Chapter 15: Criminal Law, Procedure, and Administration

Emil Slizewski

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A. JUDICIAL DECISIONS

§15.1. Criminal statutes: Construction. Regulatory statutes, perhaps better known as public welfare offense statutes,1 punishing the act with no mention of a culpable state of mind, have been before the Massachusetts courts several times in the past. Almost uniformly, the courts have read these statutes literally and have refused to require a scienter where none is set out in the legislation itself; in fact, the lack of a reasonable opportunity to know the existence of facts made the bases of such statutory crimes has been considered immaterial.

A decision during the survey year, Commonwealth v. Lee,2 may be added to this line of cases involving statutory crimes without a mens rea. The defendant was charged with violating General Laws, Chapter 94, Section 211, punishing any person "found in possession" of a "narcotic drug" except "by reason of a physician's prescription lawfully and properly issued." A package, purportedly mailed by a certain person in New York, was delivered to the defendant by a mail carrier. Shortly after the package was handed over to the defendant, and before it was opened, police came on the scene and asked the defendant whether it was hers, to which she replied in the affirmative. It was opened by the defendant in the presence of the police and was found to contain marijuana. The defendant insisted that she had no prior knowledge of the contents and that she was being "framed." The address of the supposed sender, written on the parcel, proved to be a vacant lot in New York.

The Supreme Judicial Court found no error in the trial court's refusal to grant a motion for a directed verdict. It concluded that the defendant had physical control of and the intent to control the package and contents, thereby meeting the legal requirements of "possession."

EMIL SLIZEWSKI is Associate Professor of Law at Boston College Law School and a member of the Massachusetts Bar.

§15.1. 1 The phrase "public welfare offense" was first made popular by Francis B. Sayre in Public Welfare Offenses, 33 Col. L. Rev. 55 (1933).
The Court did not consider it important that the defendant might not have had reason to believe that there was marijuana in the package. Apparently, the result would have been the same even if the defendant had been "framed," provided that the police did not institute the scheme and thus give her the defense of entrapment.

The fact that the defendant had no reasonable means of ascertaining the contents of the package before accepting it from the mailman would not change the result in light of other decided cases. Probably the best statement of the reason for construing a criminal statute of this nature so literally was made by Justice Holmes in Commonwealth v. Smith:

> When according to common experience a certain fact generally is accompanied by knowledge of the further elements necessary to complete what it is the final object of the law to prevent, or even short of that, when it is desirable that people should find out whether the further elements are there, actual knowledge being a matter difficult to prove, the law may stop at the preliminary fact, and in pursuit of its policy may make the preliminary fact enough to constitute a crime.\(^4\)

To place on the prosecution the burden of proving scienter in the type of statute involved in the Lee case would make the statute largely nugatory.

It could also be considered wise legislative policy to require persons to act at their peril in a matter which has an important connection with the restraint of illegal trafficking in drugs. Those who are willful or negligent will be caught. That the nonculpable or careful may also be punished has been thought to be the necessary price to be paid for an effective and enforceable law.

Because these statutes depart from the traditional common law concept that every crime should require a mens rea, alarmed voices have spoken out against further extension of these no-fault crimes.\(^5\) It has been argued that to punish the "innocent" not only conflicts with prevailing morals but also brings disrespect on the law. Be that as it may, these strict liability crimes are now so deeply rooted in our law that the present-day courts seem less ready to rationalize their existence than in the past.

If the final object of the law is to punish those who knowingly possess narcotics and not those who lack scienter or the reasonable

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\(^{4}\) 166 Mass. 370, 375, 376; 44 N.E. 503, 504 (1896).

\(^{5}\) Hall, Principles of Criminal Law, c. 10 (1947); Felton v. United States, 96 U.S. 699, 703, 24 L. Ed. 875, 876 (1877); Hall, Prolegomena to a Science of Criminal Law, 89 U. of Pa. L. Rev. 549 (1941); Sayre, Public Welfare Offenses, 33 Col. L. Rev. 55, 78-83 (1933).
means of acquiring knowledge, it would seem possible to do so and still have an effective regulatory statute by giving the state the benefit of prima facie evidence that possession is accompanied by knowledge and placing upon the accused the burden of proving lack of knowledge or of the reasonable means of acquiring knowledge. One court at least has taken such an approach in construing a similar statute, but such action by a court may be subject to the criticism that it was taking part in judicial legislation.

Since cases like Lee and Commonwealth v. Mixer may conflict with the sense of justice of a large segment of the public, it might be well for the legislature to consider the use of statutory presumptions or prima facie evidence in enacting further or amending present public welfare offense statutes in order to have a significant part of our law conform to the community's general conception of what is fair and just. In view of such statutes as the bad check law, it would be a far from novel experiment for the legislature.

When the courts consider statutes similar to the one in issue in the Lee case, they very infrequently fall back on the canon that criminal statutes are to be construed strictly (i.e., favorably for the accused). This canon of construction together with its close relative the ejusdem generis rule is, of course, to be used only as a guidepost in ascertaining the "intent" of the legislature in enacting the statute in question.

§15.2. Void for vagueness: Unnatural and lascivious acts. During the survey year the Supreme Judicial Court was called upon to declare two statutes unconstitutional under the void for vagueness rule. In Jaquith v. Commonwealth the accused was charged with violating General Laws, Chapter 272, Section 35: "Whoever commits any unnatural and lascivious act with another person shall be punished . . ." He contended that, due to the vagueness of the statute, there was a violation of Article XII of the Declaration of Rights and the due process clause of the Fourteenth Amendment.

The statute is in the conjunctive; the act must be "unnatural and lascivious" to come within its prohibition: apparently a natural and lascivious act is not punishable under this particular statute, nor


* Compare Nigro v. United States, 4 F.2d 781 (8th Cir. 1925); Tenement House Dept. v. McDevitt, 215 N.Y. 160, 109 N.E. 88 (1915).


* In Commonwealth v. Carlson, 1954 Mass. Adv. Sh. 509, 120 N.E.2d 384, the Court refused to apply the ejusdem generis rule and the canon of strict construction when it held that being found in the hallway of a building with a device for registering bets was in violation of a statute punishing one who was "found in, any place, way, public or private, park or parkway, or any open space, public or private, or any portion thereof" with apparatus or devices for registering bets.

would an unnatural but not lascivious act be prohibited. If the emphasis is to be placed on the conjunctive and on the meaning of the word “unnatural,” if “unnatural” qualifies “lascivious,” it may be possible to analogize the Jaquith case with Commonwealth v. Carpenter,2 where the Court struck down a statute punishing persons who “willfully and unreasonably . . . saunter or loiter for more than seven minutes after being directed by a police officer to move on.” Since all idling was not prohibited, but only unreasonable failure to obey a direction to move on by a policeman, the Court held that the statute was void because of “its failure to prescribe any standard capable of intelligent human evaluation to enable one chargeable with its violation to discover those conditions which convert conduct which is prima facie lawful into that which is criminal.”3 The distinction between reasonable and unreasonable sauntering or loitering was too tenuous a distinction for the person of average intelligence to make. If that is so, should the same model man be able to know with any more certainty the difference between natural and lascivious and unnatural and lascivious conduct?

It would seem that such a verbal skirmish is not helpful. The more realistic approach, and the one that Court took, would be to determine whether the words “unnatural and lascivious act” in the juxtaposition in which they actually appear in the contested legislation have a common usage which indicates with a reasonable degree of clarity the kind of conduct prohibited. To dissect a statutory phrase and speculate on the possible meaning of every word, in and out of context, would merely lead to the recognition that many statutes contain the ambiguity that attends the use of an imperfect means of communication, the English language. The test should not necessarily be the difficulty of applying the statute.4 The reports are full of annoying problems of statutory construction where the legislature does not expressly prescribe the litigated activity, but such difficulty in application does not of itself render a statute void.

General terms in a criminal statute do not automatically place it beyond constitutional limits, since “it is not infrequent that prescribed conduct is incapable of precise legal definition.”5 The type of conduct that the legislature desired to proscribe in the Jaquith case probably could have been made more precise,6 but this should not be the sole determinant under the void for vagueness rule. Such general statutory descriptions of crimes as the following have been upheld: coercing a licensee of a radio station to employ more persons than the number “needed . . . to perform actual services”;7 the failure to exercise “all reasonable care to avoid or prevent injury through collision

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325 Mass. at 523, 91 N.E.2d at 668.
See New York Penal Law, c. 41, art. 66, §690.

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with all other persons and vehicles . . . "; 8 "crime involving moral
turpitude"; 9 mailing an "obscene, lascivious, lewd, or filthy" article. 10
The general words and phrases which are identical with the well­
established standards of the community should be considered suffi­
ciently defined to meet due process requirements. In the Jaquith case
the Court said that the sense of decency, propriety, and morality, as
well as the common sense of the community, would be sufficient to
decide what acts were proscribed. 11
Since the indictment was drafted in terms of the statute, which the
Court thought sufficiently definite, it was an adequate basis for the
defendant's preparation of his case, and thus, there was no violation
of Article XII of the Declaration of Rights. Moreover, it would seem
that the accused was entitled to a bill of particulars setting out the
essential details of the crime as a matter of right under General Laws,
Chapter 277, Section 40. Nor was there any violation of due process
of law on the ground that the crime lacked sufficient certainty to
permit effective former jeopardy pleas, the Court pointing out that
a defendant may resort to the record and even to parol evidence to
show what facts supported a prior conviction.

§ 15.3. Void for vagueness: Defective delinquent statutes. As a re­
result of Petition of O'Leary 1 and Ex parte Tardiff 2 the Massachusetts
legislature enacted Chapter 645 of the Acts of 1953 providing for the
observation, examination, and recommitment of certain persons whose
original commitment had been found to be procedurally improper.
This act provides that if such a person is found to be mentally defec­
tive, certain prescribed notice is to be given and a hearing is to be
held for his commitment to a defective delinquent department, and
that

If after a hearing and examination of the person's record,
character and personality, the court finds that such person has
shown himself to be dangerous or shows a tendency toward be­
coming such, that such tendency is or may become a menace to
the public and that such person is not a proper subject for the
school for the feebleminded or commitment as an insane person,
the court shall make a report of the finding to the effect that
the person is a defective delinquent and may commit him to a depart­
ment for defective delinquents.

The constitutionality of this statute was attacked by a petition for
a writ of habeas corpus against the superintendent of the State Farm

9 State v. Magaha, 182 Md. 122, 32 A.2d 477 (1943).
9 Jordan v. DeGeorge, 341 U.S. 223, 71 Sup. Ct. 703, 95 L. Ed. 886 (1950), where the
Court applied the void for vagueness rule to a deportation statute because of the
serious nature of deportation.
10 Coomer v. United States, 213 Fed. 1 (8th Cir. 1914).

§15.3. 1 325 Mass. 179, 89 N.E.2d 769 (1950).
at Bridgewater by one who had been committed for observation according to the terms of the statute in *Ex parte Dubois.* It was contended that the statutory reference to a "mental defective" and to one who is "dangerous or shows a tendency toward becoming such, that such tendency is or may become a menace to the public," comes within the void for vagueness doctrine, and that because of the uncertainty and indefiniteness of the act there was an improper delegation of legislative powers to courts and juries in conflict with Article XXX of the Declaration of Rights.

The Court upheld the legislation, emphasizing that it was not a criminal statute, there being no definition of a crime or imposition of any punishment. It was a matter of the legislature acting in its role of parens patriae in caring for mentally deficient persons in the state. This being so, the criteria of definiteness of criminal statutes to avoid a due process objection would not be determinative, and the standards of certainty required may not be as great. One of the fundamental reasons for the requirement of definiteness and clarity of criminal statutes is to notify persons of the illegality of prospective activity so that such notice will permit them to avoid the prohibited acts. The *Dubois* case, however, does not involve the prohibition of any voluntary acts but concerns the involuntary condition of a person as a kind of "mental defective." 4

A noncriminal statute should at least be sufficiently definite to serve as a guide to its administration. The Court felt that the persons made subject to the provisions of the act are described by language readily understood by those who may be called upon by it to make adjudications under it. Since there is a practical and reasonable standard to guide the courts, the act does not provide for an unlawful delegation of powers.

Although a statute may be somewhat indefinite on its face, it has been held that judicial construction may adequately limit the scope of the legislation by way of a further definition of the statutory terms. 5 In the *Dubois* case the Court defined a mental defective as one whose mentality is less than normal, which is still further qualified by the statutory requirement that he be dangerous or have a tendency toward becoming a menace to the public.

Despite the petitioner's insistence in the *Dubois* case that the confinement under the statute is the equivalent to a sentence or a penalty for a crime and that criteria involving criminal statutes should be followed, the Court considered the object of the legislation to be fundamentally that of treatment. 6 A query might be made whether the petitioner's case would not have been strengthened if the 1954

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amendment to the defective delinquent statute were in force when the case was decided; Chapter 685 of the Acts of 1954 would require that a person be charged with a crime involving danger to life or limb before an application for commitment to the department for defective delinquents may be filed.

§15.4. Right to counsel and opportunity to defend. In the survey year the Supreme Judicial Court considered two cases involving the right of the accused to have the effective assistance of counsel. In the first, *Jones v. Commonwealth*, it was decided that although there is no right to have counsel assigned to defend the accused in all types of criminal cases, due process of law requires minimally a reasonable opportunity to obtain counsel and to prepare a defense.

In *Lindsey v. Commonwealth* the Court was asked by way of a writ of error to reverse two concurrent sentences for incest and carnal knowledge of a female child under the age of sixteen. The petitioner was arrested on March 1, 1949, and remained in custody at the county jail until March 21. On March 15 he was indicted and arraigned, and he pleaded not guilty. On Friday, March 18, his cases were on the daily trial list and were sent out of the first session to the third session, but it did not appear that the petitioner knew that his cases were assigned to this session. Late that same afternoon he consulted with counsel from the Voluntary Defenders Committee and told him that the cases would be reached the next Monday. Counsel promised that he would attempt to get a continuance. When counsel went to the Superior Court the following Monday, he discovered that the cases were not on the daily trial list, and he then left the court house after instructing an associate to try to obtain a continuance. A little later the associate discovered that the petitioner’s cases had commenced in the third session, and when he arrived he asked for a continuance. The trial judge, referring to the fact that a jury had been impaneled, said it was too late for a continuance but allowed the associate a short time to confer with the accused. The associate represented the accused at the trial, cross-examining witnesses and arguing to the jury.

The Court reversed the sentences, saying, “The ground of this decision is that the petitioner was deprived of due process of law because an unfortunate combination of circumstances prevented him from having the benefit on an important occasion of the services of counsel whom he himself had secured within three days of his indictment to represent him on that occasion.” The Court thought it would make no difference that the representative of the Voluntary Defenders Committee did not undertake to defend the accused completely, finding that there was at least a commitment on the part of counsel of the Voluntary Defenders to move for a continuance. Since there was found to be no reasonable opportunity to make an investigation of

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the case, the Court concluded that representation by counsel on the matter of a continuance was of substantial importance. Even though the accused was represented by counsel at the trial, there was a violation of due process because his attorney, due to lack of an opportunity to investigate and prepare the case, could not render adequate legal services.

Only three days elapsed between the date of indictment and arraignment and the petitioner's acquisition of legal services from the Voluntary Defenders Committee. On the other hand, the petitioner was arrested for these crimes more than two weeks previously and a lawyer employed for his defense shortly thereafter would have had a reasonable opportunity to investigate the case and prepare a defense before the date of trial. The Voluntary Defenders Committee does not come into any case until it reaches the Superior Court, but it seems doubtful that this should control; for it has been decided that there is no constitutional obligation imposed upon the state to appoint counsel to represent indigent defendants in noncapital cases unless special circumstances are present, such as youth, ignorance, lack of familiarity with criminal proceedings, complexity of issues, unfair conduct on the part of public officials, or, generally, some incapacity or prejudice which would make the trial of the defendant without counsel unfair.4

If the Voluntary Defenders Committee had not come to the aid of the petitioner, there might well have been no deprivation of due process when the accused was tried and convicted on March 21. Further, there might not have been a violation of the due process clause if the trial had been postponed for two weeks after arraignment and the accused had acquired services of counsel for the first time the day before the date set for trial; there at least would have been an opportunity to acquire counsel, who probably would have had sufficient time to investigate and prepare the case. It is to be doubted that an unreasonable delay by a defendant in employing a lawyer to defend him should force the court into the position of having to grant a continuance to permit effective representation by counsel, for this could lead to long undesirable delays and indirectly place docket and calendar control in the hands of a defendant.

However, it is to be noted that in the Lindsey case only three days elapsed from the date of indictment to the time when the petitioner obtained counsel. The date of arrest eighteen days previously should be of less significance because there had to be further action by the grand jury before it became certain that the petitioner would have to stand trial and require the services of an attorney. Moreover, the practice of the Voluntary Defenders of appearing only in Superior Court and the fact that the accused could not afford services of paid

counsel could be significant if not controlling factors on the issue of delay in acquiring counsel.

§15.5. Fair trial: Duty of the district attorney. A district attorney, although obliged to present the strongest case the state might have against a person accused of a crime, cannot always assume a completely partisan role. The American Bar Association in Canon 5 of its Canons of Professional Ethics, 1948, takes the position that “The primary duty of a lawyer engaged in public prosecutions is not to convict, but to see that justice is done. The suppression of facts or the secreting of witnesses capable of establishing the innocence of the accused is highly reprehensible.” The courts have reversed convictions where overenthusiastic prosecutors have procured them by such acts as the Canons prohibit.¹

In Smith v. Commonwealth² the Court considered the conduct of a district attorney which fell short of what the American Bar Association deems “highly reprehensible,” but which the Court indicated might be the basis for the reversal of a conviction. The accused had been convicted of breaking and entering a building in the nighttime and larceny therefrom and sued out a writ of error to reverse the judgment. A single justice of the Supreme Judicial Court reserved and reported the case to the full bench.

At the trial in Superior Court, the prosecution had relied heavily upon a confession of the petitioner which was in great detail and which recited certain facts attending the commission of the crime that the police did not know but which they later verified. Long before the trial this confession was repudiated by the petitioner, who insisted that the only reason he made it was to avoid severe punishment in Maine, where he was jailed awaiting trial for a crime; that it was just an attempt to get the Massachusetts authorities to bring him to this state; and that the minute details of the Massachusetts crime were obtained from a fellow prisoner in the Maine jail.

A few months before the trial, the district attorney received from the petitioner several letters and affidavits having a substantial tendency to prove that the petitioner was out of Massachusetts on the day that the crime was committed. Acting in good faith and influenced greatly by the precise details in the confession, the district attorney made no investigation of the truth of the matters alleged in these letters and affidavits, but tried the case without bringing them to the attention of the trial judge. The Superior Court, on objection of the prosecuting attorney, excluded most of these letters and affidavits as hearsay when they were offered as evidence by the petitioner. In his brief the petitioner alleged that he was without counsel at the trial, but this did not appear in the record.


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The Supreme Judicial Court, having examined these letters and affidavits as exhibits, found that they had a strong tendency to prove that the petitioner was not in the state at the time the crime was committed and stated that it believed that the matters alleged therein could have been put in evidence by deposition or otherwise. However, since the record did not indicate whether the petitioner was represented by counsel or refer to the conduct of the trial judge, the Court recommitted the case for further findings by the single justice.

The Court declared that, in view of the strong probability that the petitioner was in another state when the crime was committed, the issue of alibi ought to have been put to the jury fully and squarely; that in certain circumstances it may be the duty of the prosecuting attorney to apprise the court of facts detrimental to the state's case. If the accused was not represented by counsel during the trial, the Court suggests that the district attorney might then have to acquaint the court with this important evidence. Furthermore, the lack of defendant's counsel may determine the amount of intervention by the trial judge necessary to safeguard the accused's right to a fair trial. It would appear to be undesirable to place any rigid duty on the district attorney to investigate all leads which favor the accused's case. In the *Smith* case the Court emphasized the substantial nature, and apparently creditable sources of the letters and affidavits and announced: “It is well understood that the duty of a district attorney is not merely to secure convictions. It is his duty to secure them with due regard to the constitutional and other rights of the defendant. [Citations omitted.] It may even become his duty in some circumstances to direct the attention of the court to evidence favorable to the defendant.”

It may therefore be desirable to formulate any hard and fast rule setting out the obligations of the prosecuting attorneys in such matters.

The district attorney could not have doubted that the petitioner was relying on the defense of alibi and that the petitioner expected him to verify the documents and the facts contained in them before it was decided to prosecute the indictment. Of course, the petitioner had no right to have the district attorney enter a nolle prosequi, that matter being in the sole and complete discretion of the prosecutor.

If the district attorney comes into possession of important material evidence tending to prove the innocence of the petitioner from a source other than the petitioner himself, it has been indicated that it would be his duty to disclose it. “When there is substantial room for doubt, the prosecution is not to decide for the court what is ad-

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6 See Griffin v. United States, 183 F.2d 990, 993 (D.C. Cir. 1950); Jordon v. Bondy, 114 F.2d 599, 602 (D.C. Cir. 1940).
missible, or for the defense what is useful."  

In the Smith case, however, it was the petitioner who supplied the district attorney with the important information relating to the alleged crime, and if he had been represented by counsel at the trial, it would seem doubtful that it would have been a reversible error for the district attorney to fail to call it to the court's attention. But the petitioner did not have counsel and when he made known the information to the prosecutor he expected him to act thereon. Nondisclosure of such facts seasonably by the district attorney could be held to be such narrow partisanship as to conflict with his broader public duty.

It is not to be expected that the court would require that the district attorney make a detailed investigation of the matter of the affidavits. The affiants lived in Illinois and Indiana, and it may be doubted that the budget of the district attorney's office would cover such out-of-state investigations. The efficient and orderly administration of his office could be seriously affected by a rule that would require him to weigh and investigate the strength of the defendant's case as well as the state's. After all, the prosecuting attorney in the Smith case had a very complete confession, and a confession, though unsupported by corroborating evidence, may establish guilt under Massachusetts law.

Assuming that the district attorney had seasonably divulged the nature and the contents of the documents in his possession, the requirements of a fair trial of the unrepresented petitioner might have obliged the trial judge to appoint counsel to defend the accused or, in the alternative, the judge would have had to play a more active role into seeing that the jury had the opportunity to consider fully these matters bearing on alibi.

In Aronson v. Commonwealth the Court was urged to reverse a conviction, it being alleged that the police knew that the principal witness for the Commonwealth was telling a false story and that there was a denial of due process when the prosecuting officer introduced such false testimony. The Court, after announcing that there was nothing that raised the question in the petition for a writ of error, went on to point out that the petitioner expressly disclaimed any improper conduct on the part of the district attorney or members of his staff. The Court declared, "It would certainly be difficult to enforce the criminal law if all convictions were to be subject to subsequent inquiry as to what 'the police' knew or believed about the truth.

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9 Griffin v. United States, supra, note 6.
10 However, if the lawyer is grossly incompetent, there may be a lack of adequate representation and a fair trial. United States ex rel. Hall v. Ragan, 60 F. Supp. 820 (N.D. Ill. 1945).
11 Melanson v. O'Brien, 191 F.2d 936 (7th Cir. 1951).
of the evidence. We are not aware of any decisions going to that length." 14

§15.6. Scope of the writ of error. The old common law writ of error was a very limited appellate remedy. It reviewed only those errors which were apparent on the record, including merely the warrant, complaint, or indictment and other pleadings, the verdict, judgment, sentence, and some few entries made by the clerk. It was an unsatisfactory mode of review not only because of its close tie to the record, but also because the appellate court took no notice of errors of fact which went to the innocence of the defendant. The writ of error coram nobis permitted to some extent a court's consideration of alleged errors of fact. However, in light of General Laws, Chapter 250, Section 9, the writ of error coram nobis has become obsolete.

Today, in Massachusetts, the writ lies even though the petitioner may have an alternative remedy of appeal, and will be issued as a matter of course in cases of misdemeanors not tried with a felony. In all other cases, whether the accused may sue out a writ of error rests on the sound discretion of a single justice of the Supreme Judicial Court.1 Unlike the other ways available to review a conviction, the writ of error is an original and independent action,2 and it may be brought at any time after judgment.

During the survey year the Supreme Judicial Court reviewed on a writ of error cases where the petitioner claimed that he had been deprived of the right to effective representation by counsel or was denied the opportunity to prepare a defense;3 where the petitioner alleged that he was deprived of a fair trial by improper activity by the prosecuting attorney;4 where the petitioner was convicted under a statute contended to be void for vagueness. 5

It is obvious that under General Laws, Chapter 250, Section 9, errors of fact may be reviewed by a writ of error, but there has been some uncertainty with respect to the kind of fact situations which may be considered on review. In Aronson v. Commonwealth6 the petitioner alleged error in that a principal witness for the Commonwealth in an abortion prosecution contradicted and repudiated her testimony given at the trial, when she appeared, more than a year later, before the Board of Registration in Medicine. The Court expressed its reluctance to review the alleged error on the ground that errors of fact reviewable on a writ of error do not include possible errors which may have occurred in the determination of facts at the


trial. The petitioner had a sufficient opportunity to litigate the facts at the trial on the merits and if such facts were reviewable, "it would always be competent for a party, against whom a judgment is rendered, to sue out a writ of error, and assign for error, that the facts on which the judgment proceeded were not true, and thus obtain a new trial." Although a motion for a new trial would seem to lie when the principal witness later repudiated her testimony, it was not available to the petitioner because more than a year had elapsed before the repudiation was made. The Court thought this should not extend the scope of the writ of error.

Where this new development occurred beyond the one-year period and involved something more than mere cumulative evidence, going to the very core of the Commonwealth's case, it seems unfortunate that a new trial could not be granted. Whether the petitioner used an instrument on the body of the witness with the intent to procure a miscarriage was in issue at the trial in Superior Court, but the contradictory statements by this principal witness before the trial jury and before another agency were not facts litigated there, nor was the failure of the petitioner to place the repudiating testimony in litigation due to his failure to take advantage of the opportunity to do so.

Of course, whether a motion for a new trial for newly discovered evidence will be allowed rests on the discretion of the trial judge; so, too, in the Aronson case should the application for a writ of error be addressed to the discretion of a single justice of the Supreme Judicial Court, since the case was tried subject to the provisions of General Laws, Chapter 278, Sections 33A-33G. The Court in the Aronson case declared that not only was there lacking an abuse of discretion on the part of the single justice but also that as a matter of law the writ could not have issued.

If newly discovered evidence would sustain a motion for a new trial provided the new facts came to light within a year, it may be in the interest of justice to have such new facts considered and weighed by some other available remedy if the year has expired. In light of the Massachusetts statutory system of appellate review of criminal cases, the only possible way to prevent substantial injustice in such a case might be to permit a review by way of a writ of error, buttressed perhaps by the general superintending power given the Supreme Judicial Court by General Laws, Chapter 211, Section 3. It may be policy of doubtful merit to place major restrictions on the efficacy of the writ of error where there is a substantial threat that an innocent person has been convicted.

On the other hand, one of the most important considerations in the interest of the effective administration of the criminal law is the practical policy favoring the ultimate termination of cases. The legislature in the interest of finality of convictions limited the time within which a motion for a new trial could be brought to one year. It may

7 G.L., c. 250, §11.
be objected that there would be a circumvention of this legislative policy if a new trial might be granted by way of a writ of error for the same reasons that would have supported a motion for a new trial. Yet it appears that such grounds as the purposeful misconduct of a district attorney, the denial of a fair trial, and, generally, the denial of due process of law would support a motion for a new trial; and the Massachusetts Court has entertained a writ of error in cases involving these grounds, even though more than a year separated the conviction and the bringing of the writ.

The interest in the finality of convictions should not take precedence over the requirements of procedural due process. On the other hand, if a fair trial has been held and the fact issues have been litigated by the introduction of evidence then available, a relitigation of the fact issues as new important evidence turns up in later years would make the balancing of the policy favoring termination of judgments and the goal of convicting only the guilty more difficult to achieve. The law cannot guarantee scientific accuracy of its judgments. The innocent may have to resort to executive clemency.

**B. Legislation**

§15.7. Appeals. Before 1954, General Laws, Chapter 278, Sections 33A-33G provided for an appeal in a case of murder or manslaughter, or other felony made subject to the statute by a judge of the Superior Court, on a summary of the record, assignment of errors, claim of appeal, and a transcript of the evidence. Chapter 187 of the Acts of 1954 broadens the scope of the type of criminal case which may be appealed under General Laws, Chapter 278, Sections 33A-33G, to all felony cases, and misdemeanors tried with felonies.

Until this new act was passed, the failure to provide for the taking of evidence by a stenographer in some serious criminal cases, while stenographers were present in minor tort actions, was a basis of criticism. Chapter 187 makes it mandatory that a typewritten transcript of the evidence be prepared in all above-mentioned cases where the defendant takes an appeal. It is to be noted, however, that, since all felonies or misdemeanors tried with felonies are now subject to General Laws, Chapter 278, Sections 33A-33G, review by a bill of exceptions is no longer permitted; nor may a writ of error be issued as a matter of course to review such cases, but only after a single justice of the Supreme Judicial Court allows it.

It has been suggested that the mandatory aspect of the new act may

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§15.7. 1 G.L., c. 278, §31.
* Id., c. 250, §11.

http://lawdigitalcommons.bc.edu/asml/vol1954/iss1/21
be unduly burdensome to the Supreme Judicial Court and to the appellant.

§15.8. Interlocutory reports. Until the 1954 session of the legislature, only in civil cases could questions of law be reported before trial to the Supreme Judicial Court. Despite the enormity of the errors, the defendant in a criminal case had to await the expiration of the trial and conviction before he could seek a review of errors by the Supreme Judicial Court. Thus, the defendant might have been tried by a court entirely without jurisdiction, under a defective indictment, or under an unconstitutional statute, with resulting delay and heavy expense for both the accused and the Commonwealth. On the other hand, to give the defendant the right to have the court of review consider alleged errors before trial could readily lead to indiscriminate appeals and delays with the resultant waste if the defendant were not successful.

In the Twenty-eighth Report of the Judicial Council of Massachusetts it was recommended that a judge of the Superior Court be permitted to bring a question of law before the full bench of the Supreme Judicial Court by an interlocutory report in criminal cases. Chapter 528 of the Acts of 1954 permits a report of a question of law before trial in a criminal case "in the interest of justice" if, "in the opinion of the presiding justice, [it] is so important or doubtful as to require the decision of the supreme judicial court."

This act would seem to avoid the objections attending the automatic right to have interlocutory matters reviewed and the requirement that there cannot be a review of such matters until a conviction. It would be an unusual case, involving a doubtful question of law, which would be reported to the Supreme Judicial Court under this act.

§15.9. Business entries. For several years Massachusetts has had a statute permitting, in civil cases, the admission of certain entries in the regular course of business over any objection that they were hearsay, self-serving, or transcribed. The reasons for the allowance of the use of such business entries were cogently stated in the Fifth Report of the Judicial Council of Massachusetts. In its report for 1953 the Judicial Council found no sufficient reason why such business entries should not be admissible in criminal proceedings as well, and said:

In Massachusetts today, because of the uncertainty in the minds of the courts and the bar as to the admissibility of business entries, criminal trials are unduly extended and justice obstructed, de-

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§15.9. ¹ G.L., c. 233, §78.

layed and, perhaps, defeated by the exclusion of modern business records on which everybody outside of a court house relies in conducting the business, public or private, throughout the country. Modern American business could not survive without such reliance. With the enormous increase and variety of circumstances in the modern world, the resulting variety of probative circumstantial evidence should, reasonably, be recognized. Public records are admissible and properly kept private business records should also be admissible if justice is to be administered in the courts instead of being driven out of courts to arbitration. We do not think the present practice of excluding them makes sense.”

The main objection raised to the extension of General Laws, Chapter 233, Section 78 to criminal proceedings has been the right of the accused “to meet the witnesses against him face to face” guaranteed by the Twelfth Article of the Massachusetts Declaration of Rights. Cases involving similar statutes and constitutional provisions have on the whole dismissed such objection in the light of the commonly recognized probity of the type of entries mentioned in General Laws, Chapter 233, Section 78.

As a result of the recommendation of the Judicial Council, the Massachusetts legislature passed Chapter 442 of the Acts of 1954, amending General Laws, Chapter 233, Section 78, to extend the admissibility in evidence of business entries to criminal proceedings and also provided that “when such entry, writing or record is admitted in a criminal proceeding all questions of fact which must be determined by the court as the basis for the admissibility of the evidence involved shall be submitted to the jury, if a jury trial is had for its final determination.”

§15.10. Defective delinquents. After a study of the defective delinquent statutes of Massachusetts by the Special Commission on the Commitment, Care and Treatment of Criminally Insane and Defective Delinquents, it was reported that the following types of persons who have been confined as defective delinquents under General Laws, Chapter 123, Section 113 should not be so confined: (1) those who commit such minor offenses as larceny, vagrancy, and idle and disorderly conduct, which do not represent danger to life or limb; (2) those who have engaged in refractory noncriminal conduct in penal institutions or training schools; (3) those who have presented problems of discipline in institutions for the feeble-minded. The commission recommended legislation to restrict the commitments to the Department of Defective Delinquents to those who, in the opinion of competent psychiatrists, are mentally defective, and who have been found to be guilty of


4 Ibid. and cases cited.
offenses which are dangerous to life and limb. We see no justification for committing any other type of offender to so serious an incarceration. Experience has abundantly demonstrated that many a feeble-minded person who has in fact never committed a crime, has, because of refractory conduct, whether in an institution or in the community, been gotten rid of by way of the Defective Delinquent Department, with grave injury to the future development for good of the individual involved, and manifest injustice to his rights as a human being.1

The Massachusetts legislature adopted this recommendation by passing Chapter 685 of the Acts of 1954 to take the place of Section 113 of Chapter 123 of the General Laws. The new law limits the class of persons who can be committed as defective delinquents to those who have been charged with crimes dangerous to life and limb. A separate paragraph in the section recites the types of crimes which may be considered dangerous to life or limb.

Under the new act only a person who is subject to a prosecution may be committed as a defective delinquent. Thus, one who is incarcerated at a penal or correctional institution would have to commit a crime while he is in custody before he can be committed to the defective delinquent department. Moreover, no longer may a "probation officer, officer of a penal institution or school for the feebleminded, or the youth service board" make application for commitment as provided in the old statute; the district attorney is the only person who may file such application.

§15.11. Sex offenders. Public indignation often leads to the enactment of ill-considered legislation which, when passions subside, often has to be repealed or substantially amended to make it workable or fair. As the result of publicized crimes of violence by "sex fiends," "perverts," or "degenerates," Massachusetts, following the lead of some Midwestern states, enacted in 1947 a so-called "sexual psychopath" statute, General Laws, Chapter 123A. It defined a "psychopathic personality" as "Those persons who by an habitual course of misconduct in sexual matters have evidenced an utter lack of power to control their sexual impulses and who, as a result are likely to attack or otherwise inflict injury, loss, pain or other evil on the objects of their uncontrolled and uncontrollable desires." Statutes of this nature have been criticized by medical and legal opinion, by criminologists, social workers, and administrators.1

Some of the objectionable features of General Laws, Chapter 123A were removed by Chapter 686 of the Acts of 1954. The loose and


controversial phrase, “psychopathic personality,” was dropped and “sex offender” substituted. The “sex offender” is defined in substantially the same manner as the “psychopath” under the 1947 act with the difference that the course of misconduct in sexual matters need not be “habitual”; a “general lack of power to control . . . sex impulses” replaces “an utter lack of power . . .”; “uncontrolled and uncontrollable desires” is now put in the alternative, the word “or” being substituted for “and.”

Chapter 686 goes on to provide that, before any person may be committed as a sex offender, he must first have been convicted of one of certain named sex crimes, unlike the prior law where the “psychopath” did not have to be charged with any crime.

Under the 1947 statute commitments were to be made by the Probate Court, while under the new act the commitment results after a report by psychiatrists certified by the Department of Mental Health to the effect that the one convicted of the named sex crime is a sex offender or that “a pattern of repetitive compulsive or violent behavior exists.” The report is filed in the court where the subject was convicted and is forwarded to the Commissioner of Correction, who transfers the prisoner from the institution to which he has been sentenced to a treatment center in the Department of Mental Health.

If one under sentence in any penal or correctional institution appears to be a sex offender, the head of the institution is to report the matter to a judge of the Superior Court, who may commit the subject to the treatment center after an examination and report of psychiatrists certified by the Department of Mental Health and after a petition for that purpose is prepared by the district attorney. There are detailed provisions for notice, hearing, and representation by counsel.

The earlier statute placed no limit on the duration of confinement of any person, but the new act provides that no person may be committed to the treatment center “for a period in excess of that provided by the sentence imposed upon him for the crime committed.” However, Section 7 of the 1954 act provides for outpatient treatment for the sex offender after termination of his sentence if the court, after a hearing, so orders. These provisions of Chapter 686 may be compared with the defective delinquent statute Chapter 123, Section 113 where no maximum period of commitment is set out.

Persons who are committed under Chapter 686 are entitled to a hearing for examination and discharge once every twelve months, upon filing a written petition. Provision is made for the Department of Mental Health to make examinations every year and to give annual progress reports to the district attorney and the Superior Court.

A person may voluntarily submit to treatment under the new law, and the facilities of the treatment center are made available to victims of sex offenders.

The new act is to become operative when the Commissioner of Mental Health determines that the newly created treatment center in the Department of Mental Health is adequately staffed.