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Chapter 18: Criminal Law and Procedure

William D. Kramer

Richard B. Geltman

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§18.1. Introduction. During the 1971 Survey year, the United States Supreme Court and the Massachusetts Supreme Judicial Court decided a diverse array of cases involving issues related to trial by jury. In these decisions, which will be examined in Part A of this chapter, the two Courts discussed the right to jury trial, jury and juror impartiality, and jury procedures in capital cases. Part B of this chapter will deal with two United States Supreme Court decisions on the subject of search and seizure.

A. JURY TRIAL AND JURORS

§18.2. Right to jury trial: Delinquency adjudication proceedings. The decisions of the Supreme Court and the Supreme Judicial Court concerning delinquency proceedings can best be understood in the context of the Supreme Court decisions that have defined the due process standards applicable to state criminal prosecutions. In defining those due process standards, the Supreme Court has increasingly looked to the procedural standards guaranteed to defendants in federal proceedings by the Bill of Rights. Any right protected in federal criminal prosecutions is also protected against state action by the Fourteenth Amendment if the right is fundamental to a fair trial.1 In applying the test over the past 40 years, the Supreme Court has selectively “absorbed” or “incorporated” many Bill of Rights guarantees into the Fourteenth Amendment due process clause,2 including the

William D. Kramer is deputy director of the Governor's Committee on Enforcement and Administration of Criminal Justice. Richard B. Geltman is legal counsel to the committee.

§18.2. 1 E.g., Duncan v. Louisiana, 391 U.S. 145 (1968). The test has been phrased, variously, in terms of whether the right is among those “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” Powell v. Alabama, 287 U.S. 45, 67 (1932), quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926); whether it is “basic in our system of jurisprudence,” In re Oliver, 333 U.S. 257, 273 (1948); whether it is “a fundamental right, essential to a fair trial,” Gideon v. Wainwright, 372 U.S. 335, 343-344 (1963), Malloy v. Hogan, 378 U.S. 1, 6 (1964), Pointer v. Texas, 380 U.S. 400, 403 (1965); and whether it is “fundamental to the American scheme of justice,” Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

2 E.g., the Fourth Amendment right to be free from unreasonable searches and seizures, Mapp v. Ohio, 367 U.S. 643 (1961); the Fifth Amendment privilege against self-incrimination, Malloy v. Hogan, 378 U.S. 1 (1964); and the Sixth Amendment
Sixth Amendment guarantee of trial by an impartial jury "of the State and district wherein the crime shall have been committed."³

In recent decisions, the Supreme Court has held that certain aspects of state juvenile delinquency proceedings, like criminal proceedings, are subject to the Fourteenth Amendment due process requirement. In Kent v. United States,⁴ the Supreme Court indicated that, in the case of a trial of a juvenile, the juvenile court's authority to waive jurisdiction in favor of a court of general jurisdiction was subject to the basic constitutional requirements of due process and fairness.⁵ In In re Gault,⁶ the Court determined that delinquency adjudication proceedings that could result in commitment to a state correctional institution were subject to the due process clause. Due process in such proceedings was held to include adequate written notice, the right to a retained or appointed counsel, the rights of confrontation and cross-examination of witnesses, and the privilege against self-incrimination. In In re Winship,⁷ the Court held that the requirement of proof beyond a reasonable doubt was applicable to the adjudicatory stage of delinquency proceedings. In these decisions, the Supreme Court explicitly declined to equate delinquency proceedings with criminal trials, and instead began the process of "selective incorporation," relying upon criminal procedural requirements as its source of due process standards. Thus the Court, to a great extent, implicitly accepted both the premise that delinquency proceedings are similar in material respects to criminal proceedings and the conclusion that the same procedural safeguards should apply to both. The Court merely moved with caution in requiring specific procedural protections.

With the stage thus set, the Supreme Court decided McKeiver v. Pennsylvania⁸ and In re Burrus.⁹ McKeiver consolidated several cases that had presented the question as to whether the Fourteenth Amendment guaranteed the right to trial by jury in the adjudicative stage of state juvenile delinquency proceedings. In each instance, the juveniles involved had been adjudged delinquent because they were found to have violated state criminal laws. Despite the apparent trend of the earlier cases, the Supreme Court concluded that juveniles were not guaranteed a jury trial. Writing for the Court, Justice Blackmun rejected the "wooden approach" of simply labeling juvenile proceed-

⁴ 333 U.S. 257 (1948).
⁵ 380 U.S. 400 (1965).
⁶ 388 U.S. 14 (1967).
⁸ 403 U.S. 528 (1971).
⁹ Ibid.
ings as either civil or criminal and of defining procedural require­ments accordingly. His approach was to utilize the “fundamental fairness” standard to ascertain the precise impact of the due process requirement in the juvenile court context. In applying that standard, Justice Blackmun focused solely upon the fact-finding role of the jury. He concluded that the jury trial was not a necessary component of accurate fact-finding in the American legal system, and cited equity, workmen’s compensation, probate, and deportation cases, and military trials as examples of settings in which the jury trial was not required. Justice Blackmun acknowledged that juvenile courts had not fulfilled their potential, but emphasized factors other than the lack of procedural regularity that he thought contributed to juvenile court shortcomings; in particular, he noted the “community’s unwillingness to provide people and facilities and to be concerned, the insufficiency of time devoted, the scarcity of professional help, the inadequacy of dispositional alternatives, and our general lack of knowledge. . . .”

The primary emphasis of the opinion, however, was not upon application of the fundamental fairness standard; it concerned instead an assessment of the degree to which the jury trial might disrupt the traditional philosophy and practices of juvenile courts. Justice Blackmun argued that the introduction of the jury trial to the juvenile proceeding might remake the latter into a fully adversary process, thus bringing into juvenile courts “the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial” and perhaps putting “an effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.” Justice Blackmun concluded that the Court would not, “for the moment,” give impetus to this “ultimate disillusionment.”

In analyzing McKeiver, it should be noted that the Court again declined to equate delinquency proceedings with criminal prosecutions. The Court’s position is difficult to reconcile with the extensive similarities between criminal actions and those delinquency proceedings that arise from a violation of criminal law. Nevertheless, there are


11 403 U.S. 528, 544 (1971).
12 Id. at 550.
13 Id. at 545.
14 The Court noted that the law in most jurisdictions does not require jury trial in juvenile proceedings, and that the great majority of state courts faced with the issue have concluded that the Gault and Duncan decisions do not mandate jury trial in such proceedings. It was also noted that no recommendation for jury trial is contained in either the proposed uniform juvenile court legislation or the Delinquency Task Force Report of the President’s Crime Commission. Id. at 545-550.
15 The appellants in McKeiver noted the following similarities: “. . . that a delinquency proceeding in their State is initiated by a petition charging a penal code violation in the conclusory language of an indictment; that a juvenile detained prior to trial is held in a building substantially similar to an adult prison; that in Philadelphia juveniles over 16 are, in fact, held in the cells of a prison; that counsel and prosecu-
distinct advantages to the approach the Court adopted. It is consistent with a literal reading of the federal Constitution and juvenile court statutes, with precedent (including the Court's own recent decisions), with established practice in most jurisdictions, and with the clear legislative intent to create a separate and less formal process for juveniles. More importantly, the due process framework gives the Court much greater flexibility in determining which procedural standards are to be imposed than would be the case if delinquency proceedings were placed in lockstep with criminal standards. A flexible approach provides the Court with the opportunity to ensure that procedural requirements are well adapted to juvenile court objectives and realities. Finally, it avoids limiting juvenile court due process guarantees to those afforded adults, and thus does not preclude the creation of specialized procedural requirements particularly beneficial to juveniles.

If due process is the controlling constitutional principle, however, the question which must be addressed by the Court is whether guaranteeing access to jury trial is essential to fundamental fairness in delinquency proceedings. Such a proceeding, if arising from a violation of criminal law, bears important similarities to a criminal prosecution. First of all, both involve a very serious, coercive state intervention in the life of an individual. The adjudicative stage of both proceedings is essentially identical in its purpose and potential consequences. The factual issues presented in both cases are the same. In both cases, deprivation of liberty and stigmatization may result. As finders of fact, juries are as skillful as judges, merely applying the judgment of six or more individuals, rather than one, to the weighing of evidence and evaluation of the credibility of witnesses. There are no special fact-finding techniques peculiar to juvenile courts. The specialized expertise which the juvenile court judge may possess lies in the areas of selection of dispositional alternatives and design of individualized treatment plans, not in the area of fact-finding.

Applying the fundamental fairness standard in *McKeiver*, the Supreme Court limited its analysis to the fact-finding function of the jury and concluded that jury trial is not essential to fairness. The Court failed to consider the other fundamental safeguards which jury

16 The President's Crime Commission noted: "In theory the [juvenile] court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal." President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 9 (1967).

trial provides. In making decisions, juries apply community standards of guilt that cannot adequately be captured in statutory definitions of criminal behavior and that are perhaps not applied by a judge. The presence of a jury increases the likelihood that each individual case will be treated on its merits, not sacrificed to a process of mass-produced justice. In addition, juries provide an independent safeguard against political oppression and judicial arbitrariness, incompetence, corruption, discrimination, and malice. These factors and the traditional importance of jury trial in criminal cases strongly suggest that trial by jury should be considered essential to fairness in delinquency proceedings. The contrary result in *McKeiver* suggests that it is unlikely the Court will extend the *Gault* and *Winship* decisions to encompass other procedural safeguards.\(^{18}\)

In support of the *McKeiver* holding, it is argued that requiring jury trial would disrupt the clear legislative intent and the humane philosophy underlying juvenile court procedures.\(^{19}\) Such courts, it is said, were intended to provide an informal, private, nonadversary, nonpunitive, therapeutic process directed toward individualized care and treatment. Furthermore, it is contended that judicial precedent and established practices tend to show that juries are not necessary to fairness in juvenile proceedings. In reality, however, juvenile courts have fallen far short of achieving the humane objectives set for them.\(^{20}\) Even were this not the case, any process having the attendant serious consequences that accompany a delinquency proceeding must be subject to basic constitutional requirements essential to fairness. The fact that precedent does not favor the use of trial by jury reflects more a willingness to permit the undertaking of a humane experiment than accumulated experience verifying the fairness of existing procedures. In reality, fundamental fairness has not been provided by the safeguards presently applicable to delinquency proceedings.

*McKeiver* had not yet been decided when the Supreme Judicial Court, in the 1971 case of *Commonwealth v. Thomas*,\(^{21}\) was presented with the question whether juveniles adjudged delinquent in Massachusetts district courts are entitled to jury trial in superior court upon appeal under G.L., c. 119, §56. Section 56 provides in relevant part: “The appeal, if taken, shall be tried and determined in like manner as appeals in criminal cases. . . .” The General Laws require that criminal cases in the superior court be tried by jury unless

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\(^{18}\) E.g., the pretrial standards established in criminal cases such as *Miranda v. Arizona*, 384 U.S. 436 (1966), and *United States v. Wade*, 388 U.S. 218 (1967).

\(^{19}\) In evaluating this argument, it should be noted that introducing jury trial would affect only the adjudicative stage of delinquency proceedings, not the pretrial and dispositional stages, where the special character of juvenile courts is most evident.

\(^{20}\) See *In re Gault*, 387 U.S. 1, 17-24 (1967); President’s Commission on Law Enforcement and Administration of Justice, the Challenge of Crime in a Free Society 229-235 (1967); President’s Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 7-9, 28-40 (1967).

the defendant expressly elects to be tried by the court,\textsuperscript{22} and Article 12 of the Massachusetts Declaration of Rights guarantees the right of trial by jury in criminal cases. Reading Section 56 in light of the Massachusetts Constitution and the General Laws, the Court concluded that the legislature had intended to grant juveniles the right to jury trial in the superior court. The court did not reach the question of whether jury trial is constitutionally required. The result in \textit{Thomas} is consistent with the apparent intent of the legislature and with \textit{McKeiver}, which indicates that the Constitution does permit, although it does not require, jury trial in delinquency adjudication proceedings.\textsuperscript{23}

In a related legislative development, Chapter 336 of the Acts of 1971\textsuperscript{24} provided that rules jointly adopted by the superior court and Boston Juvenile Court may permit a child adjudged wayward or delinquent in Boston Juvenile Court or any Suffolk County district court to appeal to a 12-man jury trial in the Boston Juvenile Court. Jurors will be drawn from the Suffolk County Superior Court juror pool. The presiding justice will have all the powers and duties of a superior court judge. Peremptory challenges and appellate review procedures will be the same as those provided in a superior court jury trial.

\textbf{§18.3. Right to jury trial: Increased sentence on appeal.} During the 1971 \textit{Survey} year, the Supreme Judicial Court decided \textit{Mann v. Commonwealth},\textsuperscript{1} a criminal case involving a question of right to jury trial. In \textit{Mann}, the defendant was tried in a district court on three complaints of assault and battery. He was convicted and sentenced to one year in the house of correction on each complaint, the sentences to run concurrently. He appealed to the superior court, was convicted after a de novo trial, and was sentenced to two years' imprisonment on each complaint, with two of the sentences suspended for three years so as to have them run from and after the expiration of the first sentence. His appeal to the Supreme Judicial Court challenged the validity of the superior court sentence, arguing that the imposition of a higher sentence violated due process and imposed an impermissible burden on his constitutional right to jury trial.\textsuperscript{2}

The defendant's due process argument was based upon \textit{North Carolina v. Pearce},\textsuperscript{3} in which the Supreme Court had held:

\begin{quote}
\textsuperscript{22} G.L., c. 263, §6; G.L., c. 278, §2.

\textsuperscript{23} In \textit{McKeiver}, the Supreme Court stated: "If, in its wisdom, any State feels the jury trial is desirable in all cases, or in certain kinds, there appears to be no impediment to its installing a system embracing that feature. That, however, is the State's privilege and not its obligation." 403 U.S. 528, 547 (1971).

\textsuperscript{24} Amending G.L., c. 119, §56.


\textsuperscript{2} Mann presented these specific questions and not the full range of issues related to the desirability of the de novo trial procedure. For a discussion of these issues, see Robertson, De Novo Should Be Eliminated, 56 Mass. L.Q. 347 (1971); Walker, In Defense of De Novo, 56 Mass. L.Q. 359 (1971).

\textsuperscript{3} 395 U.S. 711 (1969).
\end{quote}
Due process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.4 [Emphasis added.]

In Mann, the defendant neither alleged nor proved vindictiveness. Furthermore, the record contained a statement of the judge's reasons for imposing a higher sentence following the second conviction for assault and battery. The reasons were not, however, "based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Instead, the reasons related to the "viciousness of the attacks" and were based upon the evidence presented at the superior court trial.5 Nevertheless, the Supreme Judicial Court rejected the defendant's due process argument, concluding that the judge was not motivated by vindictiveness and had no duty to establish on the record the absence of vindictiveness. In reaching the latter conclusion, the Court distinguished Mann from Pearce, giving emphasis to the following factors: (1) In Pearce, both trials had been in a North Carolina superior court and both sentences had been imposed by the same superior court. In contrast, the first sentence in Mann was imposed by a district court, the second by a superior court; (2) In Pearce, the new trial was required because of an error in law at the original trial, whereas in Mann the new trial was available to the defendant as a matter of right, without allegation or proof of error; (3) The de novo trial option in Massachusetts may provide the defendant with certain

4 Id. at 725-726.
5 The Judge stated: "The attacks on the victims were vicious and premeditated. Homicide is merely an assault and battery that ends in death. This defendant is lucky that none of the victims here had a weak heart of a weak artery.

"I am loath, always loath, to impose a sentence that is higher in this court than the sentence that was imposed in the lower court because no defendant should be prejudiced certainly because he claims his right to a jury trial, but what the posture of the evidence was in the lower court is one thing, but as the evidence came in here I was shocked at the viciousness of the attacks, and I have taken that into consideration in imposing sentence." 1971 Mass. Adv. Sh. 1027, 1050-1051 n.4, 271 N.E.2d 331, 334 n.4.
tactical advantages: not only is he given two opportunities to be acquitted or to receive a favorable sentence, but he is also able to hear the Commonwealth's case presented in the district court without having to disclose his own defense; and (4) In Massachusetts, the defendant "gives up nothing" by going to trial in the district court and, through the de novo procedure, gets a "second and fresh opportunity" in the superior court, complete with appellate review. Therefore, it is fair that the defendant and the Commonwealth begin again at parity.

The above points of distinction are, it is submitted, neither adequate nor substantial enough to warrant a result in Mann that is contrary to the Supreme Court's decision in Pearce. What does it matter that the de novo trial and sentencing take place in a different court? The involvement of two different courts is not a substantial distinguishing factor unless the second court is without possible motives for imposing increased sentences. Since the second trial is before a different judge, whether held in the same court or in a higher court, it is an institutional and not simply a personal vindictiveness that is involved. Regardless of whether the original trial was in the superior or the district court, it would seem that superior court judges would be as much concerned about frivolous appeals and court congestion as would the second lower court judge. The possibility of vindictive sentencing would, therefore, not appear to be more remote because a second court is involved.

Similarly, what does it matter that the defendant has access to de novo trial as a matter of right? Does this reduce the likelihood of vindictiveness and therefore decrease the need for procedural safeguards? The Court argued that in "the vast majority of cases, the appeal is, in reality, grounded on the lower court's factual determination of the defendant's guilt, and on the judge's assessment of punishment," not on legal error. The premise suggests that courts may be even less tolerant of second trials involving defendants who they presume were correctly found guilty after a fair trial than they would be of new trials following successful appeals that established the existence of legal error in the original proceeding. The Court assumed that de novo trials rarely result from errors of law in the district court. This may or may not be true, but nothing was offered to support such a conclusion. The de novo procedure makes it impossible to know whether error has occurred in any particular case. To presume that most trials are free of error does not establish that fact, nor does it provide due process to the defendant whose trial was among the presumed few which were infected with error. Moreover, it is essential to note that, in Massachusetts, de novo trial serves as an alternative to appellate review. In cases tried in the district courts, it provides the only opportunity to correct errors of law. Discouraging de novo trial is thus directly comparable to discouraging appeals on points of law.

Id. at 1028, 271 N.E.2d at 332.
The Court's third and fourth arguments are likewise unpersuasive. What bearing do the tactical advantages which the Court describes have upon the question at issue? They in no way support the conclusion that safeguards against vindictive sentencing are less essential to due process in the case of de novo trials than they would be in the case of new trials following successful appeals. The fact that de novo trial undoubtedly provides some defendants a second opportunity and tactical advantages despite the absence of error in their first trial is not a legitimate basis for penalizing defendants who seek to correct legal error through the only procedure provided by the Commonwealth. The Commonwealth has chosen the de novo procedure because it is an efficient approach to the administration of criminal justice. If it offers a second opportunity to defendants who do not deserve it, then that is a deficiency which the Commonwealth must consider in defining procedural alternatives. It is not a plausible rationale for deterring appeals in cases in which errors of law have occurred. Further, the fact that the defendant gets a "second and fresh opportunity" is not peculiar to the de novo trial situation; the same situation applies equally to the new trial following reversal upon appeal.

The defendant's second contention was that the imposition of a greater sentence after de novo trial unconstitutionally burdened his right to jury trial. The defendant relied upon United States v. Jackson, in which the Supreme Court had declared unconstitutional certain federal legislation which permitted the death penalty only in cases in which the defendant elected to be tried by a jury. The Supreme Court had found that the statute imposed an impermissible burden upon the assertion of a constitutional right. In Mann, the Supreme Judicial Court rejected the defendant's contention founded upon Jackson, distinguishing Mann on the basis that in the case of de novo trial "the previous sentence is annulled by the petitioner's appeal and he is given an untrammelled right to a jury trial. He is harmed in no way."8

The difficulty with this analysis lies in the fact that the Supreme Judicial Court is comparing the situation in Jackson before the defendant elects jury trial and the situation in Mann after the defendant elects jury trial. Contrary to the Court's conclusion, if the two cases are compared in terms of actual consequences, they are quite similar. In both cases, before the defendant decided whether to exercise his constitutionally guaranteed right to jury trial, he was faced with an attendant risk. In Jackson, the risk was the possibility that the jury might impose the death penalty; in Mann, the risk was that the judge might impose a greater sentence after the de novo trial.

The Supreme Judicial Court also concluded that the legislation providing for de novo trial is not arbitrary, unreasonable, or discriminatory because such a trial is "available to every defendant and

all those who avail themselves of the right to a de novo trial are equally subject to a greater sentence."\(^9\) Here again, however, the fact that all defendants electing de novo trial are exposed to the same risks does not distinguish Mann from Jackson, for in Jackson the state’s procedure clearly exposed all defendants to the same risk of the death penalty.

\section*{§18.4. Impartiality of jury proceedings: Change of venue for misdemeanors.} The petitioner in Groppi \textit{v. Wisconsin}\(^1\) had been arrested in Milwaukee during a period of civil disturbances, on a charge of resisting arrest. Prior to trial, he had filed a motion seeking a change of venue. He contended that he could not obtain an impartial jury trial without a change of venue because community prejudice had been stirred up against him by extensive news media coverage of his case. The trial judge denied the motion, concluding that a Wisconsin law authorizing changes of venue in felony cases did not permit such changes in the case of misdemeanors.\(^2\) After several continuances and five months after his arrest, Groppi was brought to trial. During the voir dire proceedings, he exhausted all of his peremptory challenges. His subsequent conviction was affirmed by the Supreme Court of Wisconsin, which determined that the trial judge had correctly interpreted the Wisconsin change of venue law and that the law was constitutionally valid. The Wisconsin Supreme Court noted that if the defendant’s rights to request continuances and to challenge prospective jurors on voir dire were not sufficient to provide an impartial jury, the verdict could be set aside after trial.

On appeal, the United States Supreme Court vacated the judgment against Groppi, holding that a state law that categorically prevents a change of venue for a criminal jury trial solely on the ground that the charge is a misdemeanor, regardless of the extent of local prejudice against the defendant, violates the Fourteenth Amendment guarantee of trial by an impartial jury. Justice Stewart, writing for the Court, noted that there are occasions when a community is permeated with prejudice against a defendant because of adverse publicity or for other reasons. On such occasions, the granting of continuances and the exclusion of prospective jurors by challenges to the venire are not always sufficient to guarantee an impartial jury. Consequently, Justice Stewart concluded, a statute which denies a criminal defendant any opportunity to demonstrate that a change of venue is required is constitutionally invalid.

The Massachusetts change of venue statute provides:

\begin{quote}
Upon petition of a person indicted for a capital crime, the court
\end{quote}

\(^9\) Id. at 1032, 271 N.E.2d at 335.

\(^1\) 400 U.S. 505 (1970).

\(^2\) The Wisconsin statute provided: "If a defendant who is charged with a felony files his affidavit that an impartial trial cannot be had in the county, the court may change the venue of the action to [any county where an impartial trial can be had]." Wis. Stat. §956.03(3) (1969).
may, if in its opinion an impartial trial cannot be had in the county where the case is pending, order a change of venue to any county adjoining the county where the indictment was found. . . . 3

In two respects, this provision is narrower in scope than the Wisconsin statute applied in Groppi: it addresses only capital crimes, not all felonies; and it authorizes changes of venue only to adjoining counties, not to any county in the state. The constitutionality of the Massachusetts statute is contingent, therefore, upon its interpretation as not prohibiting changes beyond the literal bounds of the statute.

§18.5. Impartiality of jury proceedings: 1 Failure to challenge repeat juror. In Commonwealth v. Zakas, 2 Zakas and a codefendant were convicted of conspiracy to steal property of Teremo, Inc. Earlier in the same sitting of the superior court, Zakas, represented by the same counsel, had obtained a directed verdict of not guilty on charges of larceny by false pretenses of property of Teremo, Inc. At the second trial, the judge and counsel explicitly agreed that the jury would be drawn from the same venire as the jury for the first Zakas trial. After the jury had been declared indifferent and sworn, the indictment read, and the Commonwealth's opening statement begun, the judge interrupted and advised counsel that one of the jurors had been a member of the jury at the previous trial. Counsel for the codefendant objected to any juror being excused. Counsel for Zakas objected to the juror remaining on the panel. The judge ordered the trial to proceed and Zakas excepted. The Supreme Judicial Court found the exception without merit, reasoning as follows:

[The defendant] was bound to use reasonable diligence to ensure that he had an impartial jury, exercising, if he so desired, the

3 G.L., c. 277, §51.

§18.5. 1 In addition to the cases discussed in this and in the next section, the Supreme Judicial Court decided—with little discussion—other jury impartiality issues in Commonwealth v. Therrien, 1971 Mass. Adv. Sh. 843, 848-849, 269 N.E.2d 687, 691-692. Included were questions concerning the selection of jurors in capital cases. In addition, the Court rejected the 20-year-old defendant's contention that exclusion of persons under 25 years of age from the jury panel was prejudicial to him. In Commonwealth v. Stewart, 1971 Mass. Adv. Sh. 1039, 1043-1044, 270 N.E.2d 811, 815, the defendant raised two jury impartiality issues. First, he argued that the judge erred in refusing his request to ask prospective jurors: "Have you any friends who are police officers?" The judge did allow the defendant to ask: "Have you any relatives who are members of a police force?" and, if the answer was yes, "What is your relation to such officer or officers?" The Supreme Judicial Court found no error, concluding that it is entirely within the trial judge's discretion under G.L., c. 234, §28 and c. 278, §3 whether to allow any questions other than those which the statutes require. Second, the defendant challenged the validity of verdicts returned by juries selected in conformity with G.L., c. 278, §3, which excludes prospective jurors whose opinions on capital punishment would prevent them from finding a defendant guilty of a crime punishable by death. The Court rejected this point, citing Commonwealth v. Connolly, 356 Mass. 617, 622-623, 255 N.E.2d 191, 195 (1970).

right to exclude members of the earlier jury by peremptory challenges or challenges for cause. Rule 48 of the Superior Court (1954). Indeed, Zakas had exercised a peremptory challenge. He had not exhausted his peremptory challenges when he declared that he was content with the jury. Zakas had the means and ample opportunity to ascertain whether a juror had been on the earlier panel and to determine if for that reason the juror was objectionable. His failure seasonably to object was a waiver of his right to object. Zakas's late objection came only after the codefendant Carney stated his opposition to excusing any sitting juror, and was a reversal of Zakas's earlier position, possibly designed to pose a dilemma for the judge.3

In general, a defendant may waive any right related to jury trial. Indeed, he may waive jury trial itself, or even, in a sense, waive the right to trial by pleading guilty. Permitting a defendant to waive his rights is a consequence of the adversary character of our adjudicative process and of the assumption that the defendant can best represent his own interests. Zakas expressly waived any objection to drawing the panel from the same venire. He then presumably failed to recognize the juror who had sat on the previous panel, failed to inquire, failed to challenge for cause, and did not exhaust his peremptory challenges. The trial process can be subject to endless confusion and delay if defendants are not required to exercise a reasonable degree of diligence. Zakas clearly failed to do so. Further, it is not clear that the defendant was prejudiced by the juror remaining on the panel. The juror may have remembered as little of the previous case as the defendant did of him. Moreover, the defendant had been acquitted of the previous charge, and it is unclear to what extent prejudicial evidence may have been presented at that trial. Finally, the alternatives available to the trial judge were limited by the conflicting demands of the codefendants. All of these considerations suggest that in Zakas the Court reached the right result.

§18.6. Juror misconduct: Defendant's right to be present at voir dire. In Commonwealth v. Robichaud,1 the Supreme Judicial Court was presented with the question of whether a defendant has the right to be present at a voir dire being conducted during the trial on the issue of juror misconduct. At the close of the evidence at trial, Robichaud had moved for a mistrial. Subject to his exception, he was not allowed to be present when the motion was heard in the judge's chambers. At the motion hearing, witnesses testified that they had overheard three jurors discussing the case at a restaurant and expressing the opinion that the defendant was guilty. Two jurors identified by the witnesses acknowledged that they had discussed the case, but

3 Id. at 1396-1397, 263 N.E.2d at 448.

denied expressing opinions about the defendant's guilt. They were later excused from the jury panel for unrelated reasons. The third juror was not identified and apparently sat on the panel that subsequently convicted the defendant. The trial judge refused to inquire about the third juror and denied the motion for a mistrial.

On appeal to the Supreme Judicial Court, Robichaud argued that his exclusion from the hearing violated his statutory rights and his rights under the Massachusetts Declaration of Rights and the due process clause of the Fourteenth Amendment as it applies the confrontation clause of the Sixth Amendment to the states. Both the Massachusetts statute and the Declaration of Rights clearly guarantee the defendant the right to be present at his trial. Thus the determinative question was whether the voir dire was to be considered a part of the trial. The Supreme Judicial Court noted that the defendant did not have the right to be present at hearings on pretrial motions, nor at those on motions for a new trial, nor at jury views. However, the Court decided that a defendant does have the right to be present when jurors are being examined as to their qualifications, because the selection of an impartial jury is considered an essential part of the trial. The Court reasoned that it would be "frequently to the defendant's advantage to communicate orally with his counsel in the course of a witness's testimony since he may have information which may aid his counsel in examining the witness"; to be in a position to communicate, the defendant would have to be present. Consequently, the Court reversed the judgment against Robichaud.

The Court's decision makes sense. If the selection of impartial jurors is a part of the trial, then a hearing during the trial on juror misconduct must also be a part. Although the defendant is not likely to have knowledge of the incident or parties involved in the alleged misconduct, he may well offer tactical suggestions or other thoughts of value to his defense. Furthermore, the presence of the defendant at such a critical inquiry may be important to his perception of the quality of justice afforded him.

§18.7. Jury trial procedures: Capital offenses. During the 1971 Survey year, the United States Supreme Court decided the companion

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2 G.L., c. 278, §6 provides: "A person indicted for a felony shall not be tried unless he is personally present during the trial."
3 Mass. Const. amend. art. XII provides: "[E]very subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election."
4 The defendant's Sixth Amendment right "to be confronted with witnesses against him" appears to be irrelevant in Robichaud, since none of those who testified at the voir dire were witnesses against the defendant.
7 Snyder v. Massachusetts, 291 U.S. 97 (1934).
8 Lewis v. United States, 146 U.S. 370 (1892); Hopt v. Utah, 110 U.S. 574 (1884).
cases of *McGautha v. California*¹ and *Crampton v. Ohio*,² and the Massachusetts Supreme Judicial Court decided *Commonwealth v. Stewart*.³ Each of the decisions concerned the constitutionality of jury trial procedures in capital cases. Because the Supreme Court has agreed to hear arguments this term on the constitutionality of the death penalty, and because there is a distinct possibility that the death penalty will be found unconstitutional, the aforementioned three cases will be treated only briefly at this time.

The defendants in *McGautha* and *Crampton* had been convicted of first-degree murder and sentenced to death. In each case, the decision of whether to impose the death penalty had been left to the absolute discretion of the jury. In *McGautha*, the jury had determined punishment in a separate proceeding after the trial on the issue of guilt. In *Crampton*, the jury had decided guilt and punishment in a single verdict after a single trial. The Supreme Court decision consolidating these two cases addressed two aspects of the constitutionality of jury sentencing in capital cases. First, the Court considered the question of whether the imposition of the death penalty without governing standards is constitutionally permissible. The defendants argued that standardless jury sentencing was fundamentally lawless and therefore violated the Fourteenth Amendment requirement that no state deprive a person of life without due process of law. The Court rejected their contention, relying principally on the judgment that it was not possible to define complete and fair standards to guide death-sentencing decisions. The Court reasoned as follows:

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability. . . . In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. . . . For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.⁴

The second question presented by *Crampton* was whether the Constitution requires bifurcated jury trials in capital cases, with evidence and argument on the issue of punishment to be presented in a separate proceeding following the determination of guilt.⁵ The de-
fendant argued that under the due process clause of the Fourteenth Amendment he had a right to be heard on the issue of punishment and a right not to be sentenced without benefit of all the relevant evidence; and that under the Fifth and Fourteenth Amendments, he had a right not to be compelled to be a witness against himself. Yet, under the unitary trial procedure, he could remain silent on the issue of guilt only at the expense of not speaking to the issue of punishment. Therefore, the defendant argued, an intolerable tension between constitutional rights was created by a procedure that was itself supported by no legitimate state interest.

The Supreme Court rejected the defendant’s reasoning on the ground that compelling such a choice did not impair to an appreciable extent any of the policies underlying the constitutional rights involved. The court noted that at many points in the criminal process defendants are routinely required to make difficult choices that are clearly constitutionally valid. Several analogous situations were cited by the Court: (a) a defendant who testifies on his own behalf cannot claim the privilege against cross-examination on matters related to his testimony; (b) a defendant who testifies may be impeached by proof of prior convictions; (c) a defendant whose motion for acquittal at the close of the prosecution’s case is denied must decide whether to offer a defense, with the risk that he may strengthen the state’s case; and (d) a “notice of alibi” rule may require a defendant to choose between abandoning his alibi defense or giving the state an opportunity to prepare a rebuttal.

In *Stewart*, the Supreme Judicial Court was presented with several questions related to jury trial in capital cases, including the issues determined in *McGautha*. Without discussion, the Court decided the latter issues in conformity with *McGautha*. *Stewart* also concerned the interpretation of a Massachusetts statute which provides in relevant part:

> Whoever is guilty of murder in the first degree shall suffer the punishment of death, unless the jury shall by their verdict, and as a part thereof, upon and after consideration of all the evidence, recommend that the sentence of death be not imposed, in which case he shall be punished by imprisonment in the state prison for life.6

The defendant argued that the statute requires a unanimous decision by the jury to impose the death penalty. The Supreme Judicial Court, however, refused to overrule its decision to the contrary in *Commonwealth v. McNeil*,7 thereby affirming an unfortunate statutory construction that allows a single holdout juror to impose the death penalty, although unanimity is required to mitigate that sentence.

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6 G.L., c. 265, §2.
§18.8. Issuance of search warrants: Affidavit sufficient to establish probable cause: Credibility of informant. In *United States v. Harris*, the United States Supreme Court was once again faced with a question as to the sufficiency of the information that must be provided to a magistrate to enable him to make an independent judgment regarding probable cause for the issuance of a search warrant in cases in which an informant unknown to the magistrate has supplied the crucial information. The affidavit submitted in applying for the search warrant in *Harris* read, in pertinent part, as follows:

... Harris has had a reputation with me for over 4 years as being a trafficker of non-taxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their [sic] life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in the outbuilding ... and has seen Roosevelt Harris go to the other outbuilding. ... on


§18.8. See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). The standards enunciated by the Supreme Court in *Aguilar* require that the affiant applying for a search warrant include in his affidavit a statement of the underlying circumstances from which the informant drew his conclusions that a crime had been committed, and a statement of the circumstances from which a magistrate could conclude that the informant was credible or his information reliable. Id. at 114.

http://lawdigitalcommons.bc.edu/asml/vol1971/iss1/21
numerous occasions, to obtain the whiskey for this person and other persons.4

Upon the basis of the above affidavit by a police officer, a search warrant was issued; the search pursuant thereto yielded evidence that led to Harris's conviction in federal district court. On appeal, however, the conviction was reversed by the court of appeals on the ground that the information in the affidavit was constitutionally insufficient to permit the issuance of a warrant.5 The affiant had not included in the affidavit information that would have enabled the magistrate to judge the trustworthiness and reliability of the informant, and the affiant had not alleged the truthfulness (as compared to the prudence) of the informant. The previous discovery of the stash of illicit liquor was not considered sufficient to establish probable cause for the issuance of a warrant because the discovery had been too remote in time. Likewise, the reputation of the defendant as a bootlegger could not establish probable cause because of the inherent unreliability of such information. The effective portion of the affidavit, after excision of the offending material by the court, was considered insufficient to establish probable cause. A majority of the Justices of the Supreme Court, concurring only in the disposition of the case, agreed that the judgment of the court of appeals should be reversed.

In Part I of a three-part opinion, Chief Justice Burger compared the Harris affidavit with the affidavit found valid in Jones v. United States:6 "Both recount personal and recent observations by an unidentified informant of criminal activity." The Chief Justice indicated that because the observations were, first, personally made by the informant and, secondly, recent in time, the information given in the affidavit could be relied upon as having been gotten in a reliable manner. On the other hand, Spinelli v. United States7 was discussed as an example of a case in which the affidavit was not supported by personal and recent observations. In the instant case, the Chief Justice seemed to indicate that additional credibility should be given to the informant's statements because they involved a declaration against interest on the part of the informant.8 Justice Stewart joined in Part I of the opinion only.

In Part II of the majority opinion in Harris, Chief Justice Burger discussed the amount of information that an affidavit would have to include to support a belief on the part of the magistrate that an unidentified informant's information was truthful. Comparing the instant affidavit with the one upheld in Jones and the one condemned in Spinelli, Chief Justice Burger concluded that there was "substantial basis for crediting the hearsay":

5 United States v. Harris, 412 F.2d 796 (6th Cir. 1969).
8 His purchase of untaxed spirits was illegal under 26 U.S.C. §5205(a)(2).
Both affidavits purport to relate the personal observations of the informant—a factor that clearly distinguishes Spinelli, in which the affidavit failed to explain how the informant came by his information. Both recite prior events within the affiant's own knowledge—the needle marks in Jones and . . . [the] prior seizure in the present case—indicating that the defendant had previously trafficked in contraband.\textsuperscript{9}

In Spinelli, furthermore, the affidavit had contained no facts to support the statement that the defendant was known to be a gambler and associated with gamblers, which was not the case in Harris with respect to the defendant's reputation. The fact that the informant in Harris had not previously given correct information was dismissed by the Chief Justice as not essential to the pertinent inquiry "whether the informant's present information is truthful or reliable."

The Chief Justice also attempted to clarify the extent to which the affiant's knowledge as to the criminal reputation of the suspect could be relied upon by a magistrate in determining the reliability of an informant's statement. Although the Court in Spinelli had refused to permit a magistrate to give any credence to the affiant's unsupported statement that the suspect was a known gambler, Chief Justice Burger found that the Spinelli Court's conclusion had been incorrectly premised on Nathanson v. United States.\textsuperscript{10} Rather than reading Nathanson as holding that reputation per se was unworthy of belief, as had the Spinelli Court, the Chief Justice read it as holding that reputation standing alone was not sufficient basis for an affidavit, a holding the Chief Justice felt had been confirmed by Brinegar v. United States.\textsuperscript{11} The test of probable cause applied by the magistrate relates to probability, to facts and practicalities rather than technicalities, said the Chief Justice: "[A] policeman's knowledge of a suspect's reputation—something that policemen frequently know . . . is . . . a 'practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely. . . ."\textsuperscript{12}

In Part III of his opinion, the Chief Justice further discussed the weight that could be accorded an informant who, in the process of relating facts that implicate the suspect, implicates himself in the commission of crime. Chief Justice Burger reasoned as follows:

Common sense in the important daily affairs of life would induce a prudent and disinterested observer to credit [statements against penal interest]. People do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions. Admissions of crime, like admissions against proprietary interests, carry their own indicia of credibility sufficient at least to support a finding of probable cause to search.

\textsuperscript{9} 403 U.S. 573, 591 (1971).
\textsuperscript{10} 290 U.S. 41 (1933).
\textsuperscript{11} 338 U.S. 160 (1949).
\textsuperscript{12} 403 U.S. 573, 583 (1971).
That the informant may be paid or promised a "break" does not eliminate the residual risk and opprobrium of having admitted criminal conduct. Concededly admissions of crime do not always lend credibility to contemporaneous or later accusations of another. But here the informant's admission that over a long period and currently he had been buying illicit liquor on a certain premise, itself and without more, implicated that property and furnished probable cause to search.\textsuperscript{13} [Emphasis added.]

Justice White agreed with Part III and concluded that, as a whole, the affidavit "was sufficient to support the issuance of the warrant." Justice Harlan dissented, joined by Justices Douglas, Brennan, and Marshall.

The magistrate's function with respect to the issuance of search warrants in cases involving the affiant's use of an absent informant has been described thusly:

\begin{quote}
[A] magistrate in discharging his duty to make an independent assessment of probable cause can properly issue a search warrant only if he concludes that: (a) the knowledge attributed to the informant, if true, would be sufficient to establish probable cause; (b) the affiant is likely relating truthfully what the informer said; and (c) it is reasonably likely that the informer's description of criminal behavior accurately reflects reality.\textsuperscript{14}
\end{quote}

At issue in\textit{Harris} was whether the third determination required of the magistrate could have been made on the basis of the information given him by the affiant. The magistrate would have been able to make such a determination if the affidavit had disclosed facts indicating that there was reason to believe both that the informer was a truthful person generally (that he was credible) and that the informant had based his particular conclusions in the matter at hand on reliable data (that his information was reliable). Although Justice Burger and the dissenting Justice Harlan were in full agreement as to the reliability of the data provided by the informant (firsthand information gained within two weeks of the search), they reached opposite conclusions as to whether the facts disclosed by the affiant provided a sufficient basis for the magistrate to conclude that the informant was credible.

In\textit{Aguilar v. Texas}\textsuperscript{15} and\textit{Spinelli}, the Supreme Court required that the issuance of a search warrant be preceded by a showing of the underlying circumstances upon which a magistrate could conclude that an affiant's informant was credible. The credibility of an informant can best be determined by direct evidence such as a lie detector test, but historically the face-to-face questioning of the informant by the magistrate has been considered an adequate basis for a decision.

\textsuperscript{13} Ibid.
\textsuperscript{14} 403 U.S. 573, 587 (1971) (Harlan, J., dissenting).
\textsuperscript{15} 378 U.S. 108 (1964).
as to the informant's credibility.\textsuperscript{16} Failing the appearance of the in­former before the magistrate, however, indirect evidence such as independent corroboration of the informant's information has been held to be sufficient.\textsuperscript{17} Additional factors that have in the past been considered to support a finding of credibility include evidence as to the reliability of the informant's previous information.\textsuperscript{18} In \textit{Harris}, the Chief Justice chose to refer as well to the affiant police officer's personal knowledge of the suspect's reputation and to whether the information delivered by the informant was obtained by the informant's personal observations.

The factors emphasized in the Chief Justice's opinion seem to portend a weakening by the Supreme Court of the strict standards set forth in \textit{Aguilar} and \textit{Spinelli}. First of all, information that seems to be derived from personal observation and that has been provided in some detail is more relevant to the issue of whether the information provided by the informant has been obtained in a reliable manner than to whether the informant himself is credible. Because a particular informant has a fanciful imagination or has knowledge of particular activity or of a place where activity occurs does not lessen the possibility that the informant is falsifying information about a particular defendant's criminal activity. Unless there is corroboration of parts of the declaration, a detailed description does not advance the magistrate any further in establishing the informant's credibility.

Secondly, neither the affiant's personal knowledge of past criminal activity of the suspect nor the affiant's personal knowledge of the general criminal reputation of the suspect are germane to the issue of the present credibility of the informant. The fact that the suspect has once committed a crime does not mean that the informant's accusation of the suspect's present tendencies is truthful. To allow a suspect's past criminal record to be weighed in assessing an informant's credibility places a continuing disability on the past offender. Having once run afoul of the law, the past offender would be in continued danger of having his privacy invaded by searches initiated on the basis of what would otherwise be a defective affidavit. The Fourth Amendment does not create different requirements of probable cause for past offenders on the one hand and unconvicted citizens on the other. Since each individual is presumed innocent until proven otherwise, each is entitled to the same constitutional protection. Where the suspect's criminal record is nonexistent and the affiant and magistrate are relying in part upon the general but unsupported reputation of the suspect as a criminal, their reliance is even less well-founded, if such is possible, than in the case where the suspect is a past offender. The general reputation of the suspect as a criminal is impossible to assess accurately; by definition it depends solely on rumor and public knowledge, the foundations of which are unknown to the recipient,

\textsuperscript{16} Cf., e.g., \textit{McCray v. Illinois}, 386 U.S. 300 (1967).
\textsuperscript{17} E.g., \textit{Draper v. United States}, 358 U.S. 307 (1959).
\textsuperscript{18} Ibid.
and contains no indicia of credibility. To permit the unquestioned use of criminal reputation as any part of the basis upon which a search warrant may be issued merely relieves the police of the task of carrying out an active investigation, allowing them instead to follow hunches or suspicions of others that are not based on probable cause.

The use of declarations against penal interest as reliable evidence and as an exception to the hearsay rule has been much discussed, and the use has been strictly limited to situations where the declarant was not available to testify and where the declarant knew the statement was in fact being made against his own interests. In *Harris*, there was no showing that the defendant was unavailable, that the information was to be used against the informant, or that the declarant knew that his statement was being made against his own interest. Indeed, based on the facts of the case, it would be hard to say that the declaration was against the informant’s penal interest. It is certainly not beyond imagination that the informant in *Harris* was apprehended red-handed by the affiant and told that he had two choices: either reveal his source of untaxed spirits or go directly to jail. It is not difficult to see why the informant, given such a choice, chose to talk; but it is difficult to see how the informant’s story could be credited as a statement against penal interest. It is even possible that the informant felt no threat of criminal prosecution at all. Justice Harlan’s dissent pointed out the anomaly in the Chief Justice’s opinion, namely that its rationale would give greater credibility to participants in criminal activity than to law-abiding citizens under a given set of circumstances. The constitutional requirement of protecting the privacy of individuals from government action suggests that (1) the occasions when a magistrate may rely on an out-of-court informant should be limited, and (2) where out-of-court informants are relied upon and the informants have engaged in criminal activity, more rather than less corroboration of their credibility ought to be demanded, particularly where the motivation of the informant is not apparent on the fact of the affidavit.

19 See Discussion in 5 Wigmore, Evidence §§1476-1477 (3d ed. 1940).

20 Ibid.

§18.9. Issuance of a search warrant: Impartial magistrate. Warrantless searches and seizures: Incident to a valid arrest; Involving automobiles; In plain view. Receipt of evidence from a third party. In Coolidge v. New Hampshire, the United States Supreme Court touched upon almost every aspect of Fourth Amendment law relating to warrantless searches and seizures. The New Hampshire police, investigating the Pamela Mason murder, had received information indicating that Coolidge had had the opportunity to commit the crime. The police thereupon called upon Coolidge at his home to question him. During the questioning, Coolidge showed three of his guns to the police and agreed to submit to a lie detector examination. The test was conducted at the police station the following Sunday. Although the lie detector test proved inconclusive, the police detained Coolidge overnight, during which time the police called upon Mrs. Coolidge, questioned her, and received from her several additional guns and items of clothing belonging to the defendant. In the subsequent weeks, sufficient evidence was gathered against Coolidge to provide probable cause for his arrest on a murder charge and for the search of his house and two cars. The Manchester police swore out an affidavit before the state attorney general, who at the time was statutorily empowered as a justice of the peace to issue search warrants, but who was also at the time directing the Mason murder investigation. The attorney general granted the requested warrants, and the defendant was arrested the same day. Pursuant to the search warrants, the police seized the defendant’s two automobiles from the driveway in front of his house and had them towed to the police station, where they were later searched.

Pretrial motions to suppress were directed by Coolidge against gunpowder particles vacuumed from the defendant’s car, a rifle that Mrs. Coolidge had turned over to the police, and vacuum sweepings of the defendant’s clothing—evidence that allegedly tended to establish that Pamela Mason had been present in the defendant’s car, that the defendant owned the murder weapon, and that the defendant’s clothing had come in contact with the victim. The motions were denied, Coolidge was convicted, and his conviction was affirmed. On appeal to the United States Supreme Court, Coolidge attacked the pretrial rulings on the motions to suppress, contending for various reasons that the search and seizure of his possessions had been in violation of the Fourth Amendment. Although the Supreme Court decided that the seizure of the defendant’s rifle and clothing had been proper, it reversed the conviction. The Court held that the search warrant had been invalidly issued and that the resulting warrantless search of the defendant’s automobile could not be sustained under any of the exceptions to the warrant requirement.

Issuance of a search warrant by an impartial and detached magis-

§18.9. 1 403 U.S. 443 (1971).


Coolidge argued before the Supreme Court that the search warrant for the car, which had been issued by the attorney general of New Hampshire while directing the investigation of the murder, had not been issued by a "neutral and detached magistrate." New Hampshire made three arguments in support of the warrant: (1) that the attorney general had in fact acted as a neutral and detached magistrate; (2) that the probable cause to issue the warrant was so overwhelming that any magistrate would have issued the warrant; and (3) that even though the federal government might be subject to the magistrate requirements, those requirements were not applicable to the states under the Fourteenth Amendment. In Part I of the Court’s opinion, Justice Stewart announced a per se rule of disqualification for warrants authorized by law enforcement officials in their capacity as magistrates. Security of one’s privacy, said the Court, is a fundamental right protected by the Fourth and Fourteenth Amendments so as to prohibit unreasonable intrusions by overzealous government officials. To protect against such intrusions, the Fourth Amendment requires, with only a few exceptions, that government enforcement officials desiring to make a search first procure a search warrant from a neutral and detached magistrate, who must make an informed and deliberate decision as to whether an individual’s right of privacy should yield to the need to search. Policemen and prosecutors, concluded the Court, “simply cannot be asked to maintain the requisite neutrality with respect to their own investigations.” To the argument of overwhelming probable cause, the Court merely cited Agnello v. United States for the proposition that probable cause, no matter how well-founded, will not replace a warrant.

The Coolidge holding with respect to the issuance of the warrant certainly makes more realistic the protections afforded by the Fourth Amendment. The interposition of a neutral and detached magistrate, presumably acting conscientiously and in good faith, between law enforcement officials and an individual’s privacy should prevent the issuance of warrants on less than probable cause and guard against

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4 The Fourth Amendment provides in part: “[N]o Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The Court has construed the warrant clause of the Fourth Amendment to require that the inferences to be drawn from evidence supporting the application for the warrant be drawn by a “neutral and detached magistrate” rather than by the police officers engaged in the investigation. Johnson v. United States, 333 U.S. 10, 14 (1948).


7 403 U.S. 443, 450 (1971).

8 269 U.S. 20 (1925).

9 The Massachusetts General Laws limit the authority to issue search warrants to justices, special justices, clerks, assistant clerks, temporary clerks, and temporary assistant clerks of the district courts. G.L., c. 218, §§33, 35. Any ambiguity as to the power of clerks to issue warrants was clarified by Commonwealth v. Penta, 352 Mass. 271, 225 N.E.2d 58 (1967) (clerks of court have the power to issue search warrants without prior action by a judge).
rash action by enforcement officials who might be tempted in the heat of the chase to misrepresent their knowledge. Essential as the probable cause hearing may be, however, elevating it to the constitutional level may not itself be sufficient to provide the full protection of the Fourth Amendment. Complete assurance of Fourth Amendment rights may best be achieved at a later hearing at which the underlying circumstances mentioned in the affidavit submitted in application for the search warrant could be reviewed. At such a hearing, intentional misrepresentations or omissions on the part of law enforcement officials or grossly negligent or willful and reckless performance of duty on the part of magistrates would be disclosed, and such disclosures could form the basis for holding culpable those officials accountable for violations of an individual's civil rights or right to privacy.

In Part II of the Coolidge opinion, which dealt mainly with three exceptions to the warrant requirement (search incident to a valid arrest, search of an automobile, and seizure of articles in plain view), Justice Stewart did not command a majority of the Court. In his introduction to Part II, Justice Stewart reviewed the principles of Fourth Amendment law: that the Amendment must be liberally construed; that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and delineated exceptions;" that the exceptions are drawn narrowly and with care; and that the burden is on the person seeking the exception to show that the "exigencies" of the situation eliminated any alternative.

Search and seizure incident to a valid arrest. In subpart A of Part II to the Court's opinion, Justice Stewart was joined by Justices Douglas, Brennan, and Marshall in disposing of New Hampshire's contention that the warrantless seizure and search of the defendant's automobile was incident to a valid arrest and therefore itself valid. Since the search had taken place in 1964, the issue had to be decided without reliance on Chimel v. California, which subsequently was applied prospectively to limit the search incident to a valid arrest to items on the person of the suspect or under his immediate control. Referring to United States v. Rabinowitz for the proposition that a search incident to a valid arrest was limited to the area under possession or control of the suspect, Justice Stewart noted initially that Coolidge had been arrested inside his house while his car had been parked outside and that the car had been left untouched until the police and Coolidge had departed. There was thus lacking at the time of seizure

any degree of contemporaneousness to the arrest and any proximity of the car to Coolidge.\textsuperscript{17} Under Rabinowitz standards, the arrest of a suspect outside his house could not bless a warrantless search made inside the house, and Justice Stewart could find no indication that the reverse of the situation would require a different result. Even assuming that an immediate warrantless search of the car would have been valid, said Justice Stewart, in Coolidge the police had seized the auto, towed it away, and searched it at their leisure, thereby engaging in conduct that has clearly been condemned as not being incident to a valid arrest.\textsuperscript{18}

Prior to Chimel, Rabinowitz was the leading case in the area of searches incident to a valid arrest. The line of cases of which it is a part, however, has by no means been consistent. Beginning with \textit{Weeks v. United States},\textsuperscript{19} Carroll \textit{v. United States},\textsuperscript{20} and Agnello \textit{v. United States},\textsuperscript{21} continuing with Marron \textit{v. United States},\textsuperscript{22} Go-Bart Co. \textit{v. United States},\textsuperscript{23} and United States \textit{v. Lefkowitz},\textsuperscript{24} and concluding with Harris \textit{v. United States},\textsuperscript{25} Trupiano \textit{v. United States},\textsuperscript{26} and Rabinowitz, the policy of the Court has swung several times between permissiveness and restrictiveness. How one reads Rabinowitz depends on how one reads the line of cases which ultimately leads to the Chimel decision.

The accepted rationale of searches incident to a valid arrest allows warrantless searches and seizures where officials seek to remove from the area of immediate control of the defendant weapons and other tools that might be used by the defendant to resist arrest or to effect an escape.\textsuperscript{27} Warrantless searches and seizures incident to arrests are also allowed for the purpose of protecting evidence within the defendant’s immediate control from being destroyed or concealed.\textsuperscript{28} Controversy has arisen as to the extent of warrantless searches and seizures incident to arrests where the purpose of the search is to secure the fruits, instrumentalities, or evidence of crimes, not to prevent escape or safeguard known evidence.\textsuperscript{29}

In \textit{Harris v. United States},\textsuperscript{30} the Court enunciated perhaps the most permissive standard for searches incident to a valid arrest. In Harris, federal agents under the authority of two arrest warrants had seized

\textsuperscript{19} 232 U.S. 383 (1914).
\textsuperscript{20} 267 U.S. 132 (1925).
\textsuperscript{21} 269 U.S. 20 (1925).
\textsuperscript{22} 275 U.S. 192 (1927).
\textsuperscript{23} 282 U.S. 344 (1931).
\textsuperscript{24} 285 U.S. 452 (1932).
\textsuperscript{25} 331 U.S. 145 (1947).
\textsuperscript{26} 334 U.S. 699 (1948).
\textsuperscript{28} Ibid.
\textsuperscript{30} 331 U.S. 145 (1947).
the defendant in the living room of his four-room apartment. Subse-
quent to the defendant’s arrest, the officers had conducted a five-hour
search in all four rooms of the apartment for two forged checks. The
search, which was pursued into every possible hiding place, had not
produced the checks, but it had produced illegally possessed draft
cards. The draft cards were seized and provided the basis for the de-
fendant’s conviction. The Supreme Court upheld the search as rea-
sonably incident to a valid arrest. Harris was followed by Trupiano,
which embodies a more restrictive standard. In Trupiano, federal
agents had observed for several months the construction and operation
of an illegal still. One night, without search warrants, federal agents
entered the property rented by the defendants, validly arrested several
defendants (one of whom was on the premises of the distillery), and
seized both defendants, the still, and a quantity of illegally produced
alcohol. Although finding the arrests valid and the search and seizures
incident and proximate to the arrests, the Supreme Court reversed the
conviction of the defendants. The Court held that in the case of a
search incident to arrest, search warrants must be procured when
practicable. Since the officers could have obtained warrants prior to
the search with no untoward consequences, without the warrants
the search and seizures were invalid.

Rabinowitz reversed Trupiano. In Rabinowitz, federal officers,
pursuant to an arrest warrant, had arrested the defendant in his one-
room office that was open to the public. Incident to the arrest, the
officers searched the contents of the room, including a desk, a safe, and
file cabinets, for evidence that would disclose the means by which a
federal crime had been committed. The search lasted for about an
hour and a half. The Supreme Court concluded that the search had
been proper; the test was whether, given the totality of the circum-
stances, the search was reasonable, not whether getting a search war-
rant was practicable. In cases subsequent to Rabinowitz and contain-
ing factual situations comparable to Coolidge, proximity of the place
searched and contemporaneity with the arrest or seizure have
been key factors in determining whether the search or seizure was
permissible. In James v. Louisiana, the defendant had been arrested
after alighting from his car. The defendant then had been driven two
blocks to his apartment, which the police forcibly entered. It was held
that the apartment had been illegally searched. In Shipley v. Cali-
ifornia, police had been waiting for the defendant outside his
house; when the defendant arrived and parked 15 to 20 feet away
from his house, the police arrested him as he alighted from his car.
After searching the defendant and his car, the police illegally entered
and searched defendant’s house and in the process found stolen jewel-
ry. In Vale v. Louisiana, the Supreme Court again concluded that if
a search of a house is to be upheld as incident to a valid arrest, the

arrest must take place inside the house. Similarly, in *Coolidge*, the arrest of the defendant inside the house precluded the seizure and search of the defendant’s car outside the house because there was no proximity. Because the car was not seized until after the defendant was removed and not searched until two and a half days later, the search was not contemporaneous. Absent findings of proximity and contemporaneousness, the Court decided that the search was not incident to the arrest.

**Warrantless searches of automobiles.** In subpart B to Part II of the opinion, Justice Stewart, again speaking for a minority of the Court, dismissed New Hampshire’s contentions that police may search an automobile without warrant whenever they have probable cause to search it, and that if a contemporaneous search can be made, the car can be seized, moved, and searched later. The underlying rationale, said Justice Stewart, is that warrantless searches of automobiles are not based solely upon the nature of an automobile as a self-propelled, mobile machine, but as well upon the circumstances in which the police discover the automobile. As to the facts in *Coolidge*, the Court found

> no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a special police detail to guard the immobilized automobile. In short, by no possible stretch of the legal imagination can [Coolidge] be made into a case where “it is not practicable to secure a warrant. . . .”

Under such circumstances, said Justice Stewart, the “automobile exception” is irrelevant. Since a search of the car at Coolidge’s home was not justifiable, a later search made at the police station would also be improper.

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34 In *Hill v. California*, 401 U.S. 797 (1971), the Court was presented with a fact situation similar to that presented by the Harris case and could have clarified the Rabinowitz decision. Although the Court concluded that the search in *Hill* had been incident to a valid arrest, no further discussion of the issue was given.

35 In *Commonwealth v. Gizicki*, 1970 Mass. Adv. Sh. 1431, 264 N.E.2d 672, the Supreme Judicial Court declared that the search of an automobile at the place where its occupants had been arrested, but 1 hour and 45 minutes after the defendants had been removed, was not a search incident to arrest. In *Commonwealth v. Appleby*, 1970 Mass. Adv. Sh. 1559, 265 N.E.2d 485, the defendant had been arrested upon probable cause. At the police station, the police exhaustively searched the defendant, examining his shirts, scraping his fingernails, and testing his skin for the presence of blood. The search was upheld by the Supreme Judicial Court on appeal as being reasonable and pursuant to a valid arrest. Compare *Rochin v. California*, 342 U.S. 165 (1952), with *Schmerber v. California*, 384 U.S. 747 (1966). In *United States v. Wilmoth*, 325 F. Supp. 1397 (D. Mass. 1971), the federal district court held that the search of a car for weapons while the occupant was standing next to it under arrest and after he had already procured three weapons therefrom was incident to arrest under the Chimel standards.


The automobile exception to the prohibition against warrantless searches was carved out to allow the seizure of evidence that might otherwise be transported away so quickly that police could not secure a warrant in time to find the evidence.\textsuperscript{38} It does not depend on the existence of probable cause for the right to arrest the operator of the car, but rather upon probable cause to search the car itself. The automobile exception is the result of a distinction the Court has made between the difference in a search of a store, house, or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon, or automobile for which it may not be practicable to secure a warrant.\textsuperscript{39} The Court has reasoned that where there is a vehicle, flight is easy, the evidence is movable, the occupants may be alerted, and the contents may not be found again.\textsuperscript{40}

\textit{Coolidge} is the latest of a line of automobile cases. In \textit{Carroll}, the Court allowed a warrantless search of a moving automobile where there had been probable cause to believe that contraband (alcohol) was being illegally transported. The car had been searched where it was stopped on the highway. The seized contraband was utilized to effect an arrest and subsequent conviction. \textit{Chambers v. Maroney} extended \textit{Carroll} to allow for searches not only at the place where the care was stopped but also at the police station some time later.\textsuperscript{41} Although \textit{Coolidge} clarified \textit{Chambers} in holding that the presence of an automobile did not automatically invoke the automobile exception to the warrant requirement, the Court created a difficult situation for police. Had the Court held that a car's inherent mobility was enough to invoke the exception, the police could have easily applied the law. Similarly, it might have been easier for the police to understand the law had the Court decided that cars were only somewhat different from houses and could be temporarily immobilized on probable cause until a search warrant was obtained, the only exception being a situation where one police officer could not maintain custody of a prisoner, guard a car, and obtain a search warrant at the same time. Under such a rule, the police would have known that in almost all automobile cases a search warrant must be obtained. \textit{Coolidge}, however, by leaving \textit{Carroll} and \textit{Chambers} intact, requires the police to

\textsuperscript{39} Id. at 158-159. Where probable cause to arrest the occupants of a car exists, there is not necessarily probable cause to search the car or to search the car incident exception or automobile exception. See \textit{Preston v. United States}, 376 U.S. 364 (1964); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968). Conversely, there may be probable cause to search the car without there being probable cause to arrest the occupants. See \textit{Carroll v. United States}, n.38 supra.
\textsuperscript{40} \textit{Chambers v. Maroney}, 399 U.S. 42, 51 (1970).
\textsuperscript{41} 399 U.S. 51 (1970). In \textit{Commonwealth v. Gizicki}, 1970 Mass. Adv. Sh. 1431, 264 N.E.2d 672, the Supreme Judicial Court held that the search of an automobile 1 hour and 45 minutes after the arrest of its occupants and at the place of arrest was permissible under the rationale of \textit{Chambers v. Maroney}; the Court could see no legal distinction between allowing a later search of an automobile at a police station or at the place of the arrest.

http://lawdigitalcommons.bc.edu/asml/vol1971/iss1/21
determine in each case whether probable cause and exigent circumstances are present.

By retaining the Chambers rule that subsequent searches are dependent on whether a search was permissible under Carroll, the Court has for the time rejected the use of an immobilization rule. A temporary immobilization rule would allow police, where they had probable cause to search a car, to immobilize it until they could get a search warrant. A magistrate would then be able to make a determination under the warrant procedure whether probable cause existed for a further intrusion into the freedom and privacy of an individual. Under this rule, a citizen’s security would be protected, albeit at some inconvenience to the operator or owner of the car. If the owner felt that he would rather be searched than await the determination of a magistrate, however, he could always consent to the search. In some cases, immobilization would be an acceptable and reasonable inconvenience to an operator of a car, since the probable cause for the search would likely be probable cause for his arrest. In the latter cases, the owner would be under arrest at the same time the car was immobilized. In other cases, however, it does not follow that because a person is arrested a further intrusion into his right of privacy is not objectionable. Such further invasion should be allowed only after a determination of probable cause by a magistrate. To the citizen, the search of his car may well be a greater invasion of his rights than either his arrest or the car’s immobilization. If that is the case, he should have the opportunity to have his greater rights protected by the courts.

Coolidge may have put in doubt what seemed to be an abandonment in Chambers of the requirement that the police have probable cause to believe that the evidence to be seized from an automobile is contraband being illegally transported. In the Coolidge opinion, Justice Stewart remarked in several places that contraband goods and the use of the car for illegal purposes were not present. It is not clear in Coolidge whether this absence was crucial. Coolidge may also breathe new life into the legal distinction in search and seizure cases between contraband goods and mere evidence, a distinction that had seemingly been eliminated by Warden v. Hayden.

42 A temporary immobilization rule has arisen in two cases. In Terry v. Ohio, 392 U.S. 1 (1968), the Court permitted a slight immobilization in the nature of a stop-and-frisk for weapons when the search is apparently required for the protection of the police officer. In United States v. Van Leeuwen, 397 U.S. 249 (1970), however, the Court allowed a 29-hour detention of first-class mail until an investigation could be made and a warrant issued. A temporary immobilization rule for automobiles would not be inconsistent with these cases.

43 In cases where warrantless searches under the automobile exception have previously been allowed, contraband has been tied in by one way or another to the search. See Carroll v. United States, 267 U.S. 132 (1925) (alcohol); Husty v. United States, 282 U.S. 694 (1931) (alcohol); Scher v. United States, 305 U.S. 251 (1938) (alcohol); Cooper v. California, 386 U.S. 58 (1967) (heroin). No contraband was involved in Chambers v. Maroney.

Seizure of objects that are in plain view. In subpart C to Part II of the Coolidge opinion, Justice Stewart, still speaking for a minority of the Justices, rejected New Hampshire's argument that the seizure of Coolidge's automobile was justifiable on the ground that the car was an instrumentality of the crime and thus could be seized without warrant because it was in plain view when the police went to arrest Coolidge. What the prior cases that invoke the plain view doctrine have in common, said Justice Stewart, is first that the intrusion that led to the seizure of the item in plain view was justifiable for separate and independent reasons (search for another item pursuant to a search warrant, or search incident to a valid arrest, for example); and second, that the item in plain view was inadvertently discovered in the course of that intrusion. The plain view doctrine does not run afoul of the Fourth Amendment warrant requirement, because the two objectives of that requirement are satisfied. The intrusion itself is still justified in advance to a magistrate, with only certain narrowly drawn exceptions, and the search is not expanded in scope beyond those items noted specifically in the warrant or in plain view in the place for which the search is authorized. The plain view exception to the warrant requirement is justifiable because of the inconvenience and possible loss or misuse of evidence that would result if officers in such situations were forced to get a warrant before seizing the particular item.

The outer limits of the plain view doctrine, according to Justice Stewart, are implicit in the statement of the doctrine. First, the plain view doctrine itself is never sufficient justification for a warrantless search or seizure; permitting seizure upon probable cause, without the necessity of obtaining a warrant, negates the basic principal that warrantless searches and seizures are not permitted except in "exigent circumstances." Second, the discovery of the items in plain view in the course of search must not be anticipated; where the police know ahead of time that a certain item will be present in the area of the intrusion and intend to seize it, the Fourth Amendment warrant requirement does not cause any inconvenience to the police that is not outweighed by the desirability of enforcing the general prohibition against warrantless seizures except in urgent circumstances. Furthermore, the failure to list in a warrant an item that the police know to be present and intend to seize is to contravene the Fourth Amendment requirement that the warrant list with particularity the items to be seized. In Coolidge, the police had had plenty of time to obtain a valid warrant, they had known in advance the description and location of Coolidge's automobile, and they had intended to seize it at the same time they took Coolidge into custody. The car itself was not contraband, stolen goods, or a dangerous instrument. Justice Stewart concluded that the seizure of the car was not justified under the plain view doctrine.

Receipt of evidence from third parties. While Coolidge was in custody following his lie detector examination, two police officers went
to his home to check out with his wife a story Coolidge had given them. The trial judge found as a fact that at that time the police knew only a few of the characteristics of the murder weapon, and that the two officers calling on Mrs. Coolidge had not been motivated by a desire to find the murder weapon. Nonetheless, the two officers asked Mrs. Coolidge whether her husband owned any guns. She answered in the affirmative, showed them to the officers, and asked if they wanted the guns. One officer replied that they did. The officers also came away with clothing shown to them by Mrs. Coolidge and represented as having been worn by her husband on the night in question. Justice Stewart, writing for the full Court, held that the taking of the guns and clothing by the police was not a search and seizure and was therefore not prohibited by the Fourth Amendment.

The test of whether Mrs. Coolidge’s actions were proscribed by the Fourth Amendment, said Justice Stewart, was whether Mrs. Coolidge, “in light of all the circumstances of the case, must be regarded as having acted as an ‘instrument’ or agent of the state when she produced her husband’s belongings.” At the murder trial, Mrs. Coolidge had ascribed to herself the motive of clearing her husband and had said that at the time of the delivery of the guns and clothing she believed she had nothing to hide. Also, the police officers had exhibited no attempt to dominate or coerce her or to direct her actions. The Supreme Court held that since the Fourth Amendment and the attendant exclusionary rule is aimed at preventing official misconduct and not at discouraging private citizens from aiding the police, it was not applicable in the Coolidge situation.

**STUDENT COMMENT**

§18.10. Statutory rape: Reasonable mistake of age as affirmative defense: Commonwealth v. Moore. The prosecutrix in the instant case was a 14-year-old runaway girl from Worcester, Massachusetts. When she arrived in Boston in November 1969, she befriended the female defendant, a 17-year-old prostitute named Doreen Moore. She was subsequently invited to stay in an apartment shared by Doreen Moore and the male defendant, Sammy L. Nelson, a 23-year-old pimp. Shortly after the prosecutrix moved into the apartment, she had sexual relations with Nelson. Both defendants soon thereafter requested that the prosecutrix “go out on the street” and “make some money.” On November 24, 1969, the female defendant and the prosecutrix were arrested when they attempted to solicit a plainclothes police officer. The male defendant posted bail for them, and the prosecutrix returned to his apartment.

A few days later, the male defendant, in a sudden fit of anger, accused the prosecutrix of being a “troublemaker” and ordered her to leave. He then began to beat her with his hands, a shoe, a length of rubber hose, and a vacuum cleaner pipe. The female defendant

provided him with a heated knife, which he used to burn the prosecutrix’ neck and to cut a pattern on her face.

When the prosecutrix appeared before the Boston Municipal Court the following day on the charge of solicitation, she explained her appearance by saying that she had been scratched by a cat and hit by a baseball bat. However, she subsequently filed complaints against both Nelson and Moore after suffering a second beating. Nelson was charged with carnally knowing and abusing a female child under the age of 16.² In addition, both defendants were charged with contributing to the delinquency of a minor and assault and battery with a dangerous weapon.

At trial in Suffolk Superior Court, Nelson, in answering the charge of carnally knowing and abusing a female child under the age of 16, attempted to establish that he had mistakenly thought the prosecutrix to be 18. The prosecutrix herself testified that she had an identification card showing that she was 18, and that she had told the female defendant that she was 18. Moreover, Nelson argued that the prosecutrix had convinced many people that she was 18, including police officers, her probation officer, her lawyer, and a judge of the Boston Municipal Court. The superior court judge refused to recognize Nelson’s alleged mistake as an affirmative defense and instructed the jury that a belief that the prosecutrix was over the age of 18 was not a defense to the indictment for statutory rape.³ The defendant based his appeal on alleged error in the judge’s charge to the jury, but the Supreme Judicial Court affirmed the defendant’s conviction and held that mistake as to age was not available to him as an affirmative defense. According to the Court, the resulting strict criminal liability was not in violation of either the Fourteenth Amendment due process clause or the Eighth Amendment prohibition on cruel and unusual punishment. In so holding, the Court refused to join several jurisdictions that have recently recognized reasonable mistake as to age as an affirmative defense to a charge of statutory rape.⁴

The Supreme Judicial Court claimed that its decision in Moore

² The offense of carnally knowing and abusing a female child under the age of 16, commonly referred to as statutory rape, is covered by G.L., c. 265, §23: “Whoever unlawfully and carnally knows and abuses a female child under sixteen years of age shall, for the first offense, be punished by imprisonment in the state prison for life or for any term of years, or, except as otherwise provided, for any term in any other penal institution in the commonwealth, and for the second or subsequent offense by imprisonment in the state prison for life or for any term of years, but not less than five years.”

³ As related in the Appellate Brief for defendant Nelson at 5, “The trial court instructed the jury that the offense, like that of ‘selling milk that is adulterated,’ carried strict liability and went on to say: ‘She (the victim) testified that she did have an I.D. card, a false name, with the age 18. Let’s assume defendant believed she was over 18 . . . that is not a defense. Even though she weigh 200 pounds, and was six feet tall and looked 35 years of age to any one of us, the responsibility is put on the one who has sex relations with that child even though she looks twice her age.’”

was in accord with the "long-standing interpretation" of G.L., c. 265, §23, as first set forth in the Court's 1895 decision in Commonwealth v. Murphy. Murphy involved a defendant, who had been charged with assault with intent to rape a 14-year-old girl. Evidence showed that the defendant had known the victim since she was a little girl, but did not know her specific age at the time of the alleged acts. The girl had frequented the defendant's place of business and his residence by his invitation, engaging in sexual familiarities with him for small amounts of money. The defendant argued that unless the state could show affirmatively that he knew or had good reason to believe that the victim was under 16 years of age, he could not be convicted of statutory rape; he did not base his appeal on a claimed mistake as to the girl's age.

Murphy apparently presented, for the first time, the question of "whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon everyone the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is." Without elaboration, the Court held that in cases of statutory rape, the state does not have the burden of alleging and proving that the defendant had knowledge of the victim's age. However, it is unclear whether the Murphy Court also intended to hold that mistake as to age is not available as an affirmative defense. On the one hand, the Court did state that "if one intentionally commits a crime, he is responsible criminally for the consequences of his act if the offense proves to be different from that which he intended." On the other hand, although the Court did refer to mistake, its primary emphasis was on the state's burden in establishing the elements of the crime of statutory rape. Thus, it would seem arguable, in spite of the Moore Court's conclusion to the contrary, that since the mistake issue was not argued by the defendant in Murphy, that decision does not itself preclude the affirmative defense of mistake.

Even if it is assumed that the Murphy decision was intended to preclude the affirmative defense of mistake, the rationale of the decision remains open to criticism. The Court chose to base its

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5 See n.2 supra.
6 165 Mass. 66, 42 N.E. 504 (1895).
7 Id. at 70, 42 N.E. at 505. Massachusetts was apparently one of the first American jurisdictions to consider the question of strict criminal liability for statutory rape. See Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 69 (1933).
8 165 Mass. 66, 70, 42 N.E. 504, 505 (1895).
9 "How far a mistake of fact in regard to the nature of his act may be availed of by a defendant in a criminal case is sometimes a difficult question to answer." Ibid. The Supreme Judicial Court made no mention of its decision in Commonwealth v. Elwell, 43 Mass. (2 Met.) 190 (1840), in which the Court had said: "If a man does an act, which would be otherwise criminal, through mistake or accident, or by force or the compulsion of others, in which his own will and mind do not instigate him to the act, or concur in it, it is a matter of defense, to be averred and proved on his part. . . ." Id. at 192.
10 In Moore, the Court concluded that "the court in the Murphy case intended to rule that a mistake of fact did not avail the defendant." 1971 Mass. Adv. Sh. 853, 858, 269 N.E.2d 636, 640.
holding in *Murphy* on an analogy to the so-called public welfare offenses:

There is a large class of cases in which on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act. In such cases, it is deemed best to require everybody at his peril to ascertain whether his act comes within the legislative prohibition. Among these cases are prosecutions for the unlawful sale of intoxicating liquor, for selling adulterated milk, for unlawfully selling naptha, for admitting a minor to a billiard room, and the like.\(^{11}\)

As Professor Sayre points out in his authoritative article on “public welfare” offenses, strict liability in cases such as those cited by the *Murphy* Court resulted from a need to expedite the criminal process in order to deal with increasingly congested court calendars in the mid-nineteenth century.\(^{12}\) The burgeoning complexity of society during the period caused legislatures to impose strict criminal liability in regard to certain lesser offenses carrying relatively minor penalties. Such offenses usually related to public health or the general welfare of society. In contrast to the “public welfare” offenses, the crime of statutory rape is a very serious felony. In addition to a possible life sentence, a person convicted of statutory rape faces restrictions on his “good time” while in prison,\(^{13}\) an examination as a “sexually dangerous” person,\(^{14}\) restriction concerning parole,\(^{15}\) and a notification by the state to all law enforcement authorities in the Commonwealth when he is released from prison.\(^{16}\) It is rather difficult to see the analogy between offenses such as selling adulterated milk or admitting a minor to a billiard parlor and the offense of statutory rape. Although the *Murphy* decision is “long-standing,” its rationale is surely questionable.

Courts in other jurisdictions have stated that strict liability for statutory rape is applied in order to protect females below a certain age from the adverse consequences of what is assumed to be their rashly given consent.\(^{17}\) Although the Supreme Judicial Court has not actually discussed the public policy reasons for establishing statutory rape as a strict liability offense, the context of the *Murphy* and *Moore* decisions suggests that the Court would agree with the foregoing rationale. Age becomes the only determinant of ability to give consent, and no regard is given to sexual sophistication, precocious maturity, experience, or physical appearance. In *Moore*, the

\(^{11}\) 165 Mass. 66, 70, 42 N.E. 504, 505. (Citations omitted.)

\(^{12}\) Sayre, Public Welfare Offenses, 33 Colum. L. Rev. 55, 64 (1933).

\(^{13}\) G.L., c. 127, §129.

\(^{14}\) G.L., c. 125A, §4.

\(^{15}\) G.L., c. 127, §133.

\(^{16}\) G.L., c. 147, §4B.

\(^{17}\) See, e.g., State v. Adkins, 106 W. Va. 658, 146 S.E. 732 (1929).
prosecutrix not only carried an identification card with her picture on it, representing that she was 18, but after she was arrested on a charge of solicitation, she also convinced the police, the trial judge, her probation officer, and her lawyer that she was 18. Although physical appearance alone should not be construed as indicating culpability on the part of the prosecutrix, it is likely that the impression of maturity presented by the prosecutrix indicated something less than pristine innocence. By holding that a female under age 16 can never give a valid consent, the Moore Court chose to disregard the possibility that a defendant might be perfectly justified in believing that his willing sexual partner was at least 16 years of age. Apparently no decision of the United States Supreme Court has dealt with a constitutional challenge to a statute imposing strict liability for a serious felony. If such a challenge comes, it may well arise out of a conviction for statutory rape. Because most state laws governing the offense do not allow the fact finder to consider whether the accused was aware that he was committing the crime, a due process argument can be made. The Supreme Judicial Court, however, rejected defendant Nelson’s due process claims in Moore. Relying on its own 1968 decision in Commonwealth v. Buckley, the Court determined that the Massachusetts legislature had made it clear that knowledge of the criminality was not to be a necessary element in the offense of statutory rape. Buckley concerned an indictment under the Massachusetts statute making it a crime to be “present where a narcotic drug is illegally kept or deposited.” Defendant challenged his indictment on the ground that the statute was so vague and indefinite as to violate the due process clause of the Fourteenth Amendment. The Supreme Judicial Court agreed with defendant, but apparently only because the statute contained no language waiving the usual knowledge requirement. After discussing the legislature’s power to waive the element of knowledge in certain minor “public welfare” offenses, the Court concluded:

[The drug statute] permits the imposition of a severe penalty, as much as five years in prison. It hardly can be regarded as a minor offense. Thus, it would take unusually clear legislative language to lead us to the view that knowledge is not required for conviction. . . .

One might question whether the legislative language in G.L., c. 265,
§23 is so "unusually clear" as to demonstrate that reasonable mistake was considered and rejected as a possible defense by the legislature. However, even if it is conceded that the Court in Moore correctly applied Buckley by finding such "unusually clear" legislative intent, the question remains whether the Court missed the target. The legislature's intent is not the real issue; the very point of a due process challenge would be to question the legislature's right to impose strict liability for a serious felony.

The application of G.L., c. 265, §23 also raises an equal protection issue under the Fourteenth Amendment. Sole criminal responsibility for the sexual contact is placed on the male, and the heavy penalties and social stigma attached to the crime are exacted without reference to the willingness or complicity of the female. In fact, the prosecutrix in Moore actively and successfully misrepresented her age; the male defendant could not have ascertained her true age even if he had asked her for a photo identification card. One surely has no particular sympathy for the male defendant in Moore, yet the constitutional issue still applies: may the Commonwealth punish one of two willing sexual participants without allowing any defense of reasonable mistake, while taking no action against the other, who in this case happened to be the only person who knew the true situation?

The due process clause does not require that all laws apply equally to everyone, and indeed many of our laws are based on classifications of individuals and groups. Equal protection does require, however, that all who are similarly situated before the law be similarly treated by the law. A classification under the criminal law that provides for the punishment of only one of several people engaged in the same conduct has been held unconstitutional: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense . . . , it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."25

The Moore decision also raises Eighth Amendment questions concerning cruel and unusual punishment. The penalties imposed on a person convicted of statutory rape are harsh. The Supreme Judicial Court admitted that "the possible penalties remain Draconian," but asserted that "we do not deem them disproportionate to the offence shown in this case."27 Murphy, upon which the Court relied in dismissing the issue of cruel and unusual punishment, decided the question thusly: "We cannot say the punishment prescribed for this offence . . . is beyond the constitutional power of the legislature to inflict."28 It is not suggested that the penalties for statutory

23 For text of G.L., c. 265, §23, see n. 2 supra.
26 See text accompanying nn. 13-16 supra.
rape would be cruel and unusual in all circumstances. When the female is young enough so that reasonable mistake as to her age is impossible, the punishment may be quite appropriate.

Anyone who tampers sexually with a [child under age 10] is potentially a killer and hence a dangerous individual outside prison walls. . . . The mere fact that the man directs his sexual attentions at a young girl indicates that he is in need of care from a psychiatrist or custody from a jailor. The public requires protection from the abnormal desires of such an individual.29

However, when, in spite of her actual age, the female can reasonably represent that she is able to give valid consent, the punishment arguably is entirely out of proportion to the crime. If the male defendant reasonably believed that the female was able to give valid consent, he did not exhibit any "abnormal" sexual drives by engaging in sexual intercourse with her. Indeed, by treating fornication as a misdemeanor punishable by a $30 fine or 90 days in jail,30 the legislature has indicated that it does not consider sexual intercourse between unmarried consenting adults to be a very serious offence.

Not all jurisdictions accept the Murphy-Moore rationale. In a 1964 case, raised by the male defendant in Moore but rejected by the Supreme Judicial Court, the California Supreme Court recognized as inequitable the imposition of strict liability in cases of statutory rape. In People v. Hernandez,31 defendant was charged under a statute prohibiting carnal knowledge of a female under the age of 18. The prosecutrix was 17 years and 9 months old, and had voluntarily engaged in sexual intercourse with the defendant. Defendant was convicted of statutory rape, and he appealed on the ground that the trial court erred in refusing to permit him to present evidence to show that he had, in good faith, believed that the prosecutrix was at least 18 years old. The California Supreme Court held that a defendant's reasonable though mistaken belief that the female was at least of an age at which she could validly give her consent would constitute an affirmative defense to a charge of statutory rape. Justice Peek, for the court, reasoned that age should not be the primary determinant of sexual sophistication. He recognized that there are numerous factors which bring understanding of the sexual act, and that to hold the defendant strictly liable would not adequately adjust the relative culpability of the male and female participants in the act.32 The court noted that jurists generally have been unable to satisfactorily explain "the na-

30 G.L., c. 272, §18.
32 "The assumption that age alone will bring an understanding of the sexual act to a young woman is of doubtful validity. Both learning from the cultural group to [sic] which she is a member and her actual sexual experiences will determine her level of comprehension. The sexually experienced 15-year-old may be far more acutely aware of the implications of sexual intercourse than her sheltered cousin who is beyond the age of consent." Id. at 531, 399 P.2d at 674, 39 Cal. Rptr. at 362.
nature of the criminal intent present in the mind of one who in good faith believes he has obtained a lawful consent.33

Had the Moore Court chosen to follow Hernandez, it would have created, in effect, a presumption that the defendant knew the true age of the prosecutrix. The presumption would be rebuttable only by a showing of reasonable mistake. Evidence of such a mistake might include, for example, a showing of deliberate misrepresentation of age, association with persons older and more socially sophisticated than those in the prosecutrix’ peer group, mature physical appearance and conduct, and sexual comprehension of a higher level than that of others in her peer group.

The Supreme Judicial Court’s position in Moore emphasizes the need in Massachusetts for legislative revision of G.L., c. 265, §23. One possible legislative response is the new Revised Criminal Code,34 to be submitted to the 1971-1972 session of the Massachusetts legislature. The code attempts to bring the law regarding sexual offenses into line with modern social realities by providing, inter alia, for a defense of reasonable mistake as to age in cases of statutory rape.

The section dealing with statutory rape in the new code is Chapter 265, Section 41. New terminology has been adopted, and Section 41, analogous to the present statutory rape law, is entitled “Rape in the Second Degree.” This section provides, in pertinent part, that a person is guilty of “rape in the second degree” if he has sexual intercourse with another not his sexual cohabitant and if that other person is less than 16 years of age. Classes of felony based on the age of the “other person”35 are established. A Class D felony is committed if the “other person” is between 14 and 16 years of age. The Class D felony provides a maximum penalty of five years imprisonment. If the “other person” is less than 14 years of age, the offense is a Class C felony, which provides a maximum penalty of ten years imprisonment. Finally, if the “other person” is less than 11 years of age, the offense is punishable as a Class A felony, which provides a minimum penalty of ten years imprisonment or one-third of the maximum sentence, life imprisonment.

One of the most notable features of the new approach embodied in the code is the recognition, in certain fact situations, of reasonable mistake as an affirmative defense. If the defendant reasonably believed the “other person” to be 16 years of age or older, this belief is

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33 Id. at 534, 393 P.2d at 676, 39 Cal. Rptr. at 364.

34 The Massachusetts Revised Criminal Code was prepared by the Massachusetts Criminal Law Revision Commission, chaired by Professor Livingston Hall of Harvard Law School.

35 The Revised Criminal Code would bring about a major change in the general terminology relating to sexual offenses. For example, sexual cohabitant is defined as “any person sixteen years or over who is living with the defendant as a consensual sexual partner regardless of the legal status of their relationship.” Chapter 265, §1. The term other person is employed in the Revised Criminal Code as an apparent substitute for the word female. Presumably, the use of the term other person would allow for a person of any sex being victimized by rape in the second degree, as defined in Chapter 265, §41.
a complete defense, even though the other person is in fact between 14 and 16 years of age. In cases where the "other person" is less than 14 years of age, reasonable mistake is not available as a defense. In effect, this statute creates a buffer zone, or an area between the ages of 14 and 16 where the law would assume that age might not be the sole or even primary determinant of sexual sophistication. The statute thus protects the male who makes a reasonable mistake as to age, although it does not release him from responsibility for making a good faith attempt to determine age.

It would seem that underlying reluctance of the Supreme Judicial Court to accept the reasonable mistake defense is a dread of doing violence to an ill-defined public policy. The judicial interpretation of the statutory rape provision embodies the implicit policy decision to protect females who are under a certain age, regardless of the facts of the individual case. In light of the weak rationale expressed to impose strict liability, the constitutional issues raised by the Moore decision, and the realities of modern society, Massachusetts should adopt the proposal of the Revised Criminal Code.

JOHN W. CONNIFF