Chapter 11: Constitutional Law

John D. O'Reilly Jr.
CHAPTER 11

Constitutional Law

JOHN D. O'REILLY, JR.

§11.1. Special statutory standing to sue: Equal protection and welfare of the Commonwealth. *Paddock v. Town of Brookline* was a case in which the "procedural" question of standing to litigate the constitutionality of a statute was uniquely intertwined with the "substantive" question of the validity of the statute. The plaintiff declared upon a claim for damages for injuries caused by a defect in a public way. She had failed, however, to give the town the statutory notice of the defect and the injury. A sympathetic legislature enacted a special statute authorizing her to maintain her action, notwithstanding her failure to give notice. The defendant town contended, successfully, that the statute was invalid and of no effect.

The Court, relying principally upon the early case of *Holden v. James*, ruled that the special statute was violative of the state constitution in that it "purports to exempt a named individual from the obligations of a general law while allowing the general law to remain in full force and effect as to all other persons . . . ." Other cases in which special exemptions from, or exceptions to, provisions of general laws were sustained were distinguished on the ground that they involved exercise of the "parental" power of the Commonwealth by making provision for administration of the property of specific infants or other incompetents.

The constitutional prohibition of inequality of treatment is not a legal abstraction to be enforced in a doctrinaire manner. As the Court

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The author wishes to acknowledge the assistance of Dwight W. Miller, of the Board of Editors of the ANNUAL SURVEY, in the preparation of this chapter.

2 G.L., c. 84, §15.
3 Id. §§18, 19.
5 11 Mass. 396 (1814).
6 Mass. Const., Declaration of Rights, Art. X: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws."
8 Davison v. Johonnot, 7 Metc. 388 (1844); Rice v. Parkman, 16 Mass. 326 (1820).
indicated in a footnote,\textsuperscript{10} there is much special legislation, such as pensions for public employees, validations of acts of notaries public, and payments of moral claims against the sovereign, which confers benefits upon individuals who would be entitled to nothing under the general law. In these cases, however, the benefits to the favored individuals do not involve corresponding detriments to others. Thus, it became necessary in the present case to determine whether the special exemption which the legislature had given Paddock imposed upon the defendant town a burden of which it could rightfully complain. The Court resolved this issue in the affirmative, taking the position that the giving of notice is an integral part of the cause of action for injuries resulting from a defect in a public way, so that a particularized exemption from the normal requirement of notice would subject the town to a liability not imposed upon it by the general law.

The standing of governmental entities to challenge the validity of legislation is a point on which subtle distinctions are sometimes made. On the one hand, the United States has been heard to litigate the question of whether an act of Congress violates the constitutional separation of powers,\textsuperscript{11} and a state has been heard to contest the constitutionality of part of the enabling act which admitted it to the Union.\textsuperscript{12} On the other hand, it seems definitely settled that a municipal corporation will not be heard to contend that a state statute is in conflict with the Constitution of the United States.\textsuperscript{13} It "has no privileges or immunities which it may invoke in opposition to the will of its creator."\textsuperscript{14} However, the Supreme Court of the United States, sitting in review of a decision of a lower federal court, will hear a municipality in challenge to a state statute on the ground of conflict with the state constitution.\textsuperscript{15} In the Paddock case the defendant town made no claim based upon the Federal Constitution.

The Massachusetts case law has rested on distinctions based on the conventional, but frequently baffling, difference between "proprietary" and "sovereign" functions of a municipality. Thus, while a political subdivision of the state may not contest the validity of a statute transferring its assets and functions to another public agency, or even

\textsuperscript{10} Id. at 508, 197 N.E.2d at 326.
\textsuperscript{11} Myers v. United States, 272 U.S. 52, 47 Sup. Ct. 21, 71 L. Ed. 160 (1926).
\textsuperscript{14} Williams v. Mayor of Baltimore, 289 U.S. 36, 40, 53 Sup. Ct. 431, 434, 77 L. Ed. 1015, 1018 (1933).
\textsuperscript{15} Ibid.
of a statute abolishing it, it does have standing to challenge a statute which would transfer, without compensation, its cemetery property to a private corporation. This is because the status of the city as to the cemetery is that of "proprietor."

In Paddock the proprietor-sovereign distinction was not used. Rather the Court pointed to the constitutional provision which authorizes the legislature "to make . . . all manner of wholesome and reasonable orders, laws, statutes, and ordinances . . . as they shall judge to be for the good and welfare of this commonwealth . . . ." The Court read the latter clause as a limitation of the legislative power, at least as it is used to regulate municipalities. Since the Court was unable to perceive any public good accomplished by the special statute in favor of the plaintiff, it concluded that the statute was invalid.

It is difficult to perceive how interpretation of a constitutional provision as a limitation upon legislative power establishes the standing of the defendant to raise the point in a litigated case. It is even more difficult to picture the future impact upon the scope of judicial review of legislation of the concept that the validity of legislation may be determined by a court's judgment as to whether it is for the good and welfare of the Commonwealth.

§11.2. Arrest: Search and seizure: Warrant. "In the current swift pace of constitutional change," it is becoming increasingly urgent that guidelines be laid down for police and other officials to follow in the process of law enforcement, particularly in the area of the criminal law. The contour of one such line was etched in Commonwealth v. Lehan.

At about 11 o'clock one evening two police officers in a patrol car saw Lehan walking "rapidly," carrying two large boxes. His coat pockets "bulged." One of the officers recognized him as a person whom he had been assigned to watch for three years earlier in connection with housebreaks in the neighborhood. The officers asked him what he was carrying, and he replied that it was "stuff" belonging to his wife. Asked where he was going with it, he replied that he had had a disagreement with his wife, had left her, and was going to a room. He was then asked why he did not take shaving gear and other effects of his own, rather than his wife's goods. He gave no

10 Weymouth & Braintree Fire Dist. v. County Commissioners of Norfolk, 108 Mass. 142 (1871).
12 See supra note 18, at 264, for a dissenting view of Justice Kirk, the author of the Paddock opinion, in dissent in Molesworth v. Secretary of the Commonwealth, 1964 Mass. Adv. Sh. 1133; 200 N.E.2d 264, briefly noted in infra. There the dissenters held that the recitals in an "emergency" preamble to a statute present no justiciable question.

1 Mr. Justice Harlan, in Pickelsimer v. Wainwright, 375 U.S. 2, 4, 84 Sup. Ct. 80, 82, 11 L. Ed. 2d 41, 43 (1963) (dissenting opinion).
satisfactory answer, and the officers opened the packages and found that they contained a hair dryer and similar articles. They then asked Lehan to accompany them to his wife's house, and he acquiesced. (One officer testified that if he had not gone with them they would have placed him under arrest.) The wife told one of the officers that there had been no disagreement between her husband and herself, and that the contents of the boxes were not her property. The officers then formally placed Lehan "under arrest" and took him to the police station. About 12:30 A.M. word came to the police station of a burglary in which the articles Lehan had been carrying had been stolen. Lehan's pockets were emptied (the record being unclear as to whether this took place when the officers first spoke to him, or after he was brought to the police station) and were found to have contained jewelry and cosmetics stolen during the burglary, along with a file and a screw driver. The victim of the burglary notified the police that a sewing machine had also been stolen. Lehan volunteered to lead the police to his back yard, where the machine was found hidden under a porch.

In reviewing Lehan's conviction for breaking and entering and for possession of burglarious implements, the Court for the first time applied the concept of a detention by the police which amounts to less than an arrest. Clearly, when the officers first saw Lehan they had no probable cause to believe either that a felony had been committed or that Lehan had committed one. At most, they had reason to suspect him of "unlawful design." In the circumstances, ruled the Court, the officers had the right, under the statute, to stop the suspect and at least make "a brief threshold inquiry." Such inquiry may be pursued to an undetermined extent if the responses given are unsatisfactory. The detention and questioning do not amount to a technical arrest, but are classified as a permissible part of official investigation into actual or possible crime. The Court treated the statute, at least to the extent that it permits "threshold inquiry," as a restatement of the powers of the New England night watch, which are again restated by part of the Uniform Arrest Act.

8 G.L., c. 41, §98: "During the night time . . . [police officers] may examine all persons abroad whom they have reason to suspect of unlawful design, and may demand of them their business abroad and whither they are going . . . . Persons so suspected who do not give a satisfactory account of themselves . . . . may be arrested by the police, and may thereafter be safely kept by imprisonment or otherwise unless released in the manner provided by law, and taken before a district court to be examined and prosecuted."

4 Ibid.


6 Ibid.

7 Section 2 of this Act provides: "(1) a peace officer may stop any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime, and may demand of him his name, address, business abroad and whither he is going. (2) Any person so questioned who fails to identify himself or explain his actions to the satisfaction of the officer may be detained and further questioned and investigated. (3) The total period of detention provided

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later, the New York Court of Appeals, in dealing with a similar factual situation, asserted that detention and inquiry on suspicion not amounting to probable cause are practices sanctioned by the common law. Under this theory the Court concluded that the defendant's motion to suppress the packages and their contents as evidence need not be allowed on the basis of their having been seized incident to an unlawful arrest. There was nothing unlawful about the "threshold inquiry." But, on the other hand, there was no arrest, so that the officers' seizure and search of the packages could not be justified as having been incident to a lawful arrest. Thus, if the seizure was without the consent of the defendant, suppression should have been ordered.

The case leaves many questions unanswered. What of the right of the officers to "frisk" the suspect to determine if he is carrying a concealed weapon which might be used against the officers? (The Court held that the emptying of Lehan's pockets, if it took place in the street, would be an unreasonable seizure. However, it was held that after talking with Lehan's wife the officers had probable cause, so that the arrest of Lehan was lawful, and the emptying of the pockets, if it took place in the police station, could be justified as a seizure incident to a lawful arrest.) What if Lehan had refused to accompany the officers to his wife's house? What if Lehan had declined to respond to inquiries, or had given answers which the officers regarded as unsatisfactory? The statute recites that in case the person involved fails to give a satisfactory account, he may be arrested, imprisoned, and prosecuted. Does this amount to making a substantive crime of refusing to respond, or responding unsatisfactorily, to threshold inquiries? Such an interpretation would raise extremely serious questions of constitutionality. The Uniform Arrest Act places a two-hour limitation on the police right of threshold inquiry. Whether some comparable limitation will be supplied by judicial gloss remains to be seen.

On the rest of the Lehan case, the rulings of the Court fell within a conventional pattern. After their conversation with the wife (and independently of any illegality involved in the inspection of the packages) the police had probable cause to support an arrest for larceny. Any searches and seizures incident to that arrest were lawful, and it was for the trier of fact to determine whether the emptying of Lehan's pockets was so incident. Likewise, it was for the trier of fact to determine whether the disclosure of the hiding place of the sewing machine was voluntary or the result of unlawful compulsion.

for by this section shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released, or be arrested and charged with a crime."

8 People v. Rivera, 14 N.Y.2d 441, 201 N.E.2d 32 (1964).
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Other decisions handed down during the 1964 Survey year seem to make it clear that the Court is disposed to adhere, generally, to the orthodox law of arrest. Thus, in Commonwealth v. Mekalian\(^\text{10}\) a police officer saw the defendant, at a dog-racing track, receiving a bet from another officer, making a note on a racing sheet, and later, paying off on the bet to the other officer. The defendant was thereupon arrested by the first officer and searched. His pockets contained a sum of money, which he admitted was the proceeds of his betting activities at the track. In a prosecution for illegal betting\(^\text{11}\) the Court ruled that the evidence should have been suppressed, because it was obtained by a search incident to an unlawful arrest. An officer's right to arrest without warrant for misdemeanor is still limited, as it traditionally has been, to cases of misdemeanor which involve breach of the peace. The offense with which the defendant was charged is not one which involves this breach. In Commonwealth v. McDermott\(^\text{12}\) an arrest for the same offense and seizure of the betting slips were sustained precisely because there was a warrant for the arrest and seizure.

In the McDermott case, however, the Court did not come to grips with the question of the sufficiency of the description in the warrant of the person or persons to be arrested. The warrant,\(^\text{13}\) after describing the premises, authorized the arrest of "all persons who are there found participating in any form of gaming, and all persons present, whether so participating or not, if any . . . apparatus or materials of any form of gaming are found in said place." The ruling of the Court appears to be that when the police saw McDermott registering a bet and in possession of the slip of paper used for that purpose, they had sufficiently identified him as one of the persons referred to in the warrant.

The opinion does not discuss specifically whether the warrant, thus applied, is in compliance with the constitutional requirement of "a special designation of the persons or objects of search, arrest or seizure."\(^\text{14}\) It is clear that a blank or "John Doe" warrant of arrest is illegal.\(^\text{15}\) It is likely that if the true name of a person is known, it

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\(^{10}\) 346 Mass. 496, 194 N.E.2d 390 (1963).

\(^{11}\) G.L., c. 271, §17.


\(^{13}\) The warrant was issued under authority of G.L., c. 271, §23.

\(^{14}\) Mass. Const., Declaration of Rights, Art. XIV. In 1963 Ann. Surv. Mass. Law §10.2, at 111-112, the present writer regarded Commonwealth v. Berwick, 346 Mass. 5, 189 N.E.2d 846 (1963), as a case in which the Court sustained an arrest for violation of the registering-bets statute on the basis of probable cause and treated an arrest warrant which the officers had obtained as surplusage. In the light of Commonwealth v. Mekalian, supra note 10, this was not correct. The language of the Court in that case must be taken to mean that the police officer's recognition of a paper protruding from Berwick's pocket as a record of bets sufficiently identified Berwick as one of the class of persons described in the warrant as persons to be arrested. The opinion, however, does not indicate that the Court had considered the constitutional sufficiency of the warrant's description of persons to be arrested.

\(^{15}\) Commonwealth v. Crotty, 10 Allen 405 (Mass. 1865).
must be inserted in the warrant. It is equally clear that if the name of the person is not known, the warrant may contain an adequate description of him. What constitutes an adequate description has not been spelled out in the reported cases.

It should be noted in this connection that the 1964 Legislature rewrote the general warrant statute. Instead of sixteen classifications of things for which search warrants may be issued, the new statute specifies four, viz., the fruits of a crime, instrumentalities of committing a crime, property the possession of which is unlawful, or which is possessed for an unlawful purpose, and dead bodies of human beings. The amendment also spells out in greater detail than formerly the requirement that warrants be supported by sufficient affidavits.

§11.3. Right to counsel: Harmless error. In 1963 the Supreme Court of the United States handed down Gideon v. Wainwright, holding that an indigent defendant in a state criminal case is entitled to court-appointed counsel, regardless of the limitations of this right announced earlier in cases such as Betts v. Brady. This decision set off a chain reaction of detailed examination of the scope of the rights of a suspect or an accused to the assistance of counsel and to other aids in his defense.

On December 21, 1962, the Supreme Judicial Court anticipated Gideon by promulgating Rule 10 of its General Rules, which directed the appointment of counsel in the Superior Court for defendants in noncapital felony cases (such counsel in capital cases had long been provided for by statute) unless the accused waived the right after having been advised of it by the court. The court was also authorized to extend similar treatment to defendants accused of other crimes if in the judgment of the court the gravity of the charge is such as to require representation by counsel. After Gideon the Court amended Rule 10 on June 29, 1964. Under the amendment the right to counsel extends to every criminal case in which a sentence of imprisonment could be imposed. Thus its application is no longer limited to cases pending in the Superior Court. The right to assigned counsel is limited to cases in which the defendant is unable to obtain counsel, as determined by the judge after interrogation of the defendant.

Of course, the assistance of counsel in pretrial investigation and preparation, and in the conduct of the trial, is extremely important.

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17 Commonwealth v. Crotty, supra note 15.

3 G.L., c. 277, §§47, 55, 56.
4 See, e.g., Anthony Lewis, Gideon's Trumpet (1964), in which there is a dramatic comparison of the first trial of the petitioner in Gideon v. Wainwright, supra note 1, at which he appeared pro se and his subsequent trial, in which he was represented by counsel and was acquitted.
It is, however, probably not an overstatement to say that most criminal cases in which conviction results are lost in the police station, before the accused is brought into court. Law enforcement officers, skilled in the art of interrogation, frequently obtain from the lips of the accused statements which are sufficient to convict, although there is not enough other evidence to support a finding of guilty beyond a reasonable doubt. Certainly, not all such persons are aware of their right to remain silent, or of the circumstances in which silence may give rise to an adverse inference.

Legislation designed to minimize the disadvantage of an accused is found in the provision that an arrested person shall be entitled to use the telephone to communicate with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. The statute recites that the person "shall be informed forthwith upon his arrival at such station or place of detention, of his right to so use the telephone." In Commonwealth v. Bouchard it appeared that there had been delay, after arrest and arrival at the police station, in informing the accused of his right of access to the telephone, and at the trial the defendant claimed that for this reason he was entitled to a finding of "not guilty." The record, however, did not indicate that the delay had in any way prejudiced the accused in the making of his defense. The Court overruled exceptions to the trial court's rejection of the defendant's claim for this reason. It went on, however, to indicate that if the delay had been prejudicial, as if, for example, during the period of delay the defendant had confessed, or made admissions or other damaging statements, the appropriate sanction would be exclusion of such statements from evidence, in line with the pattern developed for comparable situations by the Supreme Court of the United States in such cases as McNabb v. United States.

This "harmless error" approach of the Court was suggested by a slightly earlier decision in Commonwealth v. O'Leary, which involved, possibly, denial of a constitutional right. The defendant there, prior to the 1964 amendment of Rule 10, was complained of in a district court on serious charges of violation of the motor vehicle laws. At a probable cause hearing he was not represented by counsel, and the court did not advise him of his right to counsel, nor inquire as to his indigence. The defendant was bound over to the grand jury, which indicted. In the Superior Court the defendant filed a plea in abatement, based upon the failure of the district judge to provide counsel. Upon report, the Court ruled that the plea should be overruled. The opinion pointed out that the defendant was not prejudiced in any way by the nonpresence of counsel and was completely free in the Superior Court to raise any defense which

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would have been available to him had the district court episode not occurred.

On the surface, the Supreme Judicial Court's approach in these cases, particularly in *O'Leary*, might seem inconsistent with doctrine laid down by the Supreme Court of the United States both before and after *Gideon*. *Hamilton v. Alabama* and *White v. Maryland* were both cases in which defendants had been without counsel at their preliminary hearings. Convictions were set aside in both cases, and in each case the Court recited, "We do not stop to determine whether prejudice resulted." In *Hamilton*, however, it appeared that under Alabama practice certain special pleas could be entered as of right only at the preliminary hearing, and although the defendant had made a plea of not guilty, there was no assurance that he had made an intelligent waiver of his right to make other pleas. The Court simply refused to inquire whether, if he had had the assistance of counsel at the preliminary hearing, he would have pleaded differently. In *White*, the defendant pleaded guilty at the preliminary hearing, when he had no counsel. This plea was offered in evidence against him at the trial, after he had pleaded not guilty, and not guilty by reason of insanity. Thus, in each case the defendant, without having had the benefit of counsel's advice, entered a plea which could have prejudiced him. In *O'Leary*, on the other hand, the defendant stood mute at the probable cause hearing, and this could in no way have been prejudicial to his defense.

It would be dangerous to apply the "harmless error" doctrine in a doctrinaire way. Thus, in *Commonwealth v. Harris*, where the secrecy of the grand jury was invaded by the presence before it of unauthorized persons, the indictment was quashed, even without a showing of any specific prejudice suffered by the defendant named in the indictment. While the Court there did not so spell it out, it could have been said that it was not made to appear, as it was in *Bouchard* and *O'Leary*, that prejudice to the defendant did not result, or could not have resulted.

The right of an accused to have the assistance of counsel prior to trial was involved in *Commonwealth v. McCarthy*. A man was shot to death, and McCarthy was indicted for murder. He fled the jurisdiction, and, while his whereabouts were unknown, his mother retained an attorney to represent him. More than six months later McCarthy was apprehended in Illinois, where he was interviewed by two Boston police officers. One of the officers knew that McCarthy had a Boston attorney. During the interrogation McCarthy made some damaging statements which were used against him at his trial, in which he was found guilty of murder in the second degree. The

11 231 Mass. 584, 121 N.E. 409 (1919).
Supreme Judicial Court, relying upon *Massiah v. United States*, reversed, holding that police interrogation of an accused after his indictment, in the absence of counsel, is forbidden. Although *Massiah* was based specifically upon the Sixth Amendment, the Court felt that, reading it in the light of *Gideon v. Wainwright*, it announced a "constitutional principle" binding upon state governments, as well as upon the Federal Government. At some time during the police interrogation, McCarthy asked for counsel, but it was not made clear whether this was before or after he had made the damaging statements. In view of the breadth of the decision, it does not appear to make any difference when, or even whether, he asked for an attorney. Nor does it appear to be a significant fact that one of the interrogating officers was aware that counsel had been retained for the accused.

Whether these factors, or any of them, would be significant in a different context remains to be decided. *Escobedo v. Illinois*, decided a few weeks after *Massiah*, involved pre-indictment questioning of a suspect at the police station. He had retained counsel, and he stated that he would like to have advice from his lawyer. The attorney went to the police station and asked to see his client. Both requests were refused by the police; the accused finally made damaging statements which were used against him at his trial, and he was convicted. The Supreme Court reversed the conviction, but the scope of the principle upon which it based its decision is not clear. Earlier decisions had held that the right to have counsel in the police station (perhaps like the pre-*Gideon* right to have assigned counsel at a trial) is not absolute, but varies according to the circumstances of the particular case. The Court did not flatly overrule this doctrine. It suggested, at one point, a distinction between an investigation which is part of "a general inquiry into an unsolved crime" and one which "has begun to focus on a particular suspect." In the latter event, "when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession — our adversary system begins to operate, and, under the circumstances here, the accused must be permitted to consult with his lawyer." On the other hand, it seems to be significant that the police failed to warn the accused of his right to remain silent, and there is a rather equivocal statement that, to the extent that the earlier cases "may be inconsistent

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10 Id. at 492, 84 Sup. Ct. at 1766, 12 L. Ed. 2d at 987.
20 Id. at 485, 84 Sup. Ct. at 1762, 1765, 12 L. Ed. 2d at 983, 986.
with the principles announced today, they are not to be regarded as controlling.21 Thus, whether Escobedo announces a rule for a particular fact situation or, like Gideon, establishes a broad principle of universal post-arrest right to the assistance of counsel, and if the latter, what are the specifics of the principle, are questions which can be expected to tax the talents of judges and advocates in the immediate future.

One other decision in this general area during the 1964 Survey year calls for brief mention. LaMorre v. Superintendent of Bridgewater State Hospital22 was a habeas corpus proceeding to obtain the release of one who had been committed under General Laws, Chapter 123A, as a sexually dangerous person. The proceeding was based, in part, on the fact that at some preliminary stages of the commitment proceedings LaMorre had not been represented by counsel. The relief sought was refused. The Supreme Judicial Court pointed out that this statute is not penal and stated that a person proceeded against under it is not necessarily invested with the same rights to be represented by counsel as is a defendant in a criminal case. This may be so, although almost certainly such a person is entitled to Fourteenth Amendment due process.23 Actually, it was not necessary to probe into the distinction, if any, in the right to counsel in the different types of proceeding, since there was no actual prejudice to the defendant, and he was, in fact, represented by counsel at the crucial point in the proceedings, the hearing to determine whether he was a sexually dangerous person.

§11.4. Due process and equal protection: Pressure for guilty pleas.

Of all the criminal prosecutions which result in conviction, the overwhelming majority are cases in which the defendants have pleaded guilty.1 Some of these guilty pleas, particularly in the instances of lesser offenses, are the products of a "pay up and get it done with" mentality. Some are the consequence of bargaining between prosecution and defense counsel for reduction of the gravity of the charges. Whatever the reasons for such pleas, it is statistically clear that the efficient operation of the existing machinery for the administration of criminal justice requires continuance of roughly the present ratio of uncontested to contested cases. Courts and prose-

21 Id. at 492, 84 Sup. Ct. at 1766, 12 L. Ed. 2d at 987.
23 Defective delinquents and mental defectives proceeded against under G.L., c. 123, §113 (proceedings under this statute, like those under G.L., c. 123A, being remedial, not penal, Dubois, Petitioner, 331 Mass. 575, 126 N.E.2d 368 (1954)), are entitled to the due process rights of notice and opportunity to be heard. O'Leary, Petitioner, 325 Mass. 179, 89 N.E.2d 769 (1950).

§11.4. 1 See Statistical Report of the Commissioner of Correction for the Year Ending December 31, 1961, Pub. Doc. No. 115, 58, 82. In the Superior Court there were 1086 convictions after pleas of not guilty; 6514 convictions after pleas of guilty. In the district courts there were 28,236 convictions after pleas of not guilty; 195,478 convictions after pleas of guilty.
cuting offices would be swamped if an appreciable additional number of cases were to go to trial.

While there are substantial social pressures to preserve the status quo in this respect, there is a substantial individual interest in preserving the right of an accused to insist that, before he is subjected to penal sanctions, his guilt be proved in an adversary proceeding. Reconciliation of these sometimes competing interests often requires the establishment of a delicate balance. Three cases involving this problem came up during the 1964 Survey year.

Commonwealth v. Marder\(^2\) involved the legislation\(^4\) by which traffic rules, such as parking regulations, are sanctioned. This provides, in substance, that a violator may stand trial in a criminal court and, if found guilty, be subjected to a fine of not more than twenty-five dollars. He may, at his option, informally "confess" and pay a fine computed according to an administratively established schedule, but not in excess of fifteen dollars. The optional procedure is declared not to be criminal. Marder elected to stand trial on a criminal complaint for illegal parking, was found guilty, and was fined twenty-five dollars. He contended that the statutory pattern denied him due process and equal protection, in that it tended to coerce him into waiver of his right to trial by holding out the inducements of a potentially smaller penalty and freedom from taint of criminality. The Court rejected the contentions, holding that the relatively minor seriousness of the offenses and of the penalties justified the invention and utilization of this device to relieve the burdens of the criminal courts and to facilitate the effective administration of the traffic laws. The Court did not pause to consider how broad is the category of petty offenses, for which the individual interest in accessibility of adversary hearing may be subordinated to the general interest in administrative convenience. Upon appeal to the Supreme Court of the United States, three justices, one less than the number required to note probable jurisdiction, voted to take the case.

Argued the same day as Marder, and decided the same day as that case, was Letters v. Commonwealth.\(^4\) There, several persons were on trial under indictments for rape, being accessory before the fact of rape, conspiracy to rape, and robbery. After a prosecution witness testified that he had seen one of the defendants rape the victim and take her pocketbook, the judge called counsel into his lobby. There, according to the accounts given by the attorneys to their clients and the latters' families, the judge stated that, as he had indicated at earlier conferences, if the defendants remained on trial and made it necessary for the victim to testify, he would impose maximum sentences, to be served consecutively, in the event of


\(^4\) G.L., c. 90, §§20, 20A.

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verdicts of guilty. The defendants thereupon changed their pleas to guilty and were sentenced. Upon writs of error, the judgments were reversed. The Supreme Judicial Court felt that the trial judge's threats of severity of punishment in the event of conviction, even though motivated by the humanitarian desire to protect the innocent victim, constituted a forbidden coercion of the defendants to waive their right to require the prosecution to prove the cases against them. The line between the licit and the illicit in this respect can be very fine. An unidentified minority of the Court dissented, in part, for unarticulated reasons. This minority, while agreeing as to one of the defendants, disagreed as to another. The one defendant was reluctant to change his plea because of a belief that his attempted abandonment of the joint venture (successive rapes by different defendants were involved) constituted matter in mitigation. The other defendant made no such claim and stated to his attorney, "I did do it." It is difficult to see how these facts make a significant difference in the coercive impact of the trial judge's expressed attitude. It would have made for clarification of doctrine had the minority of the Court overcome the traditional disinclination of members of the Court to write dissenting opinions.

The third case was Keenan v. Commonwealth. Keenan, an illiterate, was indicted for murder and assault with intent to murder. There were several conferences between his counsel and the prosecutor. Keenan's mother and a family friend were present at some of these. There was a consensus that the only possible defense was insanity (based upon Keenan's state of intoxication at the time of the killing). The prosecutor pointed out, and defense counsel apparently agreed, that if such a plea were successful, the probable disposition would be commitment to Bridgewater State Hospital, which might cause psychiatric damage to Keenan. The prosecutor said that if Keenan would plead guilty to murder in the second degree and would learn to read and write while in prison and otherwise behave himself, the prosecutor would "reopen the case" in five to seven years with a view to having Keenan released. (The Court regarded this as an undertaking, so understood by Keenan's attorney, to make recommendations to the parole board or to the chief executive.) On the joint recommendation of his counsel, his mother, and the family friend, Keenan pleaded guilty and was sentenced to life imprisonment. Both the prosecutor and the defense counsel subsequently died. After spending eight years in prison, and without any apparent prospect of official intervention for his release, Keenan petitioned for writ of error, attacking the validity of the judgment against him. The Court concluded that, in the circumstances, the conduct of the prosecutor could not be classified as improper coercion. This was simply a case of defense counsel's negotiating for as good a bargain as he could strike with the prosecutor. The bargain, having been made in good faith on both sides, could not, because of supervening

events, be given the effect of vitiating Keenan's waiver of his right to trial. The Court indicated that the proper course would be to apply to the successor prosecutor and to other public authorities and ask them to give consideration to the undertaking of the original prosecutor. 6

§11.5. Police power regulation: Constitutional limits. Whether action of the state or of one of its municipal subdivisions went beyond the limits of the police power was an issue tendered in several of the cases decided during the 1964 Survey year.

Anton's of Reading, Inc. v. Town of Reading1 involved a town by-law which regulated the operation of laundromats. Among other restrictions was a prohibition of operating between the hours of midnight and 6 A.M. unless an attendant was present. This was asserted to be an improper limitation upon the right to engage in a lawful calling, but the Supreme Judicial Court did not agree. It held that the authorities could properly form the judgment that the regulation would have the effect of a deterrent of crime. They could have reasoned that an open laundromat is a likely situs of a crime, particularly late at night, and that the presence of an attendant would tend to reduce the likelihood of crime being committed. The prohibition was thus an advancement of the public interest in the abatement of criminal activity.

A similar approach led to the sustaining of the regulation involved in Chief of the Fire Department of Boston v. Sutherland Apartments, Inc.2 That regulation provided that when a building has an inner court not protected by a roof, it must have a substantial barrier or parapet at least thirty inches high. This was held to be a proper fire-prevention measure. The argument was that a parapet would protect a fireman from a fall into the inner court, a fireman thus protected would be less likely to be injured from such a fall, a fireman less likely to be injured is more likely to maintain his efficiency, and the more likely the maintenance of the efficiency of the fireman, the less likely the spread of conflagration.

These cases are applications of the health-safety-morals thesis, as classically stated in Commonwealth v. Alger: 3 when conduct, or use of property, has potential physical impact inimical to the public interest, public authority may invoke the principle of sic utere tuo ut alienum non laedas to prohibit the activity or the use. When the impact is primarily economic, however, there has sometimes been judicial reluctance to recognize legislative competence to control.4 There were at least traces of such reluctance in two cases handed down during the 1964 Survey year.

6 Inquiry, nearly a year after the date of the decision, revealed that Keenan was still in custody.

3 7 Cush. 58 (Mass. 1851).

http://lawdigitalcommons.bc.edu/asml/vol1964/iss1/14
The statutory prohibition of delivery of food products that are in imitation or resemblance of cream was involved in *Aeration Processes, Inc. v. Commissioner of Public Health.* Instantblend is a vegetable product that superficially resembles cream and that, when poured into coffee, cannot readily be distinguished by taste from cream. The manufacturer supplied it, in bulk, to public and employer-maintained eating places, where it was served to purchasers of coffee as cream is customarily served. Although the product is a nutritious one, the Court had no difficulty in ruling, as a matter of statutory construction, that it was a forbidden imitation of cream. The Court likewise found no merit in the manufacturer's contention that the prohibition of distribution of its product was in violation of the Fourteenth Amendment due process clause. The opinion simply recited the familiar proposition that the police power extends to the prevention of consumer confusion. A footnote, however, intimates a possible reservation, to the effect that if there is available an alternative means of avoiding consumer confusion (e.g., adequate labelling of the container in which the product is sold), the legislature might be required to elect the less drastic means of regulation, rather than impose a flat prohibition. This was pure dictum in the case, since the opinion pointed out that it was clear on the record that labelling would be inadequate to eliminate consumer confusion under the method of distribution being considered in the case.

Whether alternative and less burdensome methods of attaining a legislative end are available, and whether their availability constitutes a limitation upon the regulatory power of government, are among the most difficult problems of constitutional law. There is substantial authority to the effect that if the legislature can protect the public interest by means less restrictive upon individual freedom, it must elect that alternative. There is, however, equally substantial authority to the effect that it is for the legislature, not the courts, to make an evaluation of the efficacy of the means selected to accomplish the end. It has been suggested that the "reasonable

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5 G.L., c. 94, §187. This section characterizes as misbranded, food that is in imitation of any other food, unless it is labelled as imitation. But it does not permit even labelled imitations of foods for which legal standards have been set. Id. §12, establishes milk fat content standards for cream. Id. §§189A, 191, provide civil and criminal sanctions for delivery of misbranded foods.
7 Id. at 554, 194 N.E.2d at 843.
8 Id. at 554 n.8, 194 N.E.2d at 843 n.8.
alternative" approach should be limited to cases involving the "preferred freedoms." On the other hand, the very concept of the preferred freedoms has been strenuously doubted. Perhaps the significance of an alternative means boils down to the use of a judicial "intuition of experience."

As noted in an earlier section, a more restrictive view of the scope of legislative power was taken in Paddock v. Brookline. There the Court was unable to perceive a public purpose in the waiver, for the benefit of a particular litigant, of the statutory requirement of giving notice of injury from a defect in a public way as a prerequisite to maintaining such action. It therefore felt no necessity to evaluate the exposure of the defendant town to liability as a means to attain a public purpose. Had the Court regarded the statutory waiver as an ad hoc removal of a residual link to the anachronistic doctrine of municipal nonliability in tort, it might well have been able to find a public purpose. Whether, in such case, it would have found the exposure of the town to potential economic loss disproportionate to the public interest sought to be advanced must remain a matter of speculation.

One definite limitation upon the power of government is that when property of an individual is appropriated to public uses, he must be paid reasonable compensation. This is an appealing generalization, but its concrete meaning is impossible to define with precision. Every restriction upon the use of property is to some extent an appropriation, but it is clear that there are innumerable restrictions imposed in the public interest for which compensation need not be made. It has been held, for example, that a zoning law establishing one acre as the minimum size of a building lot in a residential district was not, in the circumstances, a compensable appropriation of the owner's property in the constitutional sense. Yet the Court, while recognizing this, held in Aronson v. Town of Sharon that prescription of minimum lot size of 100,000 square feet, with minimum width of 200 feet, could not be enforced without exercise of the power of eminent domain. Quoting Mr. Justice

14 Mr. Justice Holmes once described the judgments of a board of assessors on evidence as to property values as follows: "They express an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions,—impressions which may lie beneath consciousness without losing their worth." Chicago, B. & Q.R.R. v. Babcock, 204 U.S. 585, 598, 27 Sup. Ct. 326, 329, 51 L. Ed. 636, 640 (1907).
17 Mass. Const., Declaration of Rights, Art. X.
Holmes, the Court stated that the difference between regulation and taking is a matter of degree, and that the zoning law here involved had gone over the line of demarcation. This, of course, is a situation in which a court, although always with deference to legislative judgment, must make a value judgment of its own. Any other approach would remove the “just compensation for property taken” provisions of constitutions out of the realm of judicial review.

§11.6. Miscellaneous decisions. The docket of the Supreme Judicial Court during the 1964 Survey year included cases that seemed to present an unusually large number of constitutional issues. The cases mentioned below do not appear to require extended discussion at this time, but they are significant enough to warrant notation.

Issues of federalism came up in three cases. In Edgar H. Wood Associates, Inc. v. Skene the issue was whether two recent decisions of the Supreme Court of the United States had established that federal patent and copyright laws so pre-empt the field that state law is not competent to forbid the copying by a competitor of an architect's noncopyrighted plans for the construction of a building. The Massachusetts Court held that the field of common law copyright, i.e., protection of unpublished material, is not pre-empted and may be dealt with by state law. The Court then went on to discuss what is meant by publicaton of building plans and concluded that such plans are not placed in the public domain by filing them in the local building department either for purposes of obtaining a building permit, or at the time when a building is constructed from them.

The foreign corporation excise is applicable only to those who “do business” in the Commonwealth. The issue in Delph Brokerage Co. v. State Tax Commission was whether an Indiana corporation was in this category. The company's main office was in Indianapolis, but it owned furniture and rented office space in Boston, and it employed two salesmen and a secretary-receptionist there. Its sole activities in Massachusetts were solicitations of offers to buy, from out-of-state sellers, goods that were located in other states. When offers were obtained they were sent to Indianapolis, and the main office submitted them to potential sellers, who could accept or reject them. When offers were accepted the goods were shipped directly by the seller to the buyer, and the buyer paid the seller directly. The

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3 G.L., c. 63, §39.

buyers sent brokerage commissions direct to the Indianapolis office. (Any commissions sent to the Boston office were forwarded to Indianapolis.) The Court held, reversing the Appellate Tax Board, that these activities were purely interstate commerce and so were not subject to the tax.

Another Commerce Clause case was *Hynson, Wescott & Dunning, Inc. v. Commissioner of Public Health*. This involved the statute that imposes upon persons outside the Commonwealth who ship "harmful drugs" into the Commonwealth an annual license tax of twenty-five dollars for each place of business outside the Commonwealth belonging to such person. A companion statute imposes an annual license tax on Massachusetts manufacturers of "harmful drugs," independent of the number of places of business. Since the out-of-state operator with more than one place of business was subject to a higher license tax than his Massachusetts competitor with the same or a greater number of places of business, the statute was held to discriminate against him simply because he is out-of-state. Such treatment is forbidden by the Commerce Clause. By deciding the case on this ground the Court avoided the necessity of examining some more basic problems with respect to the license tax. In doing so, it decided a novel point with respect to the plaintiff's standing to raise the question. The plaintiff actually had only one place of business, but, said the Court, if its claim were not recognized it would have to pay the tax, and this would place it at a disadvantage in respect to other out-of-state competitors who have more than one place of business and thus have the right to raise the question.

What constitutes "public purpose" in connection with appropriations of public funds and with exercise of the power of eminent domain is a question that came up in two contexts.

There was a legislative proposal to subsidize the election campaigns of the various political parties by appropriating a sum of money to be distributed to the state committees of the parties in described proportions. The House requested an advisory opinion as to whether the proposal would be repugnant to the Sixty-second Amendment of the State Constitution, which forbids the pledge of the credit of the Commonwealth to any private individual or association. The Justices advised that the proposal would not be subject to the objection named, because it was a proposal for an appropriation, not a pledge of credit. The opinion went on, however, to point out that there might be a question as to the public purpose of the proposal. Another request for an advisory opinion was sent over,
this time inquiring specifically whether the proposed appropriation would be for a public purpose. The reply was in the negative.\footnote{10} Relying mainly upon an earlier advisory opinion,\footnote{11} the Justices ruled that disbursement of public funds through persons who are not public officers is impermissible under the “public purpose” limitation on appropriations. Justice Spiegel disagreed. He felt that state committees of political parties should not be classified as public officers for some purposes, but that there was no constitutional objection to entrusting such committees with disbursements under the proposed plan. He argued that the proper question to be considered was whether subsidy of political election campaigns was a public purpose, and that that question should have an affirmative answer.

The other public purpose case grew out of a land taking by the Massachusetts Turnpike Authority.\footnote{12} \textit{Robie v. Massachusetts Turnpike Authority}\footnote{18} came up when the Authority took land belonging to the New York Central Railroad for a portion of its turnpike, and then took Robie’s adjoining land, not for part of the turnpike, but for relocation of the railroad’s operations formerly carried on in the area taken for turnpike purposes. After contending, unsuccessfully, that the taking was in excess of the authority’s powers, Robie argued that to the extent that it authorized the taking, the enabling statute was unconstitutional. The Court ruled that the taking was for a sufficient public purpose, in that it furthered the public interest in adequate railroad accommodations. The principle of \textit{Salisbury Land & Improvement Co. v. Commonwealth},\footnote{14} forbidding taking for resale to a purely private individual, was inapplicable.

The Crime Commission,\footnote{15} its organization, and its functioning were before the Court in \textit{Sheridan v. Gardner}.\footnote{16} The Court rejected the argument that the Commission, as far as it performs the legislative function of investigating in aid of prospective legislation, stood in violation of the constitutional requirement of separation of powers\footnote{17} in that (1) its members were appointed by the governor, rather than by the legislative branch, and (2) the legislature had delegated to nonlegislators the legislative investigating power. The landmark case of \textit{Attorney General v. Brissenden}\footnote{18} was the basic authority for these conclusions. Reserved for decision in a possible future case that would present the issue more directly was the issue of whether the Commission’s enabling legislation violated the separation of powers doctrine and also Article XII of the Declaration of Rights,
if it authorized the Commission to institute criminal proceedings relevant to matters turned up by its investigations. The case before the Court was a suit by one who had been summoned to testify before the Commission as a witness. It did not appear that the Commission had instituted criminal proceedings against him, and so it was held that he did not have standing to raise the particular issue at the time.

Another Crime Commission case was *Gardner v. Massachusetts Turnpike Authority.* A subpoena issued by the Commission was challenged on the ground, among others, that it looked to an illegal "fishing expedition." The Court rejected the challenge, adopting the position of the Supreme Court of the United States, of which it said, "... the rules as to the permissible breadth of summonses issued by administrative bodies have been extended in more recent cases."

The referendum provisions of the State Constitution are to the effect that laws subject to referendum, except those declared to be emergency laws, do not take effect until at least ninety days after enactment. A further provision is that an emergency law must contain a preamble "setting forth the facts constituting the emergency." In *Molesworth v. Secretary of the Commonwealth,* a question was presented asking whether a statute providing for an immediate increase in salary and expense allowances for members of the General Court had an adequate preamble. A legislative practice of long standing has been to recite that deferred operation of an act would tend to defeat its purpose, and it is therefore declared to be an emergency law, necessary for the immediate preservation of the public convenience. Whether such a formula, or some adaptation thereof, sufficiently sets forth the facts constituting an emergency was the issue tendered. Justices Kirk and Spiegel felt that this was not a justiciable issue, and that the legislative determination of the sufficiency of the preamble was conclusive. The majority of the Court, however, felt that the issue was justiciable and proceeded to rule, on the merits, that the preamble was adequate. Justice

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23 347 Mass. 47, 196 N.E.2d 312 (1964). In a subsequent case the Court ruled that a referendum petition concerning the subject matter involved in this case should be placed on the ballot at the ensuing general election. *Molesworth v. State Ballot Law Commission*, 1964 Mass. Adv. Sh. 1149, 200 N.E.2d 583. At the election of November 3, 1964, the proponents of the referendum prevailed.
Whittemore dissented, feeling that the wording of the preamble should have been more specific.

In an advisory opinion, the Justices again underscored the inadequacy of many submissions of requests for such opinions. A proposed statute would have provided, as to premiums charged under Blue Cross and Blue Shield hospital and medical service insurance plans, that a subscriber who retired after age sixty-five would not be required to pay a higher premium than individuals covered under a group plan. The Justices were asked whether the proposal would be lacking in constitutional equal protection. Pointing out that there was no record, or other source of factual information, upon which adequate judgment of the classifications involved could be based, the Justices replied, simply, that nothing appeared on the face of the proposal that could be said to deny equal protection.

Equal protection and establishment of religion were among the issues involved in *Sisters of the Holy Cross v. Town of Brookline.* The plaintiff corporation, a religious order, operates Cardinal Cushing College. It proposed to construct a college building, but a building permit that had been issued was revoked because the building plans were not in compliance with a hastily amended zoning by-law. The zoning enabling act contains a proviso that "no ordinance or by-law which prohibits or limits the use of land for any church or other religious purpose or for any educational purpose whether public, religious, sectarian, or denominational shall be valid." It was contended that the proviso denied equal protection of the laws and constituted an unlawful establishment of religion. The Court rejected both contentions. While, clearly, the proviso affords different land-use treatment to various landowners in the same district, there is no constitutional reason why the legislature may not make classifications, so long as they are not irrational. The peculiar building requirements of religious and educational institutions justify putting them in a different category from householders, with respect to zoning restrictions. As to the establishment-of-religion argument, the Court suggested that although the Constitution forbids active state aid to religious causes, the prohibition does not extend to exemptions of such causes from restrictions applicable to others. Cases involving tax exemptions for religious institutions were said to be in point. In any event, concluded the Court, the plaintiff in the present case qualified for the exemption as an educational, rather than as a religious institution, and its religious orientation did not disqualify it for that exemption.

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28 G.L., c. 40A, §2.