospective jurors were to be interrogated individually concerning racial prejudice.

After reaching this conclusion, the Supreme Judicial Court outlined the procedures that should be followed before interrogating prospective jurors as to possible racial prejudice, where such interrogation is mandated either by the Constitution or by state statute. The Court stated that the motion for interrogation of prospective jurors as to racial prejudice should come from the defendant. The Court specified that, before the trial judge granted such a motion, he should carefully ascertain that the defendant's decision to insist on specific questions regarding racial prejudice was a knowing and

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Racial issues infected the entire Ham trial. The issues were inescapably and powerfully before the jurors. Bias formed the heart of the defense. The defendant rightfully contended that bias, official and covert, was the sole cause and foundation for the prosecution. The defendant fought bias in his civil rights activities, undoubtedly known to the jurors drawn from the locality. Any latent bias harborred by the jurors would likely have been activated by the case and would have defeated the defendant's efforts to achieve acquittal. When the racial issues were so salient and Ham, himself, was a special target for prejudice, the due process clause plainly entitled Ham to have the judge examine jurors for racial prejudice.


17 Id.

18 Id.

19 Id. The interrogation of prospective jurors, the Court noted, was to be in accordance with Massachusetts General Laws chapter 234, section 28, paragraph two. See note 13 supra.

voluntary decision. The defendant must understand, the Court reasoned, that specific questions may activate latent racial bias in certain prospective jurors or may insult others without uncovering evidence of bias in some veniremen who refuse to acknowledge verbally their prejudice. The Court stated that the trial judge has broad discretion concerning the questions to be asked of the prospective jurors, and the judge need not put to the jurors the specific questions proposed by the defendant.

In situations where the Ham rule is not triggered and the state statute does not compel specific inquiries regarding racial prejudice the Supreme Judicial Court has outlined certain procedures relating to the specific examination of prospective jurors which should be followed. The Court suggested that when a defendant requested specific interrogation regarding jurors' racial prejudice, the trial judge should inquire of counsel as to the racial aspects of the case. If the judge concludes from the preliminary inquiry of counsel that the case might reasonably be expected to present factors involving possible racial prejudice, the Court stated that the trial judge should question the prospective jurors concerning their racial prejudice. The Court noted that the precise format of the questions should be left to the judge's discretion, provided that his inquiries are sufficient to focus the attention of prospective jurors on any racial prejudices they might entertain. Once the judge concludes that a juror might entertain racial prejud-

41 Id. (citing Commonwealth v. Lumley, 367 Mass. at 217, 327 N.E.2d at 686 (1975)).
42 Id. (citing Commonwealth v. Lumley, 367 Mass. at 217, 327 N.E.2d at 686 (1975)). The trial judge in Commonwealth v. Ross concluded that questions concerning racial prejudice would most likely not reveal any prejudice in jurors:

I would be simply astonished if I ever asked a juror, or a group of jurors, or even heard a lawyer ask a group of jurors if they are white, 'Are you biased against black,' if they are white, or if they are black, 'are you biased against white.' I would be simply astonished if I had an affirmative answer. The man who has the disease of bias would be the last one to admit it.

44 In the absence of factors which make the defendant a special target for racial prejudice, the trial judge is not compelled constitutionally to ask questions beyond the statutory questions.

45 Commonwealth v. Ross, 363 Mass. at 673, 296 N.E.2d at 816 (1973). The Court explained why it believed that a preliminary inquiry of counsel was desirable: “I[W]e perceive that it will be unusual for a trial judge to understand fully the dimension of a case before he has heard it.” Id.
46 Id.
47 Id. at 673-74, 296 N.E.2d at 816 (citing Ham v. South Carolina, 409 U.S. at 527 (1973)).
udice and this prejudice presents a substantial risk that the juror's ability to render an impartial verdict may be impaired, the trial judge must examine the juror specifically, outside of the other jurors' presence, as to the juror's possible prejudice.  

Prior to the decision of the Supreme Judicial Court in Sanders, the Massachusetts courts refused to require inquiry, beyond the statutory questions, into juror bias except in those cases where such inquiry was constitutionally mandated. The provisions of chapter 234, section 28, paragraph 2, the Supreme Judicial Court noted, were operative only when there was a substantial risk that the case would be decided on extraneous considerations. The mere fact that the victim and the defendant were of different races did not entitle the defendant to inquire into the racial attitudes of individual prospective jurors. Prior to the Sanders decision of the Supreme Judicial Court, therefore, if the interracial crime was of a sexual nature, even this did not create a substantial risk of a decision on extraneous grounds. The Massachusetts courts warned that generally it was advisable to inquire into racial prejudices of the prospective jurors in situations where the victim was white and the defendant was black. Where there is no demonstrated risk of decision on extraneous grounds, however, it was within the discretion of the trial judge whether to ask additional questions beyond those mandated by chapter 234, section 28, paragraph one.

The Sanders decision of the Supreme Judicial Court removes interracial rape cases from the realm of the trial judge's discretion. The Court held that, as a matter of law, interracial rape cases present a substantial risk that extraneous issues will influence the jury. Thus, in interracial rape trials

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45 1981 Mass. Adv. Sh. at 1238, 421 N.E.2d at 438. The statutory questions are:
(1) Are you related to either party?
(2) Do you have any interest in the case?
(3) Have you expressed or formed an opinion about the case?
(4) Are you sensible of any bias or prejudice in regard to the case?
G.L. c. 234, § 28.
48 Commonwealth v. Sanders, 1980 Mass. App. Ct. Adv. Sh. 1483, 1485. If the defendant can show that there exists a substantial risk of a decision based on extraneous grounds, the defendant is entitled to inquire individually into potential bias. Id.
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after Sanders, jurors are to be examined specifically with respect to their racial prejudice.\(^6\)

The Supreme Judicial Court must now delineate those cases in which jurors must be examined with respect to their racial prejudices. The Court must determine which situations present a substantial risk that extraneous issues will influence the jury. The decision of the Court in Sanders reflects the first *per se* application of chapter 234, section 28, paragraph 2. The decision might foreshadow an expansion of the *per se* application of the statute to all violent crime situations where the defendant is black and the victim is white, even though specific questioning of jurors regarding their possible racial biases is not constitutionally mandated.

§ 13.9 Rape — Interspousal Immunity.* Under the common law definition of rape\(^1\) a man could not rape his wife as a matter of law.\(^2\) One justification for this spousal exclusion was the notion that a wife, through her marriage contract, forever consented, and waived her right to revoke her consent, to engage in sexual intercourse with her husband.\(^3\) A second justification was that because sexual intercourse between husband and wife was not “unlawful” and common law rape statutes outlawed only unlawful carnal knowledge, neither spouse could be prosecuted for what otherwise was considered rape.\(^4\) Finally, the spousal exclusion was justified by the ancient concept of the wife as chattel.\(^5\) Today, statutes take widely divergent views on whether, and to what extent, a spousal exclusion exists and is justified.\(^6\)

Until 1974, Massachusetts’ criminal law statutes utilized the common law terms to define rape.\(^7\) This use of language nourished the belief that the common law spousal exclusion was bound up with the statute.\(^8\) In 1974,

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\(^{6}\) Id. at 1236, 421 N.E.2d at 437.

* By Mark Vincent Nuccio, staff member, Annual Survey of Massachusetts Law.

\(^{1}\) Id. at 1236, 421 N.E.2d at 437.

\(^{2}\) 3 WHARTON’S CRIMINAL LAW § 286 (14th Ed. 1980); See Annot., 84 A.L.R. 2d 1017, 1019-22 (1962); 65 AM. JUR. 2d, Rape § 39 at 782-83 (1973); 75 C.J.W., Rape § 6 at 467 (1952).


\(^{4}\) R. PERKINS, CRIMINAL LAW 156 and n. 40 (2d ed. 1969).


\(^{6}\) See notes and text at notes 70-77 infra.

\(^{7}\) For the text of these statutes see text at notes 40-41 infra.

\(^{8}\) See Commonwealth v. Fogerty, 8 Gray 489 (1857) (The Supreme Judicial Court implies that the common law spousal exclusion was in force under the then existing rape laws of the Commonwealth). See also PROPOSED CRIMINAL CODE OF MASSACHUSETTS, Revision Commission Note to G.L. c. 265, § 16 (1972) cited in Commonwealth v. Chretien, 1981 Mass. Adv. Sh.
however, the Massachusetts legislature amended the rape laws.9 The common law terminology was eliminated and replaced by more modern language.10 Because the premise for asserting the continued existence of the spousal exclusion, in large part, derived from the common law language, the 1974 amendments ripened the spousal exclusion for question. Yet prior to the Survey year the Supreme Judicial Court had not considered whether these 1974 amendments had altered the common law spousal exclusion.11 In Commonwealth v. Gallant12 the Court had observed that the 1974 amendments represented a comprehensive effort to redefine the legal elements of rape,13 and that the new rape statute disregarded the sex of the offender and the victim.14 The Gallant court was silent, however, on the question of whether the spousal exclusion existed under the amended definition of rape.

During the Survey year, the Supreme Judicial Court ruled, in Commonwealth v. Chretien,15 that the amended rape statutes had eliminated the common law spousal exclusion.16 The Court was influenced primarily by the modernized language of the rape statutes17 and by the legislative policy against intramarital violence clearly expressed in the Domestic Violence Act18 which supported its construction of the language in the rape statutes.19 With the Chretien decision, Massachusetts joins a growing number of jurisdictions which permit a wife to charge her husband with rape.20

In Chretien, the defendant-husband and his wife separated in 1978, after over nine years of marriage.21 Shortly thereafter, the wife instituted divorce proceedings,22 and obtained a judgment nisi which was to become final in six months.23 Prior to the final judgment, the defendant made several

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9 For text of these statutes see notes and text at notes 42-43 infra.
10 See note 7 supra and compare note and text at note 9 supra.
11 The Supreme Judicial Court had not concluded that the common law spousal exclusion existed under pre-1974 Massachusetts rape law, but the spousal exclusion was generally thought to be operative. See text and note at note 8 supra.
13 Id. at 583, 369 N.E.2d 707, 712.
14 Id. at 584-585, 369 N.E.2d 707, 712.
16 Id. at 668, 417 N.E.2d at 1208.
17 See text and notes at notes 42-43 infra.
18 G.L. c. 209A.
19 See text and notes at notes 51-56 infra.
20 See text and notes at notes 70-76 infra.
22 Id.
23 Id., 417 N.E.2d at 1205. The judgment nisi was entered pursuant to G.L. c. 208, § 21. Id.
threatening telephone calls to his wife. One evening, after his wife had put her two children to bed, the defendant twice broke into his estranged wife’s apartment. On the first occasion, following a struggle between the defendant and his wife, police were summoned and they escorted the defendant from the apartment. Later that night, the defendant returned and forced his wife to submit to sexual intercourse with him.

Because of the incident, the wife obtained a criminal complaint against her husband for raping her. At trial, a jury convicted the defendant of raping his wife and the defendant was sentenced to a term of years in state prison. On appeal, the defendant raised several issues. His primary claim was that the trial judge had ruled erroneously that marriage to the victim was not a defense to the charge of rape. In the alternative, the defendant argued that it was unfair to subject him to prosecution for behavior not clearly criminal under prior law. Thus, the defendant’s appeal squarely presented the issue of the continued vitality of the spousal exclusion under the amended rape statutes.

The Supreme Judicial Court first discussed why the spousal exclusion did not survive the 1974 amendments. The Court began its analysis by examining the meaning of “rape” in the Commonwealth prior to the 1974 amendments of the rape statutes. The Court observed that the earliest statutory definition of rape in Massachusetts closely resembled the definition of rape at common law. The Court then determined that the first statutory prohibition of rape also reflected the common law principle that a man could not as a matter of law, rape his wife. Having discussed the presence of a
spousal exclusion from rape at common law, the Court then inquired whether there existed a spousal exclusion in Massachusetts prior to the 1974 amendment of the rape laws.\textsuperscript{1}\textsuperscript{1} Although the Court had never addressed this question, the Court did recognize that dicta in \textit{Commonwealth v. Fogerty}\textsuperscript{36} led drafters of the proposed Massachusetts Criminal Code in 1972 to conclude that the spousal exclusion existed under Massachusetts law.\textsuperscript{37} Noting the common law language used in the rape statutes prior to 1974,\textsuperscript{38} the \textit{Chretien} court assumed, \textit{arguendo}, that Massachusetts law prior to 1974 provided a spousal exclusion from rape.\textsuperscript{39}

Accepting the presence of a spousal exclusion in the pre-1974 statutory definition of rape, the Court turned to a consideration of whether the 1974 amendments had eliminated or assumed the spousal exclusion. The Court commenced its inquiry by comparing the language of the statutes dealing with rape prior to 1974 with the language of the 1974 amendments. The former version of chapter 265, section 22 provided that “\textit{[w]hoever ravishes and carnally knows a female by force and against her will will be punished by imprisonment in the state prison for life or for any term of years.’’}\textsuperscript{40} The statutory definition of rape prior to 1974, chapter 277, section 39, defined rape as “[\textit{t}he unlawful forcible carnal knowledge by a man of a woman against her will or without her consent; or the carnal knowledge by a man of a woman against her will or without her consent; or the carnal knowledge by a man of a female child under the statutory age of consent.’’}\textsuperscript{41} The post-1974 version of chapter 265, section 22 provides:

\begin{quote}
[w]hoever has sexual intercourse or unnatural intercourse with a person and compels such a person to submit by force and against his will, or compels such person to submit by threat of bodily injury, shall be punished by imprisonment in the state prison for life or for any term of years.
\end{quote}

In 1974 the Legislature also redefined rape as “[s]exual intercourse by a person with another person who is compelled to submit by force and against his will or by threat of bodily injury, or sexual intercourse or unnatural sexual

\textsuperscript{1} Id. at 666, 417 N.E.2d at 1207.
\textsuperscript{2} See note 8 supra.
\textsuperscript{4} Id. at 667, 417 N.E.2d at 1208.
\textsuperscript{5} Id. at 667, 417 N.E.2d at 1208. The Court observed that the Commonwealth had argued that the use of the word “unlawful” in the pre-1974 definition of rape specifically incorporated the spousal exclusion, but neither affirmed nor rejected that contention. Id.
\textsuperscript{6} G.L. c. 265, § 22 (Ter. Ed. 1932).
\textsuperscript{7} G.L. c. 277, § 39 (Ter. Ed. 1932).
\textsuperscript{8} 1981 Mass. Adv. Sh. at 668 n.6, 417 N.E.2d at 1208 n.6 (citing Stat. 1974, c. 474, § 1 which rewrote G.L. c. 265, § 22).
intercourse with a child under sixteen years of age." Comparing the texts of the old and new rape statutes, the Court found that their differences indicated that no spousal exclusion continued to exist after the 1974 amendments.

The first important difference between these texts was that the new definition of rape disregarded the gender of the offender and of the victim. The Court further noted that the use of the word "unlawful," which was eliminated in 1974, is widely regarded as incorporating the spousal exclusion in rape statutes. The Court observed that the significant omission of the word "unlawful" in the 1974 amended rape laws was noted by at least one commentator. For this reason, the Court, in evaluating the status of the spousal exclusion, attributed special significance to the Legislature's subsequent failure to change the definition of rape in 1978 when it altered certain other provisions of the very same section. Equally as significant, in the eyes of the Court, was the Legislature's failure to expressly exclude spousal rape when it rewrote the rape penalty law in 1980, after a widely publicized Oregon interspousal rape prosecution in 1978 and the instant defendant's own conviction in 1979. Thus, although the Court found no specific legislative intent or policy with regard to the spousal exclusion, the text of the statute alone indicated the repeal of the spousal exclusion. The Court buttressed its construction of the statute by examining the underlying policy of other recent legislation. The Court noted that the "Domestic Violence Act" includes a wide range of remedies for spousal abuse. Abuses under the Domestic Violence Act include involuntary sexual relations engaged in by spouses when one spouse is made to submit by force, threat of force, or duress. While providing certain remedies for such abuses, the Act expressly preserves resort to other available civil or criminal remedies. The Court concluded that the legislative policy

41 Id. at 668, 417 N.E.2d at 1208 (citing St. 1974, c. 474, § 7).
42 Id., 417 N.E.2d at 1208.
43 Id.
44 Id. at 669, 417 N.E.2d at 1209 (citing J.R. NOLAN, CRIMINAL LAW § 222, at 103 (1976)).
45 Id., 417 N.E.2d at 1209.
46 Id.
47 Id.
48 Id.
49 Id.
50 Id., 417 N.E.2d at 1209. The Court recognized that its construction of the new rape statutes was contrary to the common law. Id. 417 N.E.2d at 1209. The court further noted that while a statute construed in a manner contrary to the common law should be construed narrowly, the construction adopted should advance rather than defeat the purpose of the statute. Id.
51 G.L. c. 209.
53 Id. at 669-70, 417 N.E.2d at 1209.
54 Id.
underlying the Domestic Violence Act and the omission of the word "unlawful" from the new statutory definition of rape together revealed a legislative intent to criminalize forcible spousal sexual intercourse.\textsuperscript{56}

Having determined that the spousal exclusion was no longer operative after the 1974 amendments, the Court next turned to the defendant's alternative argument that it was unfair to subject him to prosecution for engaging in an activity not clearly defined as criminal under prior law.\textsuperscript{57} The Court acknowledged that there was uncertainty in the law of rape concerning the spousal exclusion.\textsuperscript{58} Under different circumstances, the Court stated, the defendant's argument might have had some force.\textsuperscript{59} In this case, however, the Court emphasized that a judgment nisi was granted prior to the defendants attack on his wife.\textsuperscript{60} Even at common law, the Court found no spousal exclusion existed for the defendant's conduct after the grant of a judgment nisi.\textsuperscript{61} In support of this conclusion, the Court looked to \textit{Regina v. O'Brien}\textsuperscript{62} where an English court held that "by a decree nisi a wife's implied consent to marital intercourse is revoked."\textsuperscript{63} The Court believed that this case and similar cases,\textsuperscript{64} gave the defendant ample notice that even the common law would not countenance his conduct.\textsuperscript{65}

Because the spousal exclusion is an anachronistic notion which deprives married women from the same basic legal protections extended to unmarried women, it is difficult to criticize the result in \textit{Chretien}. Nevertheless, at first blush, permitting wives to charge their husbands with rape may seem to create a host of problems. Emotional spats between spouses may result in a rape charge against the husband motivated solely by the wife's desire to harass her husband (or, vice versa).\textsuperscript{66} Some may caution against state interference with the marriage, but surely there can be no modern justification for allowing husbands to sexually abuse their wives with impunity. Moreover, several factors indicate that innumerable frivolous rape prosecutions will not result from the elimination of the spousal exclusion. First, the crime of rape is one of the most underreported violent crimes.\textsuperscript{67}

\textsuperscript{56} Id. at 670, 417 N.E.2d at 1209.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 671, 417 N.E.2d at 1209.
\textsuperscript{60} Id., 417 N.E.2d at 1209-10.
\textsuperscript{61} Id., 417 N.E.2d at 1210.
\textsuperscript{62} 3 All E.R. 663 (1974).
\textsuperscript{63} Id. at 665.
\textsuperscript{65} See Comment, The Common Law Does Not Support a Marital Rape Exception for Forcible Rape, 5 WOMEN'S RIGHTS L. REP. 181, 185 (1979).
\textsuperscript{67} Washburn, Rape Law: The Need for Reform, 5 N.M. L. REV. 279, 280 (1975).
any motive a wife may have to harass her husband through an illegitimate rape prosecution is almost certainly outweighed by her dread of facing the trauma and public humiliation to which a rape victim is so often subjected during the prosecution of her assailant. In other words, the inherent emotional strain associated with bringing a rape charge will serve as a natural deterrent to unfounded claims. Finally, in practical terms a wife will have a low probability of successfully prosecuting her husband in even close cases, let alone those brought solely to harass, because in most rape prosecutions consent of the victim is a crucial issue. Although the Supreme Judicial Court established that the legislature eliminated the spousal exclusion in the 1974 amendments, the exclusion may continue to exist in the minds of jurors and jurists. In short, because of the inherent trauma associated with rape prosecution and the assumption of sexual consent in marriage, it is unlikely that a large number of questionable prosecutions will result from the Chretien decision.

The analysis offered by the Chretien court to justify the elimination of the spousal exclusion is as difficult to challenge as the result. Certainly, the amendments to the rape statutes in 1974 drastically altered the legal elements of rape. The plain language of the statute indicates that the common law definition of rape is no longer operative in Massachusetts. Under the amended law, where a woman forces a man to have sexual intercourse, as well as instances of homosexual rape, are brought within the ambit of the rape law. Similarly, the plain language of the statutes indicates that the spousal exclusion was eliminated since the word “unlawful” was omitted. The Court correctly endeavored to read the rape statutes harmoniously with the policy underlying the Domestic Violence Act to stem intramarital violence and abuse. The Court’s analysis in Chretien, therefore, was both convincing and appropriate.

The Supreme Judicial Court’s decision in Chretien enlists Massachusetts among an expanding group of jurisdictions which have eliminated the spousal exclusion. At present, however, there remains great diversity in the extent to which state rape statutes protect women from being forced to engage in sexual intercourse with their husbands. One state’s rape statute clearly includes husbands among those individuals who may be charged with rape. Two other states have recently repealed express statutory...
spousal exclusions which may be interpreted as bringing husbands within the ambit of the rape statutes. The existence of a common law spousal exclusion, however, may yet be argued in those jurisdictions. In some states there is a spousal exclusion for statutory rape, but not for forcible rape. Still other states have statutes which are completely silent as to the existence of a spousal exclusion. Many states prevent persons married to the defendant from bringing a charge of rape. These latter jurisdictions do not define "married" within their rape statutes, potentially creating a problem for spouses who, though separated, are still legally married. Yet a large number of states allow wives separated from their husbands to bring rape charges against their husbands. This survey of state legislation indicates


See id., New York recently revised its rape statute definition of married to allow legally separated women to charge their husbands with rape. See 1978 N.Y. Laws ch. 735, amending the definition of "married" in N.Y. Penal Code § 130.00(4) (McKinney 1975).

that Massachusetts is now in the forefront of a humanistic approach towards interspousal sexual relations.

The *Chretien* decision may have several effects on the ability of women to charge their husbands with rape in other jurisdictions. First, in those states having modern rape statutes without express spousal exclusions, the *Chretien* statutory analysis could be highly persuasive. By its examination of the linguistic differences between the common law and modern terminology in rape statutes and its resort to similar statutes to evince a legislative policy regarding the presence of a spousal exclusion, the *Chretien* court has provided a blueprint for argument against the presence of a spousal exclusion under modern rape statutes without express spousal exclusions. Second, the *Chretien* court’s ancillary finding that a judgment nisi implicitly revoked a woman’s consent to engage in sexual intercourse with her husband, thus enabling her to charge her husband with rape, also could be of importance to women in states having either rape statutes which employ common law language and are silent as to the existence of a spousal exclusion or rape statutes that do not define the word “married” but prevent “married” persons from bringing a charge of rape against their spouse.\footnote{77}

There is virtually no negative impact generated by the *Chretien* Court’s conclusion that the spousal exclusion from rape does not operate in Massachusetts. The *Chretien* decision will protect wives from being sexually abused by their husbands in Massachusetts and, as demonstrated above, may assist women in other jurisdictions in charging their husbands with rape. The presence of a spousal exclusion benefits only those men who sexually abuse their spouses. The toleration of such neanderthal conduct today should repulse modern social sensibilities. Accordingly, it is no surprise that the *Chretien* court rejected the preposterous notion that because a woman consents to marry, she also consents to sexual intercourse against her will.

§ 13.10. Carrying a Firearm Without a License — “Weapon” is a Question of Law.* Massachusetts General Laws chapter 269, section 10(a), punishes any person carrying a firearm without a license. Under Massachusetts General Laws chapter 140, section 121, “‘firearm’ shall mean a pistol, revolver or other weapon of any description loaded or unloaded, from which a shot or bullet can be discharged and of which the length of barrel is less than sixteen inches or eighteen inches in the case of a shotgun . . . .” In *Commonwealth v. Sampson*,\footnote{55} the Supreme Judicial Court

\footnote{77} The *Chretien* decision, however, falls short of stating that at common law there was no spousal exclusion, as at least one commentator has forcefully argued. See, Comment, *The Common Law Does Not Support a Marital Rape Exemption for Forceable Rape*, 5 WOMEN’S RIGHTS L. REP. 181 (1979).

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considered whether a device which is not a weapon by design can be considered a "firearm" subject to the licensing statute. The Sampson Court held that, as a matter of law, a flare gun is not a firearm within the meaning of the Massachusetts statute.\(^2\)

Acting under the understanding that there had been a warrant issued for Michael Jon Sampson's arrest, police officers placed him under arrest and proceeded to search him.\(^3\) During the course of their search, the police officers found, \textit{inter alia}, a flare gun loaded with a flare cartridge and a second flare cartridge.\(^4\) The defendant acknowledged that although he did not consider the flare gun a firearm, he was carrying the flare gun for self-protection.\(^5\)

At trial, both the prosecution and the defense introduced expert testimony on whether the flare gun was a firearm.\(^6\) The prosecution's expert witness loaded some live shell shot primer into an empty tear gas cartridge, and packed the primer down with cotton before adding a quantity of lead shot.\(^7\) The prosecution expert then fired the device without malfunction, and testified that use of gunpowder possibly would have endangered the safety of the test.\(^8\) The defense's expert witness fired the device without malfunction as a flare gun, claiming that the instrument was not a firearm by design but a signal device.\(^9\) The trial judge found the instrument was a firearm and the defendant guilty of carrying a firearm without a license.\(^10\)

The defendant appealed to the Supreme Judicial Court.\(^11\) On appeal, the defendant contended that (1) the flare gun was not a firearm subject to Massachusetts licensing requirements, (2) even if the device was deemed a firearm there was not sufficient evidence to indicate that the defendant knew or should have known that the device was indeed a firearm, and (3) the statute requiring the licensing of carried firearms was unconstitu-

\(^2\) Id. at 1415, 422 N.E.2d at 455.
\(^3\) Id. at 1406-07, 422 N.E.2d at 450. In fact, however, the arrest warrant was no longer outstanding. \textit{Id.} at 1407 n.1, 422 N.E.2d at 450 n.1.
\(^4\) Id. at 1407, 422 N.E.2d at 450. The search also turned up several plastic bags containing white pills. \textit{Id.}
\(^5\) Id., 422 N.E.2d at 451. Sampson was quoted as stating, "If you were in my line of business in this town, you would have something to protect yourself." \textit{Id.}
\(^6\) Id. at 1407-09, 422 N.E.2d at 451.
\(^7\) Id. at 1408, 422 N.E.2d at 451.
\(^8\) Id.
\(^9\) Id. at 1408-09, 422 N.E.2d at 451. The defense's expert stated in response to a question of whether the device is a firearm: "By law, yes; by design, no." \textit{Id.} at 1408, 422 N.E.2d at 451.
\(^10\) Id. at 1409, 422 N.E.2d at 451.
\(^11\) One justice of the Appeals Court allowed Sampson's motion for a stay of execution of sentence, and the Supreme Judicial Court granted direct appellate review. \textit{Id.} at 1406, 422 N.E.2d at 450.
tionally vague as applied to his conduct in the present case.\textsuperscript{12} The Court reversed the conviction on the first ground of appeal and discussed the second ground in dictum.\textsuperscript{13}

The Court reached its decision by analyzing the three attributes of a firearm: (1) it must be a weapon, (2) it must be capable of discharging a bullet or shot, and (3) it must not surpass a certain length.\textsuperscript{14} With respect to the first attribute, the Court stated that the flare gun, although it could be used as a weapon, was not a weapon by design.\textsuperscript{15} According to the Court, the Legislature did not contemplate the inclusion of items within the concept of "weapon" those devices that were not designed to be weapons, although some people use or intend to use them as such.\textsuperscript{16} The Court reached this conclusion by evaluating the wording of the relevant statutes,\textsuperscript{17} the holdings in other jurisdictions,\textsuperscript{18} and the Legislature's intent.\textsuperscript{19}

Therefore, because the flare gun was not a weapon by design, the Court concluded that this instrument was not a firearm falling under the firearm licensing statute.

The Court also stated, in dictum, that the second attribute of a firearm, whether the instrument is capable of discharging shot or bullet, may not have been proven.\textsuperscript{20} The Court indicated that if major alterations were necessary to transform the instrument into a device capable of propelling a bullet or shot, the instrument might not satisfy the second attribute of a firearm.\textsuperscript{21} The Court noted its dissatisfaction with the record concerning the test firing by the prosecution's expert witness.\textsuperscript{22} The Court stated that the record did not indicate how far or how fast the test fired shot had been propelled.\textsuperscript{23} Acknowledging that the adaptation of the flare gun by the prosecu-
tion's expert witness was "relatively minor," the Court nevertheless was bothered by the apparent risk of harm if gunpowder would have been used in the testing process. The Court was thus forced to infer that if gunpowder was necessary to rapidly propel the bullet or shot, the more substantial alterations necessary to prevent harm to the user would remove the instrument from the category of firearm.

Although the Court did not discuss barrel length, the third attribute of a firearm, the testimony at trial indicated the flare gun was less than sixteen inches. The Court, therefore, reversed the conviction solely because the flare gun lacked the weapon attribute of a firearm, although it may well have held that the flare gun was incapable of firing a bullet or shot, if necessary. In so ruling, the Court stated that whether an item is designed to be a weapon is a question of law. When, however, the item is designed as a weapon, the problem of whether it satisfies the other qualifications of a firearm is a question of fact.

In dictum, the Court went on to discuss the second ground for appeal: even if the device was deemed a firearm there was not sufficient evidence to indicate that the defendant knew or should have known that the device was indeed a firearm. The Court stated that in order for a defendant to be guilty of violating the licensing statute, the Commonwealth needs to prove that the defendant knew that he was carrying a firearm "within the generally accepted meaning of that term." The Commonwealth, however, need not prove that the defendant knew that he was carrying a firearm whose physical traits would make the device subject to the licensing statute. In the case at hand, the Court emphasized that neither the defendant nor the general public would consider the flare device a firearm.

Finally, the Sampson Court limited its holding. According to the Court, devices used as weapons, although not designed as weapons, still can be considered weapons for other crimes such as assaults. Therefore, criminal defendants who possess and use devices not deemed a firearm under

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\[14\] Id. at 1415-16, 422 N.E.2d at 455.

\[15\] Id. at 1417, 422 N.E.2d at 456.

\[16\] Id. at 1408, 422 N.E.2d at 451.

\[17\] Id. at 1417, 422 N.E.2d at 456.

\[18\] Id.

\[19\] Id. at 1418, 422 N.E.2d at 456-57.

\[20\] Id.

\[21\] Id. at 1419, 422 N.E.2d at 457.

\[22\] There are cases which found that items, although not designed as weapons, were used as weapons. See Commonwealth v. Appleby, 1980 Mass. Adv. Sh. 867, 873-75, 402 N.E.2d 1051, 1056-57 (stating that a riding crop could become a dangerous weapon); Commonwealth v. Farrell, 322 Mass. 606, 615, 78 N.E.2d 697, 702 (1948) (stating that a lighted cigarette may become a dangerous weapon); Commonwealth v. Drew, 4 Mass. 391, 396 (1808) (stating that a bludgeon could become a dangerous weapon).
Massachusetts law, are not freed from potential criminal liability by the *Sampson* decision.

Since the Court is only concerned with the control of firearms subject to licensing, it is only logical that solely those devices which were designed to be weapons should be considered for possible licensing. As the defense expert testified in the trial court in *Sampson*: "I could probably go around and lock up every plumber because he carries a barrel length less than 16 inches, and I could make it capable of discharging a shot." In addition, other State courts have construed the word "weapon" as used in their statutes punishing the carrying of weapons as only applying to items that are weapons by design. In *State v. Rackle*, for instance, the Supreme Court of Hawaii found that "it would be anomalous to hold that an instrument which is not designed as an offensive weapon is deadly or dangerous within the meaning of [the statute under consideration]." On the federal level, however, a flare gun has been held within the definition of a firearm. Yet the National Firearms Act defines a firearm for federal pur-

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33 The Court in *Sampson* pointed out that G.L. c. 269, § 10(b) and G.L. c. 140, § 121 should be read together as indicating that only instruments or substances designed to incapacitate are covered by the statute. 1981 Mass. Adv. Sh. at 1411-12, 422 N.E.2d at 453. There is no apparent flaw in this analysis. A seemingly difficult argument by the prosecution, however, concerning G.L. c. 140, § 129C(a) which specifically exempts the owners of signal devices from obtaining a firearm identification card was that this exemption would indicate legislative intent to have these devices included within the definition of firearm. *Id.* at 1414, 422 N.E.2d at 454. The Court answered this argument by stating that a flare gun is freely available and that if a flare gun was deemed a firearm, a license to carry it outside the home would be required. *Id.* at 1414-15, 422 N.E.2d at 454-55. This answer by the Court does not seem adequate. Simply because an activity is widespread does not mean that it is legal. A better answer to the Commonwealth's contention would be to interpret G.L. c. 140, § 129C(a) as indicating a legislative intent to clarify that a flare gun should not even be considered a firearm.


35 See Louisiana v. Nelson, 38 La. Ann. 942, 944-46 (1886) (stating that a razor is not usually sold as a weapon and that the legislature intended to make a crime only the carrying of concealed dangerous weapons *eo nomine*); Brown v. State, 105 Miss. 367, 374-75, 62 So. 353, 354 (1913) (the purpose of the statute is to prevent the carrying of instruments used in fights, or arms); State v. Page, 15 S.D. 613, 615, 91 N.W. 313, 314 (1902) (in order to come under the statute, the item must be a dangerous weapon per se). *But cf.* People v. Evergood, 74 N.Y.S.2d 12, 14 (1947) (that it is not the original purpose of the item but its adaptability to firing bullets which would make the item a firearm controlled by statute); Barbourville v. Taylor, 115 W. Va. 4, 8, 174 S.E. 485, 487 (1934) (stating that an item not specifically stated in the statute, but "planned and made for a weapon," is within the statutory meaning of dangerous or deadly if in the item's intended or readily adaptable use there is a likelihood that it will produce death or serious bodily harm).


37 55 Hawaii at 537, 523 P.2d at 303.

38 United States v. Coston, 469 F.2d 1153 (4th Cir. 1972) (holding that a Blair flare gun which was 5½ inches long and had a smooth bore which proved capable of being used as a shotgun made the device a firearm within the definition of 26 U.S.C. § 5845).
poses as including "any weapon or device capable of being concealed on a person from which a shot can be discharged through the energy of an explosive. . . ." Thus, the federal statute expressly allows a device which is not a weapon to be considered a firearm. The wording is thus different from the Massachusetts statute and the Court in Sampson was correct to distinguish the two.

The Court's holding that it is a question of law whether the device is designed as a weapon follows decisions in other state courts. Indeed, in Barboursville v. Taylor the Supreme Court of Appeals of West Virginia stated that "where the offense charged is the unlawful carrying about the person of a dangerous or deadly weapon, the question of whether a particular instrument comes within the inhibited category is a legal problem to be decided by the court." Massachusetts decisions are not to the contrary. As was stated by the Court in Sampson, those decisions in Massachusetts in which it was stated that it was a question of fact whether a weapon was a firearm, subject to licensing if carried, referred to determining the other requirements of a firearm since the device, a gun, was clearly a weapon by design.

The requirement that a firearm be a weapon by design, limits the types of items which qualify as firearms under the statute. The Sampson Court, however, does not address the argument that an item, although not originally designed as a weapon, could be considered designed a weapon if over time that item was repeatedly used as a weapon to the point where the community considers it designed as a weapon. For instance, if flare guns were consistently used as weapons over a long period of time, the community

42 115 W. Va. at 7, 174 S.E. at 486.
43 1981 Mass. Adv. Sh. at 1417, 422 N.E.2d at 456. See Commonwealth v. Sperrazza, 372 Mass. 667, 670, 363 N.E.2d 673, 675 (1977) (determining the length of the barrel of a gun was a question of fact for the jury); Commonwealth v. Fancy, 349 Mass. 196, 204, 207 N.E.2d 276, 282 (1965) (that the jury could have found the gun to have been capable of discharging a bullet); Commonwealth v. Bartholomew, 326 Mass. 218, 222, 93 N.E.2d 551, 553 (1950) (whether a gun was a machine gun was a question for the jury). Clearly, however, it must be recalled that the decision of whether a device is a weapon, not for the statute concerning the carrying of firearms, but for crimes such as assault, is a question for the finder of fact. See Commonwealth v. Appleby, 1980 Mass. Adv. Sh. 867, 875-77 & n.5, 402 N.E.2d 1051, 1057-58 & n.5 (deciding whether a riding crop was in fact dangerous as used in order to convict a defendant under G.L. c. 265, § 15A was a question for the jury); Commonwealth v. Farrell, 322 Mass. 606, 615, 78 N.E.2d 697, 702-03 (1948) (the question of whether a lighted cigarette was used as a dangerous weapon was one of fact); Commonwealth v. Drew, 4 Mass. 391, 396 (1808) (question for jury whether the bludgeon, used by the prisoner to kill the deceased, was or was not a deadly weapon).
perception of a flare gun would be one of a weapon. The Court would then have to change its perception of a flare gun."

The Court in Sampson thus did not deviate from its prior decisions nor from the trend followed in other jurisdictions in holding that the prosecution can only classify as weapons, the carrying of which would be subject to licensing, those devices which are weapons by design. In addition, it will be a question of law whether the device is a weapon by design. The time may come, however, when the community's perception of devices not presently perceived as weapons by design will change and the Court's perception should change as well.

The Sampson case is also important for its dictum. The Court noted that a flare would probably not be considered a bullet or shot within the meaning of the statute and that if substantial adaptations would be necessary to make the device capable of firing a shot or bullet, as opposed to only minor adaptations, then the second attribute of a firearm would not be satisfied. Moreover, the Court indicated that the Commonwealth would need to prove that the defendant knew that he was carrying a firearm, within the generally accepted meaning of that term, to be criminally liable under M.G.L. c. 269, section 10(a). Whether this dictum will become law may be resolved in subsequent Survey years.

§ 13.11. Unnatural and Lascivious Act — Public Place.* Under Massachusetts General Laws chapter 272, section 35, the commission of an unnatural and lascivious act with another person is a crime. In construing this statute, however, the Supreme Judicial Court has not found a violation where adults engage in consensual, private conduct. If an act is consensual, therefore, the public nature of the conduct becomes the "essential element to be proved by the prosecution." In a case involving this statute and a consensual act, Commonwealth v. Ferguson, the Supreme Judicial Court clarified the public nature element of this crime and discussed what facts the Commonwealth should present in future cases to prove that the act occurred in public.

In Ferguson, a police officer observed the defendant seated in the front seat of his car with a woman resting her head on the defendant's lap per-
forming fellatio.\(^5\) The defendant had parked his car on the western edge of a parking lot, in the rear of that lot.\(^6\) The lot was surrounded on the north, east, and west by multiunit residential buildings.\(^7\) The street and the buildings along the northern perimeter were illuminated.\(^8\) Other than the defendant’s car, there were six or seven vehicles parked in the lot at that time.\(^9\) The winter night was cold and windy, but clear.\(^10\) The police officer who had followed the car to the lot, observed the conduct in controversy at approximately nine o’clock p.m.\(^11\) The defendant was found guilty in a six-member jury session in District Court of the crime of committing an unnatural and lascivious act.\(^12\)

The Supreme Judicial Court allowed the defendant to obtain direct appellate review.\(^13\) The defendant alleged that the Commonwealth had failed to present enough evidence to support a finding beyond a reasonable doubt that the act in question had occurred in a public place.\(^14\) Agreeing with the defendant, the Supreme Judicial Court set aside the trial court’s verdict.\(^15\)

In reaching its decision, the Court noted that the statute was designed to prevent unnatural and lascivious acts which might offend other persons if present.\(^16\) Since whether a given place is public or private depends upon the time and circumstances,\(^17\) the Court stated that criminal liability depended upon the defendant’s desire to ensure privacy as reflected by his conduct.\(^18\) In the Court’s words, “[t]he essential query is whether the defendant intended public exposure or recklessly disregarded a substantial risk of exposure to one or more persons.”\(^19\) Accordingly, the Commonwealth must prove that the defendant could have reasonably foreseen the likelihood of being observed by a casual passerby.\(^20\) In elaborating on this requirement, the Court indicated, on the one hand, that the fact that the defendant was indeed observed by a police officer in this instance was not controlling.\(^21\) On

\(^{15}\) Id. at 1553, 422 N.E.2d at 1366.
\(^{16}\) Id. at 1552-53, 422 N.E.2d at 1366.
\(^{17}\) Id. at 1552, 422 N.E.2d at 1366.
\(^{18}\) Id.
\(^{19}\) Id.
\(^{20}\) Id.
\(^{21}\) Id. It was not disputed that the conduct was consensual. Id. at 1553, 422 N.E.2d at 1367.
\(^{14}\) Id. at 1551, 422 N.E.2d at 1366.
\(^{13}\) Id.
\(^{12}\) Id. at 1552, 422 N.E.2d at 1366.
\(^{11}\) Id. at 1557, 422 N.E.2d at 1369.
\(^{10}\) Id. at 1554, 422 N.E.2d at 1367.
\(^{09}\) Id.
\(^{08}\) Id.
\(^{07}\) Id.
\(^{06}\) Id.
\(^{05}\) Id.
the other hand, the Court observed that the fact that no individual views the conduct does not place that behavior outside the reach of the statute, if the likelihood of observance was reasonably foreseeable to the defendant.\textsuperscript{22}

After discussing these principles, the \textit{Ferguson} Court analyzed the Commonwealth's failure to meet its burden. The Court stated that the Commonwealth failed to show direct public access to this parking lot from the buildings surrounding it.\textsuperscript{23} In addition, the Court observed that the Commonwealth failed to show whether the public frequently entered the lot\textsuperscript{24} and also failed to indicate the distance between the defendant's car and other cars in the lot.\textsuperscript{25} The Court also stressed that the Commonwealth did not demonstrate the visibility of the inside of the defendant's car from the buildings or from other cars.\textsuperscript{26} The Court was forced to conclude, therefore, that the Commonwealth had not presented sufficient evidence from which a rational jury could infer beyond a reasonable doubt that it was foreseeable to the defendant that a casual passerby would likely observe his conduct.\textsuperscript{27}

Chief Justice Hennessey's dissent in \textit{Ferguson} stated that the majority interpreted the term "public place" too narrowly.\textsuperscript{28} The Chief Justice, as well as Justices Nolan and Lynch who joined in the dissent,\textsuperscript{29} would have created a presumption that wherever an automobile travels in an urban area there is no reasonable expectation of privacy.\textsuperscript{30} Moreover, the Chief Justice noted that future defendants will not be aided by the majority's decision because the facts necessary for a conviction under the majority's analysis are easily provable.\textsuperscript{31}

The decision in \textit{Ferguson} is significant because it clarifies the public nature element of the crime of an unnatural and lascivious act. Prior to \textit{Ferguson}, there was no judicially acknowledged standard of determining whether certain conduct occurred in a public place. The majority in \textit{Ferguson} apparently has decided to adopt the Model Penal Code's view as to what conduct is "public."\textsuperscript{32} Accordingly, a "public" act is any which the

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\textsuperscript{22} Id. at 1554 n.1, 422 N.E.2d at 1367 n.1.
\textsuperscript{23} Id. at 1556, 422 N.E.2d at 1368.
\textsuperscript{24} Id.
\textsuperscript{25} Id. at 1556-57, 422 N.E.2d at 1368.
\textsuperscript{26} Id. at 1557, 422 N.E.2d at 1368.
\textsuperscript{27} See id., 422 N.E.2d at 1369.
\textsuperscript{28} Id. at 1557, 422 N.E.2d at 1369 (Hennessey, C.J., dissenting).
\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Id. at 1558, 422 N.E.2d at 1369.
\textsuperscript{32} See id. at 1554, 422 N.E.2d at 1367 (citing \textsc{Model Penal Code} § 251.1 comment (1980)). The Proposed Official Draft of 1962 states: "A person commits a petty misdemeanor if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed." \textsc{Model Penal Code} § 251.1 (Proposed Official Draft 1962).
defendant would reasonably expect to be observed by a casual passerby.\textsuperscript{33} The rationale behind the statute is to keep the defendant from offending the public by what amounts to a gross flouting of the community's standard in regard to sexuality.\textsuperscript{34} Accordingly, the statute should not be interpreted to include acts observable by members of the general public who peer into windows or through an open door of a private home.\textsuperscript{35} To hold that an act falls under the statute simply because one person not engaged in the act did observe it, would make the conduct itself illegal regardless of the consent of the participants and their efforts to secure privacy.\textsuperscript{36} Nevertheless, if conduct was not considered as being covered by the statute unless it was indeed observed by some member of the public, the rationale of the statute, to keep the defendant from flouting the community's sexual standards, would be undermined.\textsuperscript{37} Therefore, a standard which finds public any act in which the participants were unreasonable in their expectation of privacy results in a just compromise.

In clarifying what conduct is public, the \textit{Ferguson} Court also implied what facts would establish such conduct. To prove an unnatural and lascivious act is public, the Commonwealth needs to produce sufficient evidence to permit a jury to decide, without conjecture, that the defendant's expectation of privacy was unreasonable.\textsuperscript{38} In \textit{Ferguson}, the majority found that the Commonwealth only come forward with "evidence warranting an inference that the public has theoretical access to a place..."\textsuperscript{39} In future situations similar to \textit{Ferguson}, evidence concerning direct access to the parking lot from surrounding buildings and the frequency of visitors to the parking lot from surrounding buildings and the frequency of visitors to the

\textsuperscript{33} See 1981 Mass. Adv. Sh. at 1554, 422 N.E.2d at 1367. Consistent with this approach, other states have interpreted their own "lewd conduct" statutes as indicating that there is a violation "only when the lewd conduct of the defendant occurs in a place and at a time when it is likely to be observed by persons who have not consented to its occurrence ... and who are likely to be affronted by such conduct or to find such conduct alarming." Commonwealth v. Allsup, 481 Pa. 313, 317, 392 A.2d 1309, 1311 (1978).

\textsuperscript{34} See 1981 Mass. Adv. Sh. at 1554, 422 N.E.2d at 1367; \textsc{Model Penal Code} § 251.1 comment (Tentative Draft No. 13, 1961). See also Winters v. New York, 333 U.S. 507, 515 (1948) (stating that acts which are grossly and openly indecent or obscene are violations of public policy that require retribution from the offender for acts that flaunt accepted standards). The Supreme Judicial Court has stated that secret acts clearly do not support a charge of open gross lewdness and lascivious conduct. Commonwealth v. Catlin, 1 Mass. 8, 10 (1804).

\textsuperscript{35} \textit{Catlin}, 1 Mass. at 10.

\textsuperscript{36} \textit{Cf.} Griswold v. Connecticut, 381 U.S. 479, 481-86 (1965) (a statute forbidding the use of contraceptives violates the right to marital privacy).

\textsuperscript{37} See 1981 Mass. Adv. Sh. at 1554, 1554 n.1, 422 N.E.2d at 1367 n.1. \textit{Cf.} State v. Hedrick, 224 S.W.2d 546, 549 (Mo. Ct. App. 1949) (the commission of the act near a public highway showed a contemptuous disregard for the public and that it was the place of the conduct and not the actual presence of people that made the conduct illegal).


\textsuperscript{39} See \textit{id.} at 1555, 422 N.E.2d at 1368.
lot would seem to be important. In addition, evidence of the exact position of a defendant's car in relation to a nearby building or car and the visibility of conduct within the defendant's car may be very weighty.

The fundamental difference between the majority and dissent in Ferguson is that the dissent implied that the prosecution's burden of showing that the defendant's expectation of privacy was unreasonable would be met by the simple showing that the act occurred in an urban area. The dissent also stated, however, that despite the majority's holding, in the future prosecutors could still win by showing a "few, easily provable, added facts." Prior to Ferguson, the Commonwealth had met this burden of specificity in other contexts. For instance, in Commonwealth v. Scagliotti, the prosecution was able to get a case to the jury concerning a sexual solicitation in a movie theatre which showed sexually explicit films in cubicles, on the basis of witnesses' testimony concerning the nature of the viewing cubicle in which the solicitation was made. Also, in Commonwealth v. Cummings, testimony that a toilet was often used by others for legitimate purposes was found by the Court to be sufficient to warrant that it was "open." Nonetheless, the Ferguson decision clearly indicates that the Court is unwilling to look outside of the record. Future attorneys for the Commonwealth probably should provide as much evidence concerning the nature of the place of conduct. It may even be helpful to the Commonwealth's case for the jury to visit and view the site of the incident, which was not done in Ferguson.

§ 13.12. Duty Of Appointed Counsel in Pursuing Appeals He Deems Frivolous.* As a result of the Supreme Court decision in Douglas v. California, an indigent criminal defendant is constitutionally entitled to the assistance of counsel on a first appeal granted as of right by the State. If an

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41 See id., 422 N.E.2d at 1368.
42 See id. at 1557, 422 N.E.2d at 1369. The dissent did not cite any authority for this statement.
43 See id. at 1558, 422 N.E.2d at 1369.
45 Id. at 627-29, 371 N.E.2d at 727.
47 Id. at 230-31, 173 N.E. 506-07.
* By Evans Huber, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.
2 Id. at 357.
indigent criminal defendant desires to pursue what his attorney considers to be a frivolous appeal, the attorney will be put in a difficult position. On the one hand, all counsel are bound to represent their clients vigorously. This is particularly important in the case of an indigent defendant for, unlike the non-indigent defendant, he cannot seek a second legal opinion when his appointed counsel finds the appeal frivolous. On the other hand, appointed counsel are under a professional obligation not to pursue claims or assert positions that they know to be frivolous. An attorney appointed to represent an indigent defendant who insists on pursuing a claim which the attorney believes to be without merit is thus in a situation where he must choose between two apparently irreconcilable precepts of professional behavior.

The Supreme Court attempted to address this issue in Anders v. California. Anders involved an indigent criminal defendant whose court-appointed counsel had expressed a reluctance to pursuing an appeal on the grounds that the appeal was without merit. The appointed counsel had advised the court and his client that he would not file a brief on appeal. The defendant, therefore, was obliged to file a brief pro se. The California District Court of Appeal, after examining the record without the benefit of a brief filed by the appointed attorney, affirmed the conviction. The Supreme Court reversed the conviction, stating that the constitutional requirement of equality of representation for indigents could not be attained without the active advocacy of the appointed attorney on behalf of his client. The Court went on to outline the procedure that an appointed attorney should follow in similar cases.

Under Anders, appointed counsel is permitted to submit to the court a request to withdraw. The request must be accompanied, however, by "a brief referring to anything in the record that might arguably support the ap-

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1 See Note, Withdrawal of Appointed Counsel from Frivolous Indigent Appeals, 49 IND. L.J. 740, 741 (1974) [hereinafter cited as Withdrawal of Appointed Counsel].
3 Withdrawal of Appointed Counsel, supra note 3, at 742. The inability of an indigent defendant to seek alternate counsel when his appointed counsel expresses his belief that the appeal is frivolous conflicts with the purpose of constitutionally mandating the right of an indigent to be represented on appeal; that "the indigent receive substantially the same assistance of counsel as one who can afford to retain an attorney of his choice," Nickols v. Gagnon, 454 F.2d 467, 471 (7th Cir. 1971) (interpreting Anders v. California, 386 U.S. 738 (1967)), cert. denied, 408 U.S. 925 (1972).
6 Id. at 739.
7 Id. at 742.
8 Id. at 740.
9 See id. at 740.
11 386 U.S. at 744-45.
12 Id. at 744.
The indigent defendant may then present any arguments in favor of his appeal, whereupon the court will decide after a full examination of all the proceedings, "whether the case is wholly frivolous." While the Anders Court did not explicitly so indicate, presumably an appointed attorney would be required to represent his indigent client on appeal if the court found any of the points raised arguable on their merits. Commentators have criticized the Anders procedure because it puts the appointed attorney in a "schizophrenic" position, and because it still fails to ensure the indigent defendant active advocacy.

During the Survey year, the Supreme Judicial Court, in Commonwealth v. Moffett, addressed the issue of frivolous indigent appeals and set forth a procedure designed to implement the constitutional principle of equal representation enunciated in Anders. Like the defendant in Anders, the indigent criminal defendant in Moffett was represented by an appointed attorney who indicated that he felt the appeal had no merit. Unlike Anders, however, counsel in Moffett did submit a brief in which he discussed three issues that "might arguably support the appeal" but maintained that "‘after careful review of the record and relevant case law,’” the issues were without merit. The Supreme Judicial Court addressed the issue of whether Moffett’s appeal was meritorious. In so doing, it set forth the proper procedure to be followed, by an attorney who finds his indigent client’s appeal frivolous. The procedure which the Moffett Court established places a greater burden on an attorney to proceed with the appeal than the Anders procedure requires.

The defendant in Moffett was convicted of armed robbery, and assault and battery with a dangerous weapon. Moffett’s victim, Horne, was assaulted by Moffett and another man who, after beating and robbing Horne, fled the scene of the assault. Moffett was arrested almost immediately by two police officers who placed him in the police cruiser and returned to the scene of the crime. Horne identified Moffett as one of his attackers while

14 Id.
15 Id.
16 See id. See also Withdrawal of Appointed Counsel, supra note 3, at 747.
18 Withdrawal of Appointed Counsel, supra note 3, at 746-47.
20 Id. at 746-47, 418 N.E.2d at 588.
21 This brief was referred to by the appointed attorney as "Appellant Counsel’s Brief Pursuant to Anders v. California, 386 U.S. 738 (1967)." Id. at 747, 418 N.E.2d at 588.
22 Id. at 747, 418 N.E.2d at 588-89.
23 Id. at 746, 418 N.E.2d at 588.
24 Id. at 754, 418 N.E.2d at 592.
25 Id.
Moffett was still in the police cruiser.\textsuperscript{26} Horne testified at trial that he was positive of his identification when he saw Moffett.\textsuperscript{27} Moffett maintained, however, that Horne had identified him only after one of the officers asked Horne "is this the guy that attacked you?", and after Horne had hesitated for several minutes.\textsuperscript{28} After his conviction, Moffett brought the appeal which his appointed counsel had deemed frivolous.\textsuperscript{29}

In reaching its decision, that the judgments should be affirmed, the Supreme Judicial Court first addressed the broad issue of appropriate procedures under \textit{Anders}. Rather than reiterate the procedures set forth in \textit{Anders}, the Court adopted a somewhat different set of standards. In so doing, the Court attempted to respond to the most significant problem the \textit{Anders} guidelines failed to resolve: an attorney must "assume contradictory roles if he wishes to withdraw on the grounds that the appeal lacks merit."\textsuperscript{30} In order to minimize this conflict, the Court stated flatly that "[o]nce counsel is appointed to represent an indigent criminal defendant on appeal, \textit{no withdrawal will be permitted} solely on the basis of the frivolousness or meritlessness of the appeal."\textsuperscript{31} Rather, the attorney should adhere to the following four-step procedure. First, he must "prepare and submit a brief arguing any issues that are arguable."\textsuperscript{32} While the attorney need not advance unsupportable contentions as an advocate, he must nevertheless bring such contentions to the attention of the court, "simply designating pertinent portions of the trial transcript, and citing any relevant cases."\textsuperscript{33} Second, if the attorney feels it absolutely necessary to dissociate himself from the purportedly frivolous points raised in the brief, he may preface the brief with a statement that it is filed pursuant to \textit{Anders} and \textit{Moffett}.\textsuperscript{34} Third, if the attorney includes such a disclaimer, he must notify the defendant, who will have thirty days to present additional arguments.\textsuperscript{35} The attorney must certify to the court that the defendant was no notified.\textsuperscript{36} Fourth, the attorney may \textit{not} further indicate that he believes the appeal is without merit.\textsuperscript{37}

After establishing the guidelines to be followed by appointed counsel in these situations, the Court then proceeded to examine the merits of the

\textsuperscript{26} Id.
\textsuperscript{27} Id. at 754-55, 418 N.E.2d at 593.
\textsuperscript{28} Id.
\textsuperscript{29} Id. at 746-47, 418 N.E.2d at 588.
\textsuperscript{30} Id. at 749, 418 N.E.2d at 590.
\textsuperscript{31} Id. at 761, 418 N.E.2d at 586 (emphasis added).
\textsuperscript{32} Id.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 752, 418 N.E.2d at 592.
issues which the defendant had raised on appeal. The defendant presented six such issues which, although not properly before the Court, were considered by the Court for reasons of judicial economy. The six issues were 1) inadequate jury instructions concerning the possible effect of the circumstances surrounding the initial identification; 2) inaccurate instruction on assault and battery by means of a dangerous weapon; 3) ineffective assistance of counsel; 4) reading of an unrelated indictment by the judge to the jury; 5) erroneous instructions on the necessity of an unanimous verdict; and 6) an inappropriate sentence. The Supreme Judicial Court addressed each of these contentions and concluded that they were all without sufficient merit to constitute reversible error. The Court also noted that while the procedure followed by the appointed attorney in this case did not comply with the precise guidelines Moffett established (and consequently in any subsequent case would be deficient), it did seem to be in accord with the Anders procedure. Consequently, the Court affirmed the conviction, concluding that the defendant's appeal was without merit, and that he was not denied his constitutional right to effective appellate representation.

The Supreme Judicial Court's holding in Moffett, which attempted to solve the three major problems created by the Anders decision, leaves two of them largely unresolved. Only the administrative problem created by the court's having to rule on counsel's motion for withdrawal in addition to having to rule on the merits of the appeal (which forces the court to go through two procedures, both of which may be resolved by the determination of one issue) is solved in any significant way by Moffett. The other two major problems which Anders created, those of placing the appointed attorney in a "schizophrenic" position, and of prejudice to the indigent defendant, remain at least partially unresolved. As is the case with the Anders procedure, the court is left to rely on a brief prepared by an attorney who believes the appeal to be frivolous. The resulting prejudice to the indigent de-

37 Id. at 753, 761 N.E.2d at 592, 596.
38 Id. at 755, 418 N.E.2d at 593.
39 Id. at 761, 418 N.E.2d at 596.
40 Id. at 755, 418 N.E.2d at 593.
41 Id. at 756, 418 N.E.2d at 594.
42 Id. at 757, 418 N.E.2d at 594.
43 Id. at 760, 418 N.E.2d at 595.
44 Id., 418 N.E.2d at 596.
45 Id.
46 Id. at 755-60, 418 N.E.2d at 593-96.
47 Id. at 753, 418 N.E.2d at 592.
48 Id. at 761, 418 N.E.2d at 596.
49 Id. at 755, 418 N.E.2d at 593.
50 Id. at 753, 418 N.E.2d at 592.
51 See Withdrawal of Appointed Counsel, supra note 3, at 746.
fendant, arising both because the attorney is unlikely to adequately argue his client's case, and because the court is being told even before it considers the case that the appeal is without merit, is only slightly obviated by the Moffett requirements that appointed counsel "argue any issues that are arguable" and that he refrain from injecting disclaimers into the brief or otherwise arguing against the client's interest. Furthermore, the "schizophrenic" position in which Anders places appointed counsel is only slightly abated by the flat Moffett rule that appointed counsel will not be allowed to withdraw on the grounds that the appeal lacks merit. Appointed counsel is still required to submit a brief in whose validity he does not believe — if he believed in the merits of the appeal, the situation would never have arisen in the first place. Thus, while attempting to provide practical guidelines, for appointed counsel who believe their client's appeal to be frivolous, the Supreme Judicial Court is only partially successful. The problems of prejudice to the defendant, and of placing conflicting demands on the attorney in such situations will continue to arise.

The Moffett decision does, however, support more fully than Anders the principle enunciated in Douglas v. California than an indigent criminal defendant is constitutionally entitled to the assistance of counsel on a first appeal granted as of right by the state. It clearly states that appointed counsel will not be allowed to withdraw solely on the grounds of perceived frivolousness; under Anders, counsel might be permitted to withdraw on such grounds. Thus Moffett places an absolute obligation on the court-appointed attorney to represent his client on appeal, insofar as that attorney might wish to withdraw on the grounds of frivolousness.

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52 See id.
54 Id.
55 This was one of the objections which Justice Stewart raised in his dissent to Anders, 386 U.S. 738, 746 (1967) (Stewart, J., dissenting).
56 Douglas v. California, 372 U.S. 353, 356-57 (1963). Moffett supports this principle more fully than Anders because, under Anders, the possibility that an indigent will not be represented on an appeal of right remains open. There is no such possibility under Moffett.