CHAPTER 10

Constitutional Law

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§ 10.1 Obscenity Statute: Constitutionality: Construction. In 1974 Massachusetts amended its obscenity statutes[1] in an attempt to

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§10.1. [1] Acts of 1974, c. 430, G.L. c. 272, §§ 28C-31 provide in pertinent part:

§ 28C:

Whenever there is reasonable cause to believe that a book which is being disseminated, or is in the possession of any person who intends to disseminate the same, is obscene, the attorney general, or any district attorney within his district, shall bring an information or petition in equity in the superior court directed against said book by name. Upon the filing of such information or petition in equity, a justice of the superior court shall, if, upon a summary examination of the book, he is of opinion that there is reasonable cause to believe that such book is obscene, issue an order of notice, returnable in or within thirty days, directed against such book by name and addressed to all persons interested in the dissemination thereof, to show cause why said book should not be judicially determined to be obscene. [Notice provisions omitted.] . . . After the issuance of an order of notice under the provisions of this section, the court shall, on motion of the attorney general or district attorney, make an interlocutory finding and adjudication that said book is obscene, which finding and adjudication shall be of the same force and effect as the final finding and adjudication provided in section twenty-eight E or section twenty-eight F, but only until such final finding and adjudication is made or until further order of the court. It shall be an affirmative defense under this section if the evidence proves that the defendant was a bona fide school, museum or library, or was acting in the course of his employment as an employee of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization.

§ 28D:

Any person interested in the dissemination of said book may appear and file an answer on or before the return day named in said notice or within such further time as the court may allow, and may claim a right to trial by jury on the issue whether said book is obscene.

§ 28E:

If no person appears and answers within the time allowed, the court may . . . order a general default and if the court finds that the book is obscene, may make an adjudication against the book that the same is obscene.

conform to the standards enunciated by the United States Supreme

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§ 28F:

If an appearance is entered and answer filed, the case shall be set down for speedy hearing, but a default and order shall first be entered against all persons who have not appeared and answered. . . . Such hearing shall be conducted in accordance with the usual course of proceedings in equity including all rights of exception and appeal. At such hearing the court may receive the testimony of experts and may receive evidence as to the literary, artistic, political or scientific character of said book and as to the manner and form of its dissemination. Upon such hearing, the court may make an adjudication in the manner provided in said section twenty-eight E.

§ 28H:

In any trial under section twenty-nine on an indictment found or a complaint made for any offence committed after the filing of a proceeding under section twenty-eight C, the fact of such filing and the action of the court or jury thereon, if any, shall be admissible in evidence. If prior to the said offense a final decree had been entered against the book, the defendant, if the book be obscene, shall be conclusively presumed to have known said book to be obscene, or if said decree had been in favor of the book he shall be conclusively presumed not to have known said book to the obscene, or if no final decree had been entered but a proceeding had been filed prior to said offence, the defendant shall be conclusively presumed to have had knowledge of the contents of said book.

§ 29:

Whoever disseminates any matter which is obscene, knowing it to be obscene, or whoever has in his possession any matter which is obscene, knowing it to be obscene, with the intent to disseminate the same, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in a jail or house of correction. It shall be an affirmative defense under this section if the evidence proves that the defendant was a bona fide school, museum or library, or was acting in the course of his employment as an employee of such organization or of a retail outlet affiliated with and serving the educational purpose of such organization.

§ 30:

The superior court shall have jurisdiction to enjoin the dissemination of any matter which is obscene. The attorney general or a district attorney within his district may request an injunction against any person, firm, or corporation which disseminates or is about to disseminate any matter which is obscene.

The person, firm, or corporation sought to be enjoined shall be entitled to a trial on the merits within one day after filing of responsive pleadings and a decision shall be rendered by the court within two days of the conclusion of the trial.

A justice of the superior court may issue a preliminary injunction pending the trial on the merits against such person, firm, or corporation which disseminates or is about to disseminate any matter which is obscene.

No preliminary injunction shall be issued without notice to the adverse party.

. . . .

If the court finds that the person, firm, or corporation is disseminating or is about to disseminate any obscene matter, it shall issue a permanent injunction prohibiting the dissemination of that matter. The court's order shall direct the person, firm or corporation to surrender to a sheriff or a police officer the matter found obscene and a sheriff or police officer shall be directed to seize and destroy the same. . . . [A]ny party or intervenor shall have the right to an expedited appeal to the appeals court.

Court in *Miller v. California.*[2] During the *Survey* year, the Supreme Judicial Court reviewed the obscenity statutes in a variety of contexts.

Perhaps the most significant of the cases decided by the Court was *Commonwealth v. 707 Main Corp.,*[3] in which the Court generally upheld the overall constitutionality of the obscenity statute. The defendant in *707 Main Corp.* was found guilty in the superior court of two criminal violations of the obscenity statutes.[4] On appeal, the defendant raised three challenges to the statutes. First, the defendant contended that since the commonwealth had instituted a civil proceeding for an injunction against the showing of the film in question, under section 30 of chapter 272 it was collaterally estopped from proceeding criminally against him under section 29 of chapter 272.[5] Second, the defendant maintained that the statute violated the equal protection clause of the fourteenth amendment[6] by providing disparate procedural protections depending upon whether the material in question was a "book."[7] Third,

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The procedures set forth in this section are in addition to criminal proceedings initiated under any provisions of the General Laws, and not a condition precedent thereto.

§ 31 [Definitions]

"Disseminate," to import, publish, produce, print, manufacture, distribute, sell, lease, exhibit or display.

. . . .

"Knowing," a general awareness of the character of the matter.

. . . .

"Matter," any printed material, visual representation, live performance or sound recording including but not limited to books, magazines, motion picture films, pamphlets, phonographic records, pictures, photographs, figures, statutes, plays, dances.

"Obscene," matter is obscene if taken as a whole it (1) appeals to prurient interest of the average person, applying the contemporary standards of the commonwealth; (2) depicts or describes sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political or scientific value.

"Sexual conduct," human masturbation, sexual intercourse actual or simulated, normal or perverted, or any touching of the genitals, pubic areas or buttocks of the human male or female, or the breasts of the female, whether alone or between members of the same or opposite sex or between humans and animals, any depiction or representation of excretory functions, any lewd exhibitions of the genitals, flagellation or torture in the context of a sexual relationship. Sexual intercourse is simulated when it depicts explicit sexual intercourse which gives the appearance of the consummation of sexual intercourse, normal or perverted.

. . . .

[2] 413 U.S. 15 (1973).

[3] 1976 Mass. Adv. Sh. 2643, 357 N.E.2d 753.

[4] *Id.* at 2643, 357 N.E.2d at 755; *see* G.L. c. 272, § 29. The charges arose from the defendants' showing of the film "Deep Throat" on two separate occasions. 1976 Mass. Adv. Sh. at 2643, 357 N.E.2d at 755.

[5] *Id.* at 2644, 357 N.E.2d at 755.

[6] U.S. CONST. amend. XIV, § 1.

[7] 1976 Mass. Adv. Sh. at 2644, 357 N.E.2d at 755.

the defendant contended that the obscenity statute was overbroad and vague in violation of the first amendment[8] and the due process provisions of the fifth[9] and fourteenth[10] amendments.[11]

The Supreme Judicial Court rejected the defendant's first challenge, based on collateral estoppel, on the grounds that the United States Supreme Court has left to state law determinations as to the collateral effect of prior findings of nonobscenity in subsequent proceedings.[12] The Court stated that the legislature had established a specific statutory design in the obscenity statutes capable of leaving as many procedural remedial options open to prosecutors as possible.[13] Moreover, the Court concluded that, by this design, the legislature intended to make available to prosecutors the concurrent use of civil and criminal proceedings for enforcement of the obscenity laws.[14] Thus, the Court held that the institution of a civil proceeding before a criminal proceeding does not estop action in the criminal proceeding.[15]

The defendant's second contention was that the Massachusetts stat-

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[8] U.S. CONST. amend. I.

[9] *Id.* at amend. V.

[10] *Id.* at amend. XIV, § 1.

[11] 1976 Mass. Adv. Sh. at 2644, 357 N.E.2d at 755-56.

[12] *Id.* at 2646, 357 N.E.2d at 756. This assumption by the Supreme Judicial Court may not be entirely accurate. In *Miller,* the Supreme Court refused to consider the issue of collateral estoppel on the grounds that the issue had not been raised properly in the California courts. 413 U.S. at 34. Moreover, the record in *Miller* did not reveal clearly how California law might resolve the question. *Id.* at 34 n.14. Thus, the Supreme Court merely remanded the collateral estoppel question to the California courts without expressing an opinion on the merits of the claim. *Id.*

[13] The Supreme Judicial Court interpreted the legislative intent in enacting the statutes as providing law enforcement officials with as much flexibility as possible: "[The legislature] established a civil proceeding which would provide notice of potential criminal liability to disseminators of matter alleged to be obscene, while reserving for law enforcement officials the right to use criminal proceedings as a primary enforcement tool when necessary." 1976 Mass. Adv. Sh. at 2647, 357 N.E.2d at 757.

[14] *Id.*

[15] In *707 Main Corp.* the commonwealth utilized the civil proceeding for injunctive relief pursuant to G.L. c. 272, § 30, concurrently with the crimnal proceeding pursuant to G.L. c. 272, § 29. See note 1 *supra.* After a trial on the merits, the judge in the civil action refused to enjoin the defendant from showing the film becaue the commonwealth had failed to prove it obscene. *See* District Attorney v. Three Way Theatres Corp., 1976 Mass. Adv. Sh. 2665, 2665-66 & n.1, 357 N.E.2d 747, 748 & n.1. The commonwealth appealed, and while the appeal was pending, the defendant was convicted in the criminal proceeding.

While permitting *concurrent* utilization of both civil and criminal proceedings without collateral estoppel consequences, the Court in *707 Main Corp.* emphasized that it was not deciding what result it would reach if the commonwelath had "tried and failed to obtain an injunction and thereafter, while appeal of an unfavorable result was pending, proceeded with criminal prosecution. . . *after the date of the civil decision,* of the same allegedly obscene matter." *Id.* at 2647 n.3, 357 N.E.2d at 757 n.3 (emphasis in original).

utes violate the equal protection clause of the United States Constitution by requiring a civil proceeding to decide the issue of the material's "obscenity" as a condition precedent to criminal proceedings only when the material in question is a "book".[16] The defendant argued that the statutory distinction between books and other materials is discriminatory and that the Court, applying a strict scrutiny standard of review, must find it unconstitutional.[17]

Responding to the defendant's equal protection argument, the Court first refused to apply strict scrutiny to the legislation in question, since the Court determined that the statute does not affect a fundamental right.[18] The Court indicated that the obscenity statutes do not purport to distinguish between books and magazines for the purpose of determining whether *any given content* is obscene. On the contrary, the Court noted that the statutes provide a procedure to litigate the line between obscenity and protected speech in *all* cases.[19] The Court observed that the classifications established in the obscenity statutes are content neutral—they distinguish between "books" and "other species of materials," not between first amendment protected speech and nonprotected speech.[20] The mere fact that the statutes additionally establish a separate procedure for one category of materials does not demand that the Court apply strict scrutiny to the entire scheme. Thus, the Court applied the traditional rational basis test to the obscenity statutes.[21] Having determined that the appropriate standard for its review

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[16] 1976 Mass. Adv. Sh. at 2648-49, 357 N.E.2d at 757-58.

G.L. c. 272, §§ 28C-28D provide for an in rem civil proceeding to determine whether a "book" is obscene. This proceeding must precede the initiation of any criminal action against the disseminator of the book. A decree issuing from the civil proceeding is conclusive evidence on the issue of criminal knowledge of the book's obscenity. *See* G.L. c. 272, § 28H. No similar procedure is available for materials other than books. See generally note 1 *supra*.

[17] 1976 Mass. Adv. Sh. at 2649, 357 N.E.2d at 758.

[18] *Id.*

[19] *Id.* at 2650, 357 N.E.2d at 758.

The Court asserted that the procedures outlined in G.L. c. 272, §§ 29-30 afforded constitutionally adequate protections to disseminators of materials other than "books." G.L. c. 272, § 29, the criminal section of the obscenity statutes, encompasses within its proscription of "obscene matter" "hard core" sexual conduct as specifically described by the United States Supreme Court in *Miller*, 413 U.S. at 25 and Jenkins v. Georgia, 418 U.S. 153, 160-61 (1974). Moreover, the allegedly obscene matter must satisfy a three-pronged test set out in G.L. c. 272, § 31, which parallels the test established in *Miller*. *See Miller*, 413 U.S. at 24.

G.L. c. 272, § 30 provides for injunctive relief against dissemination of obscene matter and is procedurally identical with § 29 on the issue of "obscenity."

[20] 1976 Mass. Adv. Sh. at 2649-50, 357 N.E.2d at 758.

[21] *Id.* at 2650-51, 357 N.E.2d at 758-59.

The application of the rational basis test normally results in the Court's upholding the challenged statute. "[I]t has been our frequently stated rule that a statutory classifiction

of the obscenity statutes was the rational basis test, the Court had little difficulty disposing of the defendant's equal protection challenge. The Court identified a variety of justications to explain the disparity of procedural routes created in the legislation.[22] Therefore, the Court concluded that a rational basis exists for the distinction between books and other types of material.[23]

The third challenge to the obscenity statutes raised by the defendant in *707 Main Corp.* involved the contention that the Massachusetts statute was overbroad[24] in its definitions of "obscene" matter and "criminal knowledge" and that the definition of "obscenity" was insufficiently specific "to provide adequate notice of proscribed conduct."[25] In response, the Court concluded that since the statutory definition of "obscene"[26] generally reflects the definition adopted by the United States Supreme Court in *Miller,*[27] it is sufficiently specific to avoid an

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will not be set aside as a denial of equal protection or due process *if any state of facts reasonably may be conceived to justify it."* Commonwealth v. Henry's Drywell Co., 366 Mass. 539, 542, 320 N.E.2d 911, 914 (1974) (emphasis added); *see, e.g.,* Colella v. State Racing Comm'n, 360 Mass. 152, 155-56, 274 N.E.2d 331, 334-35 (1971).

[22] 1976 Mass. Adv. Sh. at 2651, 357 N.E.2d at 759.

[23] *Id.*

[24] The overbreadth doctrine is a mode of judicial scrutiny epitomized by NAACP v. Alabama, 377 U.S. 288 (1964), where the Court explained that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved *by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." Id.* at 307 (emphasis added). In application, a statute which prohibits both protected and unprotected speech is unconstitutionally overbroad. *See* Broadrick v. Oklahoma, 413 U.S. 601, 612 (1973).

In the context of first amendment claims, the Court has consistently held that traditional rules of standing do not apply because "the First Amendment needs breathing space" and "the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Id.* at 611-12. Thus the statute will be struck down even if the particular defendant's speech clearly is unprotected and thus legitimately controllable by the terms of the statute. *See id.;* Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). *But see* Parker v. Levy, 417 U.S. 733, 756 (1974) (void-for-vagueness challenge). *See generally* Note, *The First Amendment Overbreadth Doctrine,* 83 HARV. L. REV. 844 (1970).

On the other hand, the Supreme Court has indicated its unwillingness to invoke the overbreadth doctrine, except "sparingly and only as a last resort." Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). Consistent with this reluctance, the Court warned that "[f]acial overbreadth has not been invoked when a limiting construction *has been or could be* placed on the challenged statute." *Id.* (emphasis added). Therefore, since the Court has held that "obscene material is unprotected by the First Amendment," Miller v. California, 413 U.S. at 23, a state statute regulating obscene materials may be upheld so long as the statute's reach does not exceed permissible parameters. *See id.* at 23-24.

[25] 1976 Mass. Adv. Sh. at 2651, 357 N.E.2d at 759.

[26] G.L. c. 272, § 31. See note 1 *supra.*

[27] According to the Court in *Miller,* in order to determine whether a work is obscene:

> The basic guidelines for the trier of fact must be:
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> (a) whether "the average person, applying contemporary community standards"

overbreadth attack.[28] The Court added that since the statutory definition of "knowing"[29] is "a general awareness of the character" of the matter disseminated, it is not overbroad.[30] The Court adverted to the 1974 decision of the United States Supreme Court in *Hamling v. United States,* which held that a defendant need be aware only of the contents and general character of the disseminated matter.[31]

The Court was equally unwilling to accept the defendant's argument that the obscenity statutes should be declared void for vagueness.[32] The

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would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual content specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24 (citations omitted).

[28] 1976 Mass. Adv. Sh. at 2652, 357 N.E.2d at 759.

Moreover, the Court concluded tht the statute afforded the defendant constitutionally adequate procedural protections, since there existed a provision requiring an adversary proceeding leading to a judicial determination on all issues. *Id.*

[29] G.L. c. 272, § 31. See note 1 *supra.*

[30] 1976 Mass. Adv. Sh. at 2652-53, 357 N.E.2d at 759-60.

[31] 418 U.S. 87, 123 (1974).

[32] In Commonwealth v. Thureson, 1976 Mass. Adv. Sh. 2659, 357 N.E.2d 750, decided the same day as *707 Main Corp.*, the Court held that in a criminal proceeding under G.L. c. 272, § 29 the prosecution has the burden of proving that a defendant had knowledge of the contents of the matter distributed. *Thureson,* 1976 Mass. Adv. Sh. at 2661-62, 357 N.E.2d at 752. See text and notes 73-84 *infra.* This holding comports with the United States Supreme Court decision in *Hamling,* which was decided when the Massachusetts obscenity statutes were still under consideration by the legislature.

An issue that constantly arises in criminal prosecutions for obscenity centers around the concept of "scienter," or criminal intent. Generally, an individual cannot be convicted of a crime under American criminal jurisprudence without the concurrence of a criminal act (actus reus) and a criminal intent (mens rea, or "scienter"). *See Hamling,* 418 U.S. at 122-24. There are a few exceptions to this generalization, where criminal liability may be imposed on a "strict liability" basis, without the necessity of proving criminal intent. However, these exceptions are rare and generally center around public welfare offenses. In Smith v. California, 361 U.S. 147 (1959), the Court recognized that some strict liability crimes were valid, but added that where a crime had some relationship to first amendment freedom of speech, some form of scienter need be proven in order to eliminate any chilling effect on the distribution and availability of materials within the ambit of first amendment protection. *Id.* at 154-55. The Court elaborated on this theme in 1974 in *Hamling.* There, the Supreme Court specified that proof of "knowledge of the contents. . ., the character and nature of the materials" is sufficient to satisfy the scienter requirement and that it need not be shown that the defendant believed the material to be obscene. *Hamling,* 418 U.S. at 123.

The void-for-vagueness doctrine is a mode of judicial analysis sufficiently similar to overbreadth analysis that the two claims are frequently asserted in the same action. *See, e.g.,* Broadrick v. Oklahoma, 413 U.S. 601 (1973). It is important to recognize, however, that the two claims are different. The overbreadth doctrine invalidates a statute for impermissibly impinging upon protected activities; the void-for-vagueness doctrine invalidates a statute for failure to provide fair warning of prohibited conduct. *See generally* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67, 76

Court determined that the definitions of "obscene" matter and "sexual" conduct contained in the statute were sufficient to provide reasonably ascertainable standards of guilt and thus were capable of withstanding a vagueness challenge.[33]

In a brief dissent to *707 Main Corp.*,[34] Justice Kaplan indicated that he would hold the statute in question unconstitutional, adhering to the views previously expressed by Justice Brennan, that "at least in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the State and Federal Governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents."[35]

While there may be grounds for legitimate disagreement with the

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(1960). The void-for-vagueness doctrine stems from the consistent holding of the Supreme Court that due process of law requires that "the person of ordinary intelligence . . . [must be given] a reasonable opportunity to know what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); *see, e.g.*, Broadrick v. Okalhoma, 418 U.S. 601, 607 (1973); Zwickler v. Koota, 389 U.S. 241, 249-50 (1967) (distinguishing vagueness from overbreadth claims).

The due process requirement that a statute provide an ascertainable standard of guilt, however, means that the statute must contain a "comprehensible normative standard." Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971). Thus the Supreme Court has invalidated statutes for failure to give fair warning generally where the statute provided no standard whatever. *See, e.g.*, Parker v. Levy, 417 U.S. 733, 755 (1974); Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

Where first amendment considerations are involved, the Court has indicated that the law must be written with greater specificity because of the potential "chilling effect" on the exercise of protected activities. *See, e.g.*, Smith v. Gogruen, 415 U.S. 566, 573 (1974); Grayned v. City of Rockford, 408 U.S. 104, 109 & n.5 (1972). Nonetheless, even though a statute may contain some peripheral vagueness, a defendant must demonstrate that the statute is vague *concerning his conduct:*

> None of [our cases] suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. *One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.*

Parker v. Levy, 417 U.S. 733, 756 (1974) (emphasis added); United States v. Harriss, 347 U.S. 612, 618 (1954). *Compare* Broadrick v. Oklahoma, 413 U.S. 601, 611-12 (1973); Dombrowski v. Pfister, 380 U.S. 479, 486 (1965) (overbreadth challenges).

[33] For the statutory definitions of "obscene" and "sexual conduct," see note 1 *supra*. In order to further clarify the situation for triers of fact and the public generally, the Court specified in a definitive manner what expression is constitutionally protected and what expression is obscene. *See generally* 1976 Adv. Sh. at 2654-57, 357 N.E.2d at 760-61.

[34] *Id.* at 2658, 357 N.E.2d at 761-62 (Kaplan, J., dissenting).

[35] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 113 (1973) (Brennan, J., dissenting); *see Miller*, 413 U.S. at 47 (Brennan, J., dissenting).

Justice Kaplan further indicated that he would declare the obscenity statute unconstitutional under the Massachusetts Constitution. 1976 Mass. Adv. Sh. at 2658, 357 N.E.2d at 762.

holding of the Court in *707 Main Corp.*,[36] it seems apparent that, as far as it goes, the case is consistent with the recent pronouncements of the United States Supreme Court. Nonetheless, it is submitted that the Supreme Judicial Court could have taken the opportunity presented in *707 Main Corp.* to minimize the situations which would impose criminal penalties on expressive activities. For example, an objection generally levied at obscenity statutes is that they potentially can subject individuals to criminal penalties unfairly since the concept of what is or is not obscene is so difficult to define and is even more difficult to apply with any semblance of consistency.

To minimize the potential for inequitable application of obscenity statutes, Chief Justice Burger has indicated that prior to exposing an individual to criminal penalties for exhibiting or purveying obscene material, a civil procedure designed solely to test the issue of obscenity should be employed.[37] The Massachusetts obscenity statutes represent an attempt by the legislature to respond to Chief Justice Burger's caveat. Unfortunately, by providing a prior civil proceeding only for books, the response is incomplete and thus tends to cloud further this already turbid area of law.[38]

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[36] *See, e.g.*, Commonwealth v. Zone Book, Inc., 1977 Mass. Adv. Sh. 743, 753, 361 N.E.2d 1239, 1244 (Liacos, J., concurring).

[37] *See* Paris Adult Theater I v. Slaton, 413 U.S. 49, 55 (1973) (approving the Georgia civil procedures as giving "the best possible notice, prior to any criminal indictments. . ."). In his dissent from *Miller*, Justice Douglas also emphasized the potential for inequitable application of obscenity statutes: "Obscenity—which even we cannot define with precision—is a hodge-podge. To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." *Miller*, 413 U.S. at 43-44 (Douglas, J., dissenting).

[38] It is true that Chief Justice Burger's suggestion is dicta and not binding as a matter of constitutional law. However, the Supreme Court has held that once a state has afforded a particular class the benefits of a specific proceeding the state may not unreasonably withhold those same benefits from members of another class similarly situated. *See generally* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). To be sure, there were other factors in *Douglas* and *Griffin* which make them distinguishable. Both involved appeals from criminal convictions and the Court held that the challenged statutes discriminated on the basis of "wealth." In *Douglas*, the state set up a statutory procedure for appealing criminal convictions that was available to any convicted individual who could afford counsel to pursue the procedure; indigents, on the other hand, could not have counsel appointed for appeal unless the state first determined that the appeal was not frivolous. 372 U.S. at 355-56. Similarly, in *Griffin*, the state set up a procedure of appeal of criminal convictions requiring a transcript of the trial proceedings which was available free of charge only to indigents sentenced to death. 351 U.S. at 14 & n.5. The Supreme Court found that both state statutes violated the due process and equal protection clauses of the fourteenth amendment. *Douglas*, 372 U.S. at 357-58; *Griffin*, 351 U.S. at 19.

The interesting aspect of *Douglas* and *Griffin* is that the Court struck down the respective statutory procedures even though they did not find that there is a constitutional "right" to a criminal appeal. *See Griffin*, 351 U.S. at 18; *cf. Douglas*, 372 U.S. at 356

Even though a majority of the Supreme Judicial Court might be unwilling to find a "suspect" classification or fundamental right involved in the obscenity statutes, thereby necessitating a strict scrutiny analysis, a traditional rational basis analysis nevertheless could have been applied in a meaningful manner. The Court could easily have determined that no rational basis exists for discriminating between sellers of books and sellers of magazines in the extent of procedural protection available.[39]

Requiring a prior civil proceeding for all material in this confusing and uncertain area would put the seller on notice that he is engaging in conduct which may be unlawful and afford the seller the opportunity of conforming his conduct to law before criminal sanctions are imposed. Moreover, such a procedure would maximize first amendment protections by reducing the potential "chilling effect" of the existing legislation.[40]

In addition to *707 Main Corp.*, a number of cases were decided by the Supreme Judicial Court during the Survey year which further clarified the obscenity statutes. In *Commonwealth v. Zone Book, Inc.*,[41] the Court defined the word "book" as used in the Massachusetts obscenity statutes.[42]

The defendant in *Zone Book* was charged with possession of obscene

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(California law granted appeal as a matter of right). Moreover, even though a majority of the Supreme Court has been unwilling to consider wealth a "suspect" classification requiring strict judicial scrutiny, the Court nevertheless reviewed the statutes challenged in *Douglas* and *Griffin* very carefully, refusing to accept at face value the legislative purpose for the classification. This analysis is indicative of a trend by the majority of the Supreme Court away from traditional two-tier equal protection analysis. *See* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 98-99, 109-10 (1973) (Marshall, J., dissenting).

[39] *See, e.g.*, Commonwealth v. Zone Book, Inc., 1977 Mass. Adv. Sh. 743, 756-57, 361 N.E.2d 1239, 1246 (Liacos, J., concurring).

[40] There appears to be some support for the proposition that, where first amendment freedoms are involved, books should be afforded more protection than other materials. In Kaplan v. California, 413 U.S. 115 (1973), Chief Justice Burger, writing for a divided Court, observed in a footnote that:

> This Court, since Roth v. United States, 354 U.S. 476 (1957), has only once held books to be obscene. That case was Mishkin v. New York, 383 U.S. 502 (1966), and the books involved were very similar in content to [the book forming the basis of this conviction]. But most of the *Mishkin* books, if not all, were illustrated. . . . Prior to *Roth*, this Court affirmed, by an equally divided Court, a conviction for sale of an unillustrated book. Doubleday & Co., Inc. v. New York, 335 U.S. 848 (1948) [per curiam]. This Court has always rigorously scrutinized judgments *involving books* for possible violation of First Amendment rights, and has regularly reversed convictions on that basis.

Id. at 118 n.3 (emphasis added) (some citations omitted).

[41] 1977 Mass. Adv. Sh. 743, 361 N.E.2d 1239.

[42] *See* G.L. c. 272, §§ 28C-28E, 28G-28H. See note 1 *supra*.

magazines with intent to distribute them in violation of section 29 of chapter 272.[43] The defendant filed motions to dismiss the complaints, alleging that the material possessed constituted books, not magazines, and thus, as a condition precedent to a criminal proceeding under section 29, the commonwealth was required to institute in rem procedures as set forth in sections 28C-28H of chapter 272.[44]

The obscenity statutes provide that before any criminal proceeding may be instituted against an individual for dissemination of obscene books, there must first be an in rem civil proceeding to determine whether the books in question are obscene.[45] However, while the statute defines "matter" broadly to include any printed material,[46] it does not define "books."

After reviewing the definitions of "books" and "magazines" in other contexts, the Court concluded that "a substantial printed publication is a book for the purposes of G.L. c. 272, §§ 28C-31, if it is complete in itself, betraying no evidence of continuation with publications of a similar nature issued at regular periodic intervals."[47] The Court then vacated the denials of defendants' motions and remanded the case for dismissal as to both complaints.[48]

In essence, the Court held that it is the element of periodicity which distinguishes "books" from other materials and that if "books" are involved, a civil proceeding must precede any criminal action.[49] The burden of proof on the issue of whether a publication is a book or a magazine rests on the defendant and must be timely raised by a motion to dismiss before trial.[50]

It is interesting to note that the Court in *Zone Book* recognized the

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[43] 1977 Mass. Adv. Sh. at 743, 361 N.E.2d at 1240.

[44] Upon denial of these motions the defendant petitioned for and was granted a transfer of the cases to the Supreme Judicial Court pursuant to G.L. c. 211, §§ 3, 4A. 1977 Mass. Adv. Sh. at 744, 361 N.E.2d at 1241.

[45] G.L. c. 272, §§ 28C-D. The material in question in *Zone Book* consisted of two publications, each of more than forty pages in length, "bound by staples and containing a series of photographs with incidental text but no advertising or variety in subject matter." 1977 Mass. Adv. Sh. at 744, 361 N.E.2d at 1241 (footnote omitted). One of the publications had Volume I written on its cover but there was no identification of the photographers, editors, or publishers. *Id.*

[46] G.L. c. 272, § 31. See note 1 *supra.*

[47] 1977 Mass. Adv. Sh. at 749, 361 N.E.2d at 1243.

[48] *Id.* at 751, 361 N.E.2d at 1244.

[49] *Id.* at 747, 361 N.E.2d at 1242.

[50] *See* Commonwealth v. Ferro, 1977 Mass. Adv. Sh. 761, 769, 361 N.E.2d 1234, 1238-39.

The Court interpreted G.L. c. 272, § 28D, to permit a defendant in a § 29 or § 30 proceeding to move for dismissal by proving that the allegedly obscene material disseminated fits the definition of "book," and that the prosecutor had not proceeded in rem against the book pursuant to G.L. c. 272, §§ 28C-28H.

value of the in rem proceeding for all materials both from the perspective of the potential defendant who disseminates materials which he believed in good faith to be non-obscene as well as from the perspective of the "general public who wish to obtain, without self-censorship by disseminators fearing criminal or civil disability, materials which are not obscene but which are close to the obscenity line."[51] Nevertheless, because a prior in rem proceeding is not mandated by the United States Supreme Court as a matter of constitutional law, the Court was unwilling to substitute its judgment for that of the legislature.[52]

In *Commonwealth v. Ferro*,[53] decided the same day as *Zone Book*, the Court was called upon to interpret further the obscenity laws. The defendant in *Ferro* was charged with and convicted for possession of obscene magazines with an intent to disseminate them in violation of section 29 of chapter 272.[54] The trial court held that the defendant was not entitled to a prior in rem proceeding under G.L. c. 272, §§ 28C-28H. While the judge denied the defendant's motions to dismiss, he nevertheless submitted the issues raised by the motions to the jury.[55] The Supreme Judicial Court was not persuaded by the defendant's constitutional arguments but did remand the case for hearing on the issue of whether or not the material in question fell within its definitions of "books"[56] and therefore was subject to an in rem proceeding as a condition precedent to the criminal proceeding.[57]

Relying on its decision in *707 Main Corp.*, the Court quickly disposed of defendant's argument that the statute violates the equal protection clause of the United States Constitution in its distinction between "books" and "magazines."[58] However, the Court did reflect further on the basis for the distinction between "books" and "magazines," justifying the requirement of a prior civil proceeding for books on their lack of periodic publication.[59]

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[51] 1977 Mass. Adv. Sh. at 748 n.4, 361 N.E.2d at 1242 n.4.

[52] *Id.* Justice Kaplan apparently would not be as constrained as a majority of the Supreme Judicial Court on this question. Accepting the reluctance of a majority of the United States Supreme Court to invalidate obscenity laws in general, he would invalidate the obscenity laws on the basis of the Massachusetts Constitution. *See* Commonwealth v. 707 Main Corp., 1976 Mass. Adv. Sh. at 2658, 357 N.E.2d at 762 (Kaplan, J., dissenting).

[53] 1977 Mass. Adv. Sh. 761, 361 N.E.2d 1234.

[54] *Id.* at 761, 361 N.E.2d at 1235.

[55] *Id.* at 762, 361 N.E.2d at 1235.

[56] *Id.* at 770, 361 N.E.2d at 1239. For the Court's definition of "book" as enunciated in *Zone Book*, see text at note 47 *supra*.

[57] *Ferro*, 1977 Mass. Adv. Sh. at 769-70, 361 N.E.2d at 1239.

[58] *Id.* at 763-64, 361 N.E.2d at 1236. See text and notes 16-23 *supra*.

[59] Given the periodicity distinction that the Court emphasized in *Zone Book*, see text at note 47 *supra*, the Court opined that the legislature may well have concluded that magazines which appear in issues or numbers over a period of time place a retailer on

The defendant in *Ferro* raised an equal protection challenge to a classification in the obscenity statutes not raised in *707 Main Corp.* The statutes make it an affirmative defense to a criminal prosecution that the defendant disseminator is a "bona fide school, museum or library, or [who is] acting in the course of his employment as an employee of such an organization or of a retail outlet affiliated with and serving the educational purpose of such [an] organization."[60] The defendant contended that this classification of disseminators violated the equal protection provisions of the Massachusetts and the United States constitutions.[61] The Court rejected this equal protection argument. Particularly, after concluding that the classification did not affect a fundamental interest,[62] the Court upheld the statute because the classification scheme may have a rational basis.[63]

The defendant contended further that the materials he possessed were "books" and thus the commonwealth had not complied with section 28I.[64] In response, the Court took the opportunity to explain in some detail the section 28I procedure.[65] As an integral and indispensible part of the section 28I procedure the trial judge must determine whether the material disseminated is a "book" or other material.[66] The judge's deci-

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notice of their continuing quality. *See Ferro,* 1977 Mass. Adv. Sh. at 764, 361 N.E.2d at 1236. This conjecture of purpose by the Court raises a typical criticism of traditional equal protection analysis. The so-called "old" equal protection analysis exemplified by the application of a rational basis test, often results in an exercise in mental gymnastics by a court in order to justify legislation that in reality was never premised on a valid basis. Rather than examining the true intent of the legislature in drawing the challenged distinction, as developed through a review of the legislative history, the court instead will create a possible purpose to save the statute from constitutional infirmity. *See generally* Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1 (1972).

[60] G.L. c. 272, § 29.

[61] 1977 Mass. Adv. Sh. at 764, 361 N.E.2d at 1236.

[62] *Id.* at 764-65, 361 N.E.2d at 1236-37.

[63] *Id.* at 765, 361 N.E.2d at 1237.

Since the classification in question did not involve the definition of obscenity, the Court was of the opinion that no question arose involving a potential infringement of protected first amendment expression. Therefore, the Court was able to use the rational basis analysis rather than a more demanding strict scrutiny. See text at notes 16-23 *supra.* The Court indicated that the classification "may reflect a policy of protecting educational resources from use in obscenity litigation rather than social service while still proceeding to eliminate public availability of obscene matter." Consequently, the classification "may have a rational basis." *Ferro,* 1977 Mass. Adv. Sh. at 765, 361 N.E.2d at 1237.

[64] *Id.* at 767, 361 N.E.2d at 1238. For the text of G.L. c. 272, § 28I, see note 1 *supra.*

[65] The Court, citing G.L. c. 277, § 47A, explained that a judge must comply with G.L. c. 272, § 28I before reaching the merits in any proceeding under § 29 or § 30. 1977 Mass. Adv. Sh. at 767-68 & n.3, 361 N.E.2d at 1238 & n.3.

[66] It was on this issue that the trial judge in *Ferro* erred. Rather than decide as a matter of fact whether the disseminated material was a "book," the judge summarily denied the defendant's motion to dismiss raised at the trial on the merits without entertaining evi-

sion on this issue is appealable either by the Commonwealth,[67] if the defendant's motion to dismiss is allowed, or after the trial by the defendant if the motion is denied. The Court also discussed the type of evidence that could be presented at a hearing on such a motion to dismiss. At a minimum the trial judge should receive as evidence at the hearing a copy of the material in question.[68] Moreover, testimony of completeness and lack of periodicity, presented by individuals accustomed to classifying publications by genre, may be received at the hearing,[69] and the Court may examine the material for evidence of continuity with other publications.[70] Finally, the burden of proof relative to whether the material is a book rests on the defendant in the motion to dismiss hearing.[71]

In *Ferro,* since the trial judge submitted the issue of whether the material was a "book" to the jury, neither the defendant nor the prosecution had an opportunity to present evidence relative to the periodicity of the material in question to the trial judge at a motion to dismiss hearing before a trial on the merits. Therefore, the Supreme Judicial Court remanded the case for a motion to dismiss hearing in the superior court.[72]

The Court further interpreted the obscenity statutes during the *Survey* year in *Commonwealth v. Thureson,*[73] in which the defendant was charged with violation of section 29.[74] The defendant, a cashier in a book store which advertised "peep" shows, had been working at the store for only two or three days before her arrest.[75] The defendant was arrested by a police officer with a search warrant after responding that

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dence on the issue and submitted the question to the jury. The Court made it clear that the trial judge does *not* determine whether the material is legally "obscene" at this hearing—only whether or not it is a "book." 1977 Mass. Adv. Sh. at 769, 361 N.E.2d at 1238.

[67] *See* G.L. c. 278, § 28E.

[68] 1977 Mass. Adv. Sh. at 769, 361 N.E.2d at 1238.

[69] This type of evidence was provided, and was approved by the Court, in *Zone Book.* 1977 Mass. Adv. Sh. at 749, 361 N.E.2d at 1243.

[70] *Id.* at 750, 361 N.E.2d at 1243.

The Court indicated that while expert testimony relative to a publication's classification for purposes of periodicity is not necessary, it is certainly proper for consideration by a trial judge in a hearing of this nature. The Court also stressed that once the issue of whether the material is a "book" has been decided at the hearing on the motion to dismiss it should not be relitigated as part of a trial on the merits. *Ferro,* 1977 Mass. Adv. Sh. at 769, 361 N.E.2d at 1238.

[71] On the other hand, the burden of showing compliance with the required § 28I in rem procedure is on the Commonwealth. *Id.*, 361 N.E. 2d at 1239.

[72] *Id.* at 770, 361 N.E.2d at 1239.

[73] 1976 Mass. Adv. Sh. 2659, 357 N.E.2d 750.

[74] G.L. c. 272, § 29. For the text of § 29, see note 1 *supra.*

[75] 1976 Mass. Adv. Sh. at 2659-60, 357 N.E.2d at 751.

she had "a pretty good idea" when asked if she knew what kind of pictures were shown in the machines located in the store.[76] At trial, the defendant testified that she worked alone in the store, did not know who her employer was, and had performed no tasks relative to the "peep" show machines except making change.[77] The prosecution introduced no evidence to show that the defendant had ever viewed the contents of the "peep" show machines.[78] The trial judge denied the defendant's motion for a directed verdict for insufficient evidence of the defendant's knowledge, and she was found guilty by a jury of violating section 29 of the obscenity statutes.[79] On appeal, the Supreme Judicial Court reversed.[80]

The Court recognized that in order to convict a defendant of criminal dissemination of obscene materials, it is necessary that the prosecution prove that the defendant "had knowledge of the contents of the matter distributed."[81] "The prosecution must produce evidence from which a jury could conclude beyond a reasonable doubt that the defendant had seen, or should have seen, or otherwise had knowledge of, the material's contents."[82]

The Court concluded that the evidence presented in *Thureson* did not reasonably lead to an inference that the defendant "had viewed or had reason to view, or otherwise had knowledge of, the contents"[83] of the "peep" shows. Therefore, the Court held that the evidence failed to support a finding of a violation of section 29.[84]

During the *Survey* year, the Supreme Judicial Court also decided *District Attorney v. Three Way Theatres Corp.*,[85] a case involving three civil suits commenced pursuant to section 30 of the obscenity statutes.[86]

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[76] *Id.* at 2660, 357 N.E.2d at 751.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* at 2663, 357 N.E.2d at 752.

[81] *Id.* at 2662, 357 N.E.2d at 752.

The burden on the prosecution is to demonstrate that the defendant knew of the contents of the material. There is no burden on the prosecution to prove that the defendant knew that the material in question was obscene as a matter of law. *See* Smith v. California, 361 U.S. 147, 154-55 (1959). See text and notes 30-32 *supra*. In addition, proof that the defendant had knowledge of the contents of the material in question may be established by inference without the use of direct evidence. *Thureson*, 1976 Mass. Adv. Sh. at 2662, 357 N.E.2d at 752.

[82] 1976 Mass. Adv. Sh. at 2662, 357 N.E.2d at 752.

[83] *Id.* at 2663, 357 N.E.2d at 752.

[84] *Id.*

While the defendant in this case raised a number of constitutional challenges to the obscenity statutes, the challenges were dismissed by the Court based on the other cases decided during the *Survey* year.

[85] 1976 Mass. Adv. Sh. 2665, 357 N.E.2d 747.

[86] G.L. c. 272, § 30. Section 30 confers jurisdiction on the superior court to enjoin the dissemination of obscene material. This procedure is available to any district attorney or

The plaintiffs in the suits were district attorneys from three separate districts, who "each alleged that a corporate defendant was exhibiting obscene motion pictures and requested injunctive relief."[87]

At the trial in the superior court the judge viewed the motion picture films alleged to be obscene and heard expert testimony offered by both the plaintiffs and the defendants. Applying the *Miller* test,[88] the trial judge "found that the films lacked any serious literary, artistic, political or scientific value and that they appealed to prurient interest."[89] However, the judge ruled that the films were not obscene, as that term is defined in section 31 of chapter 272, because the plaintiffs had failed to show by a preponderance of evidence, and, particularly, had failed to present expert testimony indicating, that the films depicted sexual conduct in a patently offensive way.[90]

The plaintiffs appealed, alleging that it was prejudicial error for the trial judge to require expert testimony on the issue of the "patent offensiveness" of the films.[91] The defendants cross-appealed, alleging that the obscenity statutes violate the equal protection clause by affording a jury trial to defendants in proceedings established for the prosecution of books, while denying a jury trial to defendants in section 30 proceedings.[92]

Citing the United States Supreme Court decision in *Kaplan v. California*,[93] the Supreme Judicial Court found no constitutional requirement that expert testimony be offered on the issue of obscenity

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the Attorney General in addition to any criminal procedures provided in the obscenity statutes and is not a condition precedent to criminal proceedings. Furthermore, unlike § 28R, this section does not distinguish between "books" and other materials and does not provide for a jury trial.

[87] 1976 Mass. Adv. Sh. at 2665, 357 N.E.2d at 748. The case originally involved three separate civil cases each commenced in a different county. The cases were consolidated and tried before a superior court judge in Middlesex County.

[88] See note 27 *supra*.

[89] 1976 Mass. Adv. Sh. at 2666, 357 N.E.2d at 748.

[90] *Id.* The trial judge concluded that, as a trier of fact, he could not decide whether the average citizen of Massachusetts would think the films were "patently offensive." He was of the opinion that expert testimony was necessary on this issue. *Id.* at 2667-68, 357 N.E.2d at 749.

[91] *Id.* at 2666, 357 N.E.2d at 748. The plaintiffs also alleged on appeal that the trial judge's ruling that the films did not depict sexual conduct in a patently offensive manner was clearly erroneous.

[92] *Id.*, 357 N.E.2d at 748-49. The § 30 proceedings are the only civil proceedings available to control materials other than books.

Defendants also claimed that the obscenity statutes violate the due process provisions of both the United States and the Massachusetts Constitutions. However, the Supreme Judicial Court disagreed on the basis of its opinion in *707 Main Corp. See Three Way Theatres Corp.*, 1976 Mass. Adv. Sh. at 2667, 357 N.E.2d at 749.

[93] 413 U.S. 115 (1973).

itself or on any ancillary issue.[94] Moreover, the Court held that the offering of such evidence is not required by the obscenity statute. The Court recognized that the phrase "contemporary community standard" in the statutory definition of obscenity[95] bars the trier of fact from using personal views or peculiar group views as a measure of obscenity. However, the Court determined that the phrase does allow the trier of fact to apply his own knowledge of normative sensibilities to hard core depictions of sexual conduct in Massachusetts[96] in deciding whether material is "patently offensive" as that concept is used in the statute; and that such determinations may be made by the trier of fact in the absence of expert testimony. Thus, because the trial judge incorrectly required expert testimony on the issue of community standards for proof of obscenity the Supreme Judicial Court reversed the judgment and remanded the case for further consideration.[97]

The Court disposed of the defendant's constitutional challenges to the statute by referring to the previously decided case of *Commonwealth v. 707 Main Corp.*[98] Applying a rational basis standard of review, the Court concluded that the denial of a jury trial to defendants in section 30 proceedings is justified because section 30 proceedings are injunctive in nature. Such proceedings therefore require speedy adjudications to avoid restraint of a mode of expression which may be constitutionally protected.[99]

The Massachusetts obscenity statutes represent a legislative attempt to control obscene material in a manner consistent with the constitutional parameters announced by the United States Supreme Court. The *Survey* year obscenity opinions of the Supreme Judicial Court, while open to some criticism grounded in the Court's application of a rational basis standard of review to equal protection challenges to the statutes,

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[94] *Three Way Theatres Corp.*, 1976 Mass. Adv. Sh. at 2667-68, 357 N.E.2d at 749. *See* Paris Adult Theatre I v. Slaton, 413 U.S. 49, 56 (1973) (holding that expert testimony is unnecessary in obscenity cases).

[95] G.L. c. 272, § 31.

[96] The Court interpreted the definition of "sexual conduct" in § 31 as including only "hard core" sexual conduct as described in *Miller*, 413 U.S. 15, 25 (1973). It is interesting to note that the Massachusetts obscenity statute refers to "statewide" community standards in its definition of obscenity. *See* G.L. c. 272, § 31. The United States Supreme Court has indicated that the "Constitution does not require that juries be instructed in state obscenity cases to apply the standards of a hypothetical state-wide community" and that instructions to apply " 'community standards' [are appropriate] without specifying what 'community.' " Jenkins v. Georgia, 418 U.S. 153, 157 (1974).

[97] 1976 Mass. Adv. Sh. at 2668, 357 N.E.2d at 749.

[98] See text and notes 3-40 *supra*.

[99] The in rem proceedings of G.L. c. 272, §§ 28C-28I are not injunctive in nature and a speedy adjudication is not constitutionally required. Therefore, jury trials may be afforded.

generally clarified the substantive reach and procedural application of the statutes.

§ 10.2. Libel: Standard of Proof. During the *Survey* year, the Supreme Judicial Court had occasion to refine once again the law of libel in Massachusetts. In *Callahan v. Westinghouse Broadcasting Co.*,[1] the Court addressed the issue of the standard of proof in first amendment libel cases.

The plaintiff in *Callahan,* a member of the Boston Licensing Board at the time of the alleged libel, acknowledged that he was a "public official" and thus allowed the Court to avoid this still rather ambiguous issue.[2] The plaintiff's sole argument on appeal was that the trial judge

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§10.2. [1] 1977 Mass. Adv. Sh. 1025, 363 N.E.2d 240.

[2] Even had plaintiff not conceded this issue, it seems clear that his position with the Boston Licensing Board would qualify him as a "public official." Therefore, consistent with the Supreme Court's ruling in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), the plaintiff may only recover damages for defamation if "he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 279-80.

The application of the "actual malice" standard has been the focus of considerable Supreme Court attention in the years following *New York Times.* In 1967, the Court extended the actual malice standard to "public figures." Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967). Four years later, the Court appeared to replace this status approach, which focuses on the identity of the parties involved, with a content approach, which focuses on the nature of the subject matter involved. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971). However, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Court retreated to the status approach by holding that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347 (footnote omitted). *See generally* Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc., *and Beyond: An Analytical Primer,* 61 VA. L. REV. 1349 (1975).

The Supreme Judicial Court set the standard for Massachusetts in 1975. In Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975), the Court held that "a plaintiff who is not a public officer or a public figure may recover damages in an action for libel by proof of negligence in the publishing of the libel. . . ." *Id.* at 851, 330 N.E.2d at 164. For a comprehensive discussion of *Stone,* see Cronin, *Constitutional Law,* 1974 ANN. SURV. MASS. LAW § 10.1.

The Supreme Court in Time, Inc. v. Firestone, 424 U.S. 448 (1976), amplified its definition of "public figure." There, the Supreme Court seemed to return to the content approach of *Rosenbloom* in the context of its public figure analysis. According to Justice Rehnquist, writing for the Court in *Firestone:*

> Dissolution of a marriage through judicial proceedings is not the sort of "public controversy" referred to in *Gertz,* even though the marital difficulties of extremely wealthy individuals may be of interest to some portion of the reading public. . . . [Ms. Firestone] assumed no "special prominence in the resolution of public questions." *Gertz,* [418 U.S.] at 351. We hold respondent was not a "public figure"
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> . . . .

Firestone, 424 U.S. at 454-55. Justice Marshall, dissenting in Firestone, maintained that the distinction between public figures and private individuals drawn by the Court in

erred in defining "clear and convincing proof" for the jury.[3]

The plaintiff conceded that as a public official he had the burden of persuading the jury by "clear and convincing proof" that the defendants had knowledge of the falsity of their statements or that they acted in reckless disregard of the truth.[4] The plaintiff contended, however, that the trial judge had imposed an excessively high burden of proof by instructing the jury that "[t]he word 'convincing' after the word 'clear' . . . suggests to me that there should not be too much room for argument among reasonable men and women under the standard. . . ."[5]

The Court began its discussion of plaintiff's argument by noting that the phrase "clear and convincing proof" had been utilized infrequently in Massachusetts because of its vagueness as a standard.[6] However, the Court had felt obligated to adopt the standard in libel cases as a result of Supreme Court precedent, and did so in *Stone v. Essex County Newspapers, Inc.*[7] The Court did not attempt in *Stone* to articulate a precise form of instructions defining "clear and convincing proof."[8] Nevertheless, the Court considered the trial judge's charge in *Callahan* a commendable effort "to describe the elusive intermediate level of burden of persuasion in terms which the jury could understand."[9]

In order to avoid future problems, the *Callahan* Court, in a footnote to its opinion, suggested a form of instruction defining "clear and convincing proof:"

> The burden [of persuasion] is not a burden of convincing you that the facts which are asserted are certainly true or that they are

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Firestone was precisely the distinction drawn five years earlier in *Rosenbloom* and subsequently rejected in *Gertz*. *See Firestone*, 424 U.S. at 488-89 (Marshall, J., dissenting).

[3] 1977 Mass. Adv. Sh. at 1025, 363 N.E.2d at 241.

[4] *Id.; see* Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 851, 330 N.E.2d 161, 164 (1975).

[5] 1977 Mass. Adv. Sh. at 1029-30, 363 N.E.2d at 243.

[6] *Id.* at 1026, 363 N.E.2d at 241; *see* Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 870 & n.10, 330 N.E.2d 161, 174-75 & n.10 (1975).

[7] 367 Mass. 849, 330 N.E.2d 161 (1975). In *Stone*, the Supreme Judicial Court expressed some concern with its adoption of the "clear and convincing proof" standard, but felt that the imposition of such a standard was mandated by the Supreme Court in *Gertz* and *New York Times*. *Id.* at 870, 330 N.E.2d at 174-75.

[8] According to the Court in *Stone:*

> The *New York Times* and the *Gertz* cases offer no definition of the meaning of "clear and convincing proof," to assist in formulating jury instructions. However, from other sources we find the phrase defined. Clear and convincing proof involves a degree of belief greater than the usually imposed burden of proof by a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt imposed in criminal cases. . . . [T]he proof must be "strong, positive and free from doubt" . . ., and "full, clear and decisive" . . . .

367 Mass. at 871, 330 N.E.2d at 175 (citations omitted).

[9] 1977 Mass. Adv. Sh. at 1031, 363 N.E.2d at 243.

> almost certainly true, or are true beyond a reasonable doubt. It is, however, greater than a burden of convincing you that the facts are more probably true than false. The burden imposed is to convince you that the facts asserted are highly probably true, that the probability that they are true or exist is substantially greater than the probability that they are false or do not exist. If then you believe upon consideration and comparison of all the evidence in the case that there is a high degree of probability that the facts are true you must find that the facts have been proved.[10]

The Court in *Callahan* made no significant substantive statement altering the law of defamation in Massachusetts. Nonetheless, by providing a reasonably clear and comprehensible jury instruction for the standard of proof in first amendment libel cases, the Court has clarified one area of uncertainty in what has heretofore been generally murky terrain.[11]

§ 10.3. Corporate First Amendment Rights.

During the *Survey* year, the Supreme Judicial Court considered the constitutionality of section 8 of chapter 55 of the General Laws, which prohibits the expenditure of corporate funds for the purpose of influencing any vote on referendum questions not "materially affecting any of the property, business or assets of the corporation."[1] The Court in *First National Bank v. Attorney General*[2] sustained the statute.

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[10] *Id.* at 1032 n.3, 363 N.E.2d at 244 (quoting from McBaine, *Burden of Proof: Degrees of Belief*, 32 CALIF. L. REV. 242, 263-64 (1944)).

[11] For a further discussion of *Callahan*, see Mone and Finn, *Torts*, *supra* § 5.3.

§ 10.3. [1] G.L. c. 55, § 8 provides in pertinent part:

> No corporation carrying on the business of a bank, trust, surety, indemnity, safe deposit, insurance, railroad, street railway, telegraph, telephone, gas, electric light, heat, power, canal, aqueduct, or water company, no company having the right to take land by eminent domain or to exercise franchises in public ways, granted by the commonwealth or by any county, city or town, no trustee or trustees owning or holding the majority of the stock of such a corporation, no business corporation incorporated under the laws of or doing business in the commonwealth and no officer or agent acting in behalf of any corporation mentioned in this section, shall directly or indirectly give, pay, expend or contribute, or promise to give, pay, expend or contribute, any money or other valuable thing for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interests of any political party, or influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation. No question submitted to the voters solely concerning the taxation of the income, property or transactions of individuals shall be deemed materially to affect the property, business or assets of the corporation. . . .
>
> Any corporation violating any provision of this section shall be punished by a fine of not more than fifty thousand dollars . . . .

[2] 1977 Mass. Adv. Sh. 134, 359 N.E.2d 1262, *rev'd*, ___ U.S. ___, 46 U.S.L.W. 4371

Plaintiffs[3] in *First National* sought a declaratory judgment from the Supreme Judicial Court, "alleging that they intended to expend moneys to publicize, by newspaper advertisements and other similar methods"[4] their opposition to a 1976 referendum question which proposed the imposition of a graduated individual income tax in the commonwealth.[5] Plaintiffs claimed both that the proposed referendum question would, if adopted, "substantially and materially effect their business activities"[6] and that the statute was unconstitutional both on its face and as applied.[7]

The Court summarily disposed of plaintiffs' claim that the individual income tax would materially affect their businesses by finding that the claim was not supported by the record.[8] Moreover, the Court observed that the statute explicitly prohibited corporate expenditures in connection with referenda limited to individual income tax questions.[9]

Reaching plaintiffs' constitutional claims,[10] the Court granted that first amendment rights were involved.[11] However, the Court remarked that "a corporation does not have the same First Amendment rights to free speech as those of a natural person" and concluded that the first amendment rights of corporations derive solely from the corporation's property rights under the fourteenth amendment.[12] Specifically, the Court held that "only when a general political issue materially affects a corporation's business, property or assets may that corportion claim First Amendment protection for its speech or other activities entitling it to communicate its position on that issue to the general public."[13] Thus, the Court upheld the challenged statute against the claim that it

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(U.S. April 25, 1978). For a brief discussion of the Supreme Court's reversal, see note 24 *infra*.

[3] In addition to the First National Bank of Boston, plaintiffs were New England Merchants National Bank, The Gillette Company, Digital Equipment Corporation and Wyman-Gordon Company. 1977 Mass. Adv. Sh. at 134 n.1, 359 N.E.2d at 1262 n.1.

[4] *Id.* at 134, 359 N.E.2d at 1265.

[5] *Id.* at 134-35 & n.3, 359 N.E.2d at 1265 & n.3.

[6] *Id.* at 137, 359 N.E.2d at 1266.

[7] *Id.* at 144, 359 N.E.2d at 1268-69.

[8] *Id.* at 138, 359 N.E.2d at 1266.

[9] *Id.* See note 1 *supra*.

[10] The defendant had raised two procedural objections to the court's consideration of the case: whether the case was ripe for adjudication without a full trial on the merits and whether the case involved an actual controversy under G.L. c. 231A, § 1. Considering the massive record before it and the nature of the issues, the court found both arguments without merit. 1977 Mass. Adv. Sh. at 142-43, 359 N.E.2d at 1268.

[11] 1977 Mass. Adv. Sh. at 145, 359 N.E.2d at 1269.

[12] *Id.* at 147, 359 N.E.2d at 1270. *But see* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 500-01 (1952) (first amendment guarantees within the *liberty* interests of the fourteenth amendment).

[13] *Id.* at 148, 359 N.E.2d at 1270.

was unconstitutional on its face, since the statute permitted expenditures of corporate funds to influence the outcome of election materially affecting corporate business.[14]

Plaintiffs also claimed that the challenged statute should be declared overbroad[15] and void for vagueness.[16] The overbreadth challenge was grounded in the plaintiffs' claim that the challenged statute could be read to proscribe the use of "in-house" newspapers or bulletins discussing a personal income tax.[17] The Court construed the statute to exclude expenditures for such publications and therefore found that the statute was not overbroad.[18]

The Court rejected plaintiffs' challenges that the statute should be declared void for vagueness because "the prohibition against corporate expenditures on a referendum question solely concerning a personal [graduated income tax] is both precise and definite."[19] The Court refused to consider whether the statute might be impermissibly vague in other contexts, since the conduct in question in *First National* was "plainly within its terms."[20]

Once the Supreme Judicial Court decided that corporate first amendment rights derived solely from the property rights of the fourteenth amendment, the Court easily disposed of plaintiffs' equal protection claim. The Court refused to apply the strict scrutiny which would be required where free speech itself is involved[21] and applied a rational basis test—"the traditional scrutiny involving economic matters."[22] Because the Court found that the statute "could represent a legislative desire to protect such shareholders against ultra vires activities,"[23] the Court upheld the statute.

In *First National,* the Supreme Judicial Court clearly distinguished the first amendment rights afforded corporations from those afforded individual citizens. Given this distinction, the Court sustained the legislative judgment that corporate funds may not be used to influence the outcome of public questions, except where such questions materially

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[14] *Id.* See note 1 *supra.*

[15] See § 10.1 n.24 *supra.*

[16] See § 10.1 n.31 *supra.*

[17] 1977 Mass. Adv. Sh. at 152, 359 N.E.2d at 1272.

[18] *Id.* at 153-54, 359 N.E.2d 1273, *quoting* Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973), *and* United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 571 (1973).

[19] 1977 Mass. Adv. Sh. at 156, 359 N.E.2d at 1274 (emphasis in original).

[20] *Id.* at 155, 359 N.E.2d at 1273, *quoting* United States v. Harriss, 347 U.S. 612, 618 (1954).

[21] *See* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

[22] 1977 Mass. Adv. Sh. at 159, 359 N.E.2d at 1275.

[23] *Id.* at 160, 359 N.E.2d at 1275.

affect the property, business or assets of the corporation itself.[24]

[24] On April 26, 1978, the United States Supreme Court in First Nat'l Bank v. Bellotti, ___ U.S. ___, 46 U.S.L.W. 4371 (U.S. April 25, 1978), reversed the holding of the Supreme Judicial Court. The United States Supreme Court found "no support in the First or Fourteenth Amendments, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses that protection simply because its source is a corporation. . . ." *Id.* at 4376.

Once the Supreme Court held that corporations have free speech interests protected by the first amendment, the Court applied its "exacting scrutiny" standard of review to determine whether the Massachusetts statute constituted a permissible encroachment on first amendment protections. *Id.* at 4377; *see, e.g.,* Elrod v. Burns, 427 U.S. 347, 360-62 (1976); Buckley v. Valeo, 424 U.S. 1, 64-65 (1976) (per curiam). In order to survive exacting scrutiny, the challenged practice "must further some vital government end by a means that is least restrictive of [first amendment] freedoms . . . in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights." *Elrod,* 427 U.S. at 363 (footnote omitted). *See* Note, 18 B.C. IND. & COM. L. REV. 782, 792 (1977).

While the Supreme Judicial Court did not address the issue because of its view of corporate first amendment interests, see text and notes 11-14 *supra,* the commonwealth advanced two vital state interests before the United States Supreme Court: (1) "the State's interest in sustaining the active role of the individual citizen in the electoral process and thereby preventing diminution of the citizen's confidence in government"; (2) "the interest in protecting the rights of shareholders whose views differ from those expressed by management on behalf of the corporation." 46 U.S.L.W. at 4377. The Supreme Court recognized the importance of the state interests, but concluded that neither interest was sufficient to outweigh the encroachment on first amendment freedoms. *Id.* at 4377-79. Thus the Court invalidated the Massachusetts statute. *Id.* at 4379.

Justice White, dissenting in *First Nat'l Bank,* observed that the majority failed "to realize that the state regulatory interests in terms of which the alleged curtailment of First Amendment rights accomplished by the statute must be evaluated are themselves derived from the First Amendment." *Id.* at 4381. Justice White agreed that corporate speech is protected by the first amendment, *see id.* at 4382, but disagreed with the outcome of the balancing process employed by the Court.

Justice White was most concerned that the majority had drawn an untenable distinction between the corporate first amendment interests and the first amendment interests of shareholders in the corporation. *Id.* at 4384-85. He pointed to the 1977 decision in Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) and the Court's earlier opinion in International Ass'n of Machinists v. Street, 367 U.S. 740 (1961) for the proposition that an individual may not be compelled as a condition of employment to contribute to a political or ideological cause which he does not support. Justice White was not persuaded by the majority's claim that "the shareholder invests in a corporation of his own volition and is free to withdraw his investment at any time . . . ." 46 U.S.L.W. at 4379 n.34. As Justice White observed, "[t]he employees in *Street* and *Abood* were also free to seek other jobs where they would not be compelled to finance causes with which they disagreed, but we held in *Abood* that First Amendment rights could not be so burdened." *Id.* at 4385 (White, J., dissenting).

The Supreme Court's opinion in *First Nat'l Bank* seems irreconcilable with its opinion in *Abood.* As Justice White put it, after *First Nat'l Bank* "Massachusetts may not constitutionally prohibit the very evil which Michigan [in *Abood*] may not constitutionally permit." 46 U.S.L.W. at 4384. Whether or not corporations have first amendment rights, the Supreme Court's application of the balancing process mandated by its exacting scrutiny standard of review has permitted an unfortunate encroachment on the first amendment rights of individuals.

§ 10.4. Abortion Statute: Construction. In 1974, the legislature substantially altered the Massachusetts abortion statute[1] by adopting "An Act to Protect Unborn Children and Maternal Health Within Constitutional Limits."[2] Among the sections added to the statute by the 1974 Act was section 12P, which requires parental or judicial consent before a nonemergency abortion is performed on an unmarried minor.[3]

In October, 1974 a pregnant unmarried minor aged 16 years, her physician and the director of a family planning clinic[4] brought an action in the federal district court, seeking to enjoin the enforcement of section 12P. In April, 1975 a three judge district court held the section unconstitutional and ordered the entry of a judgment permanently enjoining the Attorney General and the various district attorneys from enforcing section 12P.[5] On appeal, the United States Supreme Court held that the district court should have abstained from deciding the constitutionality of the statute pending definitive construction of the new statute by the Massachusetts courts.[6] Abstention, the Court held, "might avoid in

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§ 10.4. [1] G.L. c. 112, §§ 12H-12R.

[2] Acts of 1974, c. 706.

[3] G.L. c. 112, § 12P provides:

(1) If the mother is less than eighteen years of age and has not married, the consent of both the mother and her parents is required. If one or both of the mother's parents refuse such consent, consent may be obtained by order of a judge of the superior court for good cause shown, after such hearing as he deems necessary. Such a hearing will not require the appointment of a guardian for the mother.

If one of the parents has died or has deserted his or her family, consent by the remaining parent is sufficient. If both parents have died or have deserted their family, consent of the mother's guardian or other person having duties similar to a guardian, or any person who had assumed the care and custody of the mother is sufficient.

(2) The commissioner of public health shall prescribe a written form for such consent. Such form shall be signed by the proper person or persons and given to the physician performing the abortion who shall maintain it in his permanent files.

Nothing in this section shall be construed as abolishing or limiting any common law rights of any other person or persons relative to consent to the performance of an abortion for purposes of any civil action or any injunctive relief under section twelve R.

[4] For a summary of the plaintiffs and the classes which they represented, see Bellotti v. Baird, 428 U.S. 132, 137-38 & nn.7-8 (1976).

[5] Baird v. Bellotti, 393 F. Supp. 847, 857 (D. Mass. 1975). A majority of the three judge district court based its decision on Roe v. Wade, 410 U.S. 113 (1973) and Doe v. Bolton, 410 U.S. 179 (1973). The majority ruled essentially that § 12P is not simply a consultation statute, but rather that it applies to all unmarried minors with no exception for the "mature minor," and that it provides for an absolute, if reasonably made, independent veto of the decision by the parents. *See* Baird v. Bellotti, 393 F. Supp. at 854-55. For a discussion of the decision of the district court, see Berney & Buchbinder, *Constitutional Law*, 1975 ANN. SURV. MASS. LAW § 12.6.

[6] Bellotti v. Baird, 428 U.S. 132, 146-47 (1976).

whole or in part the necessity for federal constitutional adjudication. . . ."[7]

Before vacating the judgment of the federal district court, however, the Supreme Court addressed the availability of the certified question procedure for questions of state law in Massachusetts.[8] The Supreme Court indicated that the certification procedure substantially alleviates the dysfunctional aspects of abstention[9] and "the availability of an adequate certification procedure 'does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism.'"[10] In fact, the Court remarked that the availability of adequate certification procedures for questions of state law actually *enhances* the desirability of abstention.[11] Accordingly, the Supreme Court vacated the judgment of the district court and remanded the case for certification to the Supreme Judicial Court of appropriate questions concerning the meaning of section 12P and the procedures it imposes.[12]

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[7] *Id.* at 147, *quoting* Harrison v. NAACP, 360 U.S. 167, 177 (1959).

[8] Bellotti v. Baird, 428 U.S. 132, 150-51 (1976). *See* MASS. RULES OF COURT, SUP. JUD. CT. Rule 3:21.

[9] *See, e.g.,* Lake Carriers' Ass'n v. MacMullan, 406 U.S. 498, 509 (1972) (delay & expense); England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 418 (1964) (delay, expense & procedural pitfalls).

[10] Bellotti v. Baird, 428 U.S. 132, 150-51 (1976) (footnoted omitted), *quoting* Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974).

[11] Bellotti v. Baird, 428 U.S. 132, 151 (1976).

[12] *Id.* at 151-52. On the same day that the United States Supreme Court decided *Bellotti,* it also ruled on the constitutionality of a Missouri abortion statute. Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The Missouri statute, MO. REV. STAT. §§ 559.100 (Vernon 1953), 563.300 (Vernon 1978 Supp.), *as amended by* 1974 Mo. Laws 809 (H.B. 1211) (repealed by 1977 Mo. Laws ____, S.B. 60, § 1), also contained a parental consent provision which provided in pertinent part that:

> Section 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:
>
> (1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment;
>
> (2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion.
>
> (3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.
>
> (4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

1974 Mo. Laws 809, 810 (H.B. 1211 §3).

A divided Court in *Danforth* held that the parental consent provision in the Missouri statute was unconstitutional as a violation of rights enunciated in *Wade* and *Bolton* in that it gave "a third party an absolute, and possibly arbitrary, veto over the decision of

With this somewhat unusual procedural background, on August 31, 1976 the three judge federal district court certified nine questions to the Supreme Judicial Court of Massachusetts.[13] The Supreme Judicial Court provided answers to those nine questions during the *Survey* year in *Baird v. Attorney General.*[14]

The procedural context of *Baird* presented an interesting dilemma to the Supreme Judicial Court. In effect, the Court was asked to give the federal district court a definitive interpretation of a Massachusetts statute, the constitutional validity of which was challenged. The Court, however, was only to interpret the statute; it was not to go on to assess the statute's constitutionality. The constitutional questions in the case were reserved for the federal courts alone. Thus, if the Supreme Judicial Court went about the business of interpreting the statute in the traditional way, that is, by reviewing the language, intent and history, it ran the risk of having it later declared unconstitutional. On the other hand,

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the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent." 428 U.S. at 74.

In a concurring opinion in *Danforth,* Justice Stewart recognized that the Missouri statute was constitutionally infirm because it vested an absolute veto of the abortion decision in the parents. *Id.* at 90. Nevertheless, he contrasted the Missouri provision with the Massachusetts provision, which allows for a judicial resolution of an intrafamilial conflict, and implied that the Massachusetts procedure may be valid. *Id.* at 90-91.

Two dissenting opinions in *Danforth* would have upheld the Missouri provision on the grounds that the state's interest and the parents' legitimate interest in their unmarried minor child would outweigh the child's interest in seeking to terminate her pregnancy. *Id.* at 94-95 (White, J., dissenting in part), 102-03 (Stevens, J., dissenting). Justice Stevens made it explicit that he would apply a rational relationship standard to the statute. *See id.* at 103. In effect, he thus would recognize the state's interest in helping to foster an informed decision on the part of the unmarried minor, even though its means of achieving that interest—the requirement of parental consent—may not be a perfect fit. At the least, he concluded, it is "surely not irrational." *Id.*

In light of the views of the dissenting justices and the implication in the majority opinion in *Danfoth* that not all parental consent statutes are necessarily unconstitutional, it is not surprising that the Court remanded the Massachusetts statute for clarification.

[13] On remand, the three-judge court dissolved the outstanding injunction and § 12P went into effect from July 21, 1976 until July 30, 1976, when enforcement was stayed by order of Justice Brennan acting in summer recess for the Supreme Court. On October 18, 1976, the full Supreme Court summarily denied motions to vacate the stay. Bellotti v. Baird, 429 U.S. 892 (1976).

The three judge court solicited proposed questions from all parties before finally arriving at the nine questions ultimately certified.

[14] 1977 Mass. Adv. Sh. 96, 360 N.E.2d 288 (1977).

The certified opinion of the Supreme Judicial Court was received by the clerk of the federal district court on February 14, 1977. This event automatically dissolved the stay, see note 13 *supra,* entered by Justice Brennan. *See* Baird v. Bellotti, 428 F. Supp. 854, 857 (1977) (Julian, J., dissenting on the motion to stay). However, the federal district court granted its own stay, effective February 10, 1977, pending its determination of the constitutionality of § 12P as interpreted by the Supreme Judicial Court. Baird v. Bellotti, 428 F. Supp. at 855.

if the Court interpreted the statute in an anticipatory way, that is interpeting it in a strained fashion in an attempt to save its constitutionality, perhaps it would be upheld in a subsequent federal court proceeding. The Court chose the latter approach and as a result the opinion is replete with uncertainties and ambiguities.[15]

In essence, the certified questions solicited the Supreme Judicial Court's opinion as to: (1) the statutory standard for parental consent; (2) the statutory standard for a judicial order granting consent; (3) parental consultation as a statutory requirement; (4) parental notification; (5) procedures for expeditious decision; (6) the relationship of sections 12P and 12F; (7) appointment of counsel for an indigent minor; (8) the physician's reasonable and good faith belief as a defense; and (9) other comments.[16]

The Court began its discussion of the nine questions with the general proposition that: "Our principal advice to the Federal District Court is that we would construe § 12P to preserve as much of the expressed legislative purpose as is Constitutionally permissible."[17] Then the Court proceeded to answer the individual questions.

Responding to the first two questions, which inquired into the statutory standards for parental and judicial consent,[18] the Court determined that the standard of section 12P requires that the parents and court

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[15] The attempt to save the statute apparently was unsuccessful. On May 3, 1978 the federal district court again declared the statute unconstitutional. Baird v. Bellotti, ____ F. Supp. ____ (1978). See note 51 *infra.*

[16] The complete form of the question certified to the Court may be found in the footnotes to the Court's opinion in *Baird. See generally* 1977 Mass. Adv. Sh. 96, 360 N.E.2d 288.

[17] 1977 Mass. Adv. Sh. at 100, 360 N.E.2d at 292.

[18] 1. What standards, if any, does the statute establish for a parent to apply when considering whether or not to grant consent?

a) Is the parent to consider "exclusively . . . what will serve the child's best interest"?* (*Appellants' Brief before the Supreme Court, p. 23. *But cf.* Baird v. Bellotti, D. Mass., 1975, 393 F. Supp. 847, at 855).

b) If the parent is not limited to considering exclusively the minor's best interests, can the parent take into consideration the "long-term consequences to the family and her parents' marriage relationship"?* (*Defendants' Brief in this Court, p. 16).

c) Other?

Id. at 102 n.4, 360 N.E.2d at 292 n.4.

2. What standard or standards is the superior court to apply?

a) Is the superior court to disregard all parental objections that are not based exclusively on what would serve the minor's best interests?

b) If the superior court finds that the minor is capable, and has, in fact, made and adhered to, an informed and reasonable decision to have an abortion, may the court refuse its consent based on a finding that a parent's or its own, contrary decision is a better one?

c) Other?

Id. at 103 n.5, 360 N.E.2d at 293 n.5.

consider "exclusively . . . what will serve the child's best interests."[19] The Court construed the statute in this fashion, even though no standard was explicitly mentioned in the statute,[20] because it believed that constitutional constraints enunciated by the Supreme Court in *Planned Parenthood v. Danforth*[21] required such an interpretation.

In answer to question three, involving prior parental consultation,[22] the Court believed the legislative intent too obvious to permit any interpretation other than the absolute necessity of prior parental consultation except in the case of emergencies requiring immediate action or where no parent or statutory substitute is available.[23] The Court thereby rejected an argument made by the Attorney General in an attempt to bolster the constitutionality of the section, to the effect that the "mature minor" rule would apply, thereby abrogating the need for prior parental consultation in certain instances.[24]

The Court was of the opinion that the legislature made it categorically clear that prior parental consultation was necessary without any exception for the mature minor rule. It is interesting to note that in discussing this issue, however, the Court by way of dicta reached the conclusion that "apart from statutory limitations which are constitutional, where the best interests of a minor will be served by not notifying his or her parents of intended medical treatment and where the minor is capable of giving informed consent to that treatment, *the mature minor rule* applies in this Commonwealth."[25] Thus, the Court for the first time explicitly recognized the mature minor rule even though the rule does not apply to section 12P.

Since the Court had concluded that prior parental consultation was required by section 12P, it followed that question four, concerning par-

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[19] *Id.* at 102, 360 N.E.2d at 292.

[20] Section 12P has no discernible legislative history and provides simply that "the consent of both . . . parents is required." For the text of § 12P, see note 3 *supra.*

[21] See note 12 *supra.*

[22] "3. Does the Massachusetts law permit a minor (a) 'capable of giving informed consent,' or (b) 'incapable of giving informal consent,' 'to obtain [a court] order without parental consultation'?* (*See Supreme Court [opinion, 428 U.S. p. 145 . . .])" 1977 Mass. Adv. Sh. at 105 n.6, 360 N.E.2d at 293 n.6.

[23] 1977 Mass. Adv. Sh. at 106, 360 N.E.2d at 294.

[24] The so-called mature minor rule has never been explicitly adopted in Massachusetts either by statute or judicial decision. *But see* G.L. c. 112 § 12F. See text and note 32 *infra.* The mature minor rule developed as an exception to the requirement of parental consent prior to an operation. The unemancipated but mature minor was capable of consenting to an operation even though there was no medical emergency and even though one or both parents were available for consultation. The rule calls for an analysis of the nature of the operation, its likely benefit, and the capacity of the particular minor to understand fully what the medical procedure involves.

[25] 1977 Mass. Adv. Sh. at 111, 360 N.E.2d at 296 (emphasis added).

ental notification,[26] had to be answered that parental notification was required.[27] The Court responded to question five[28] by determining that a speedy disposition of a section 12P proceeding is essential so as not to unduly burden the minor's constitutional right to an abortion and indicating that it would become directly involved, if necessary, to assure a speedy section 12P proceeding.[29] Moreover, the Court observed that its appeal procedure was sufficiently prompt and dispositive, citing its 1974 decision in *Doe v. Doe*[30] to demonstrate that, where necessary, an appeal in an abortion case could be processed quickly.[31]

The sixth question certified to the Supreme Judicial Court necessitated a comparison between section 12P and section 12F of the statute.[32]

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[26] "4. If the court answers any of question 3 in the affirmative, may the superior court, for good cause shown, enter an order authorizing an abortion, (a), without prior notification to the parents, and (b), without subsequent notification?" *Id.* at 112 n.10, 360 N.E.2d at 297 n.10.

[27] *Id.* at 113, 360 N.E.2d at 297.

[28] "5. Will the Supreme Judicial Court prescribe a set of procedures to implement c. 112, § 12P which will expedite the application, hearing, and decision phases of the superior court proceeding provided thereunder? Appeal?" *Id.* at 113 n.11, 360 N.E.2d at 297 n.11.

[29] *Id.* at 113, 360 N.E.2d at 297.

[30] 365 Mass. 556, 314 N.E.2d 128 (1974).

[31] 1977 Mass. Adv. Sh. at 115, 360 N.E.2d at 298 (noting that in *Doe* the Court entered a dispositive order within 48 hours after the case was reported for decision).

[32] G.L. c. 112, § 12F, *as amended by* Acts of 1975, c. 564, was enacted after the decision of the district court in Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975), and before the decision of the Supreme Court remanding case to the district court. Bellotti v. Baird, 428 U.S. 132, 151-52 (1976).

Section 12F permits certain categories of minors to obtain medical treatment without parental consent with a proviso excluding abortion and sterilization procedures.

Section 12F provides in pertinent part:

> Any minor may give consent to his medical or dental care at the time such care is sought if (i) he is married, widowed, divorced; or (ii) he is the parent of a child. . .; or (iii) he is a member of any of the armed forces; or (iv) she is pregnant or believes herself to be pregnant; or (v) he is living separate and apart from his parent of legal guardian, and is managing his own financial affairs; or (vi) he reasonably believes himself to be suffering from or to have come in contact with any disease defined as dangerous to the public health pursuant to section six of chapter one hundred and eleven; provided, however, that such minor may only consent to care which relates to the diagnosis or treatment of such disease.
>
> Consent shall not be granted under subparagraphs (ii) through (vi), inclusive, for abortions or sterilization.

In argument before the Supreme Court, plaintiffs "pointed to the new provisions of § 12F and argued that § 12F heightened the discrimination between unmarried minors seeking abortions and minors seeking other medical procedures." Baird v. Attorney General, 1977 Mass. Adv. Sh. at 118, 360 N.E.2d at 299. The Supreme Court declined to consider this argument until the Supreme Judicial Court had an opportunity to define "the nature of the consent required for abortions." Bellotti v. Baird, 428 U.S. 132, 150 (1976). The United States Supreme Court, however, concluded that "it would not be inappropriate for the District Court . . . to certify a question [to the Supreme Judicial

In response, the Court characterized section 12F as the adoption of a limited statutory mature minor rule.[33] Those minors who are "married, widowed, or divorced" need no parental or judicial approval for any medical procedure, including abortions.[34]

In addition, the Court noted that the standard to be applied in both section 12F and section 12P cases was that of the best interests of the minor.[35] In section 12F procedures, the physician must exercise his medical judgment and the minor must consent, both agreeing that the medical procedure is in the minor's best interest.[36] In section 12P cases, once the physician exercises his medical judgment, the statute requires consent of the minor *and* consultation with the parents or a court order that the abortion is in the best interests of the minor.[37]

Responding to question seven,[38] the Court held that if the trial judge, in his discretion, concludes that the best interests of the minor would be served by the appointment of counsel, the judge may appoint such counsel or a guardian ad litem for the indigent minor, at public expense.[39] The Court rested this conclusion both upon the positive implication of section 12P and upon specific statutory authority granting a superior court judge the power to appoint counsel to protect the interests of a minor.[40]

The eighth question certified to the Court addressed the physician's good faith defense against charges of violation of the statute.[41] The Court interpreted section 12F as extending its protections to physicians performing abortions. Section 12F provides that a "physician who believes,

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Court] concerning the meaning of the new statute, and the extent to which its procedures differ from the procedures that must be followed under § 12P." *Id.* at 151-52.

[33] 1977 Mass. Adv. Sh. at 117, 360 N.E.2d at 299.

[34] *Id.* at 119, 360 N.E.2d at 300.

[35] *Id.*

[36] *Id.*

[37] *Id.*

The court declined to rule on whether the procedural differences between section 12P and section 12F violated the equal protection provisions of the Massachusetts Constitution. However, the Court noted that the standard for determining possible equal protection violations under the Massachusetts Constitution is "substantially the same" as the standard for determining possible equal protection violations under the United States Constitution. *Id.* at 120, 360 N.E.2d at 300. Therefore, the Court addressed equal protection concerns in response to the ninth certified question. See text and notes 45-48 *infra.*

[38] "7. May a minor, upon a showing of indigency, have court-appointed counsel?" 1977 Mass. Adv. Sh. at 120 n.17, 360 N.E.2d at 301 n.17.

[39] *Id.* at 122, 360 N.E.2d at 301.

[40] *Id.* at 119 & n.18, 360 N.E.2d at 301 & n.18; *see, e.g.,* MASS. R. CIV. P. 17(b).

[41] "8. Is it a defense to his criminal prosecution if a physician peforms an abortion solely with the minor's own, valid, consent, that he reasonably, and in good faith, though erroneously, believed that she was eighteen or more years old or had been married?" 1977 Mass. Adv. Sh. at 123 n.21, 360 N.E.2d at 302 n.21. The Court remarked that the use of the term "'valid' may not be an appropriate one in the context of the question." *Id.*

reasonably and in good faith, that a minor is eighteen or more years old or has been married, divorced or widowed, although it is not a fact,"[42] shall not be liable, civilly or criminally, for failing to obtain the consent of the parent or legal guardian of the minor. Since section 12F does not explicitly except abortions from its coverage, the Court, in order to avoid a constitutional problem, ruled that its protections do extend to physicians performing abortions.[43]

In response to the final question certified,[44] the Court expressed its opinion concerning the effect that a ruling holding the differing procedures in section 12P and section 12F unconstitutional would have on those two sections.[45] The Court suggested two alternatives: (1) section 12F might be construed as applying to all operations, including abortions, in which case section 12P would be repealed; or (2) section 12F as it applies to pregnant minors might be interpreted as extending only to medical procedures associated with a determination of pregnancy and abortion counseling rather than to all medical procedures.[46] The Supreme Judicial Court was of the opinion that the second alternative should be adopted.[47] However, if the proposed interpretation would be unconstitutional because it distinguishes between pregnancy-related operations and all other operations, then the Court was of the opinion that section 12P must fail because the Court saw "in § 12F a general legislative intent to eliminate any necessity for parental or judicial consent to operations on minors in the circumstances described in § 12F."[48]

The Supreme Judicial Court thus labored to construe the Massachusetts abortion statute in a manner designed to save the statute. Nonetheless, in light of the *Danforth* limitations,[49] it seems unlikely that the Massachusetts statute, with its mandatory parental consultation provisions,[50] can withstand constitutional attack.[51]

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[42] *Id.* at 123, 360 N.E.2d at 302.

[43] *Id.*

[44] "9. Will the Court make any other comments about the statute which, in its opinion, might assist us in determining whether it infringes the United States Constitution?" *Id.* at 123 n.22, 360 N.E.2d at 302 n.22.

[45] Section 12F allows a pregnant minor to consent to any medical procedure except abortion or sterilization, while § 12P requires parental or judicial consent before a pregnant minor can consent to an abortion. See text and notes 32-37 *supra.*

[46] 1977 Mass. Adv. Sh. at 125, 360 N.E.2d at 303.

[47] *Id.*

[48] *Id.* at 125-26, 360 N.E.2d at 303.

[49] See note 12 *supra.*

[50] 1977 Mass. Adv. Sh. at 126, 360 N.E.2d at 303.

[51] It appears conceivable that some type of parental consent or parental consultation statute could survive constitutional attack. *Cf.*, Poe v. Gerstein, 517 F.2d 787, 793 (5th Cir. 1975) (statute unconstitutional, since it permits parents to prohibit daughter's abortion "for reasons other than the minor's best interests"), *aff'd mem.*, 428 U.S. 901 (1976); Foe v. Vanderhoof, 389 F. Supp. 947, 955 (D. Colo. 1975) (Colorado "blanket requirement"

§ 10.5. Abortion: Commonwealth v. Edelin. During the *Survey* year, the Supreme Judicial Court also rendered an opinion addressing the abortion issue in *Commonwealth v. Edelin,*[1] a case deserving of comment because it attracted national attention.[2] Because of the unique circumstances of the case, however, the decision has limited precedential value for constitutional decisionmaking.[3]

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of parental consent unconstitutional); State v. Koome, 84 Wash. 2d 901, 909, 530 P.2d 260, 266 (1975) (parental *consultation,* but not consent, requirement may survive constitutional attack). Moreover, it is unlikely that the United States Supreme Court would have withheld final judgment if no form of parental consultation statute could have survived.

[51] The Massachusetts statute did not survive. *See* Baird v. Bellotti, No. 74-4992-F (D. Mass. May 2, 1978). The federal district court invalidated the statute, finding "that there could be no parents' bypass in any case . . . [and] that the statute eliminated abortions altogether from the mature minor rule." *Id.,* slip op. at 5.

Ironically, the district court criticized the Supreme Judicial Court's attempt to save the statute. "The Massachusetts court . . . purported to give it a chameleon-like ability to adjust to whatever color should ultimately be necessary to protect it." *Id.,* slip op. at 16. The court seemed somewhat amused by the efforts of the Supreme Judicial Court:

> [T]he court seems to have found the ultimate remedy for all constitutional infirmities. If a statute which, in terms, requires parental consultation without exception, can "be construed to require as much parental consultation as is permissible constitutionally," here, at once, is an instant cure, both for overbreadth, and for lack of standards. Regardless of whether a statute says too much, or too little, so long as the legislature intended it to be constitutional, when it comes before a court it will be appropriately rewritten. With due respect, we cannot believe this to be possible.

Id., slip op. at 18.

Dissenting in *Baird,* Judge Julian would have upheld the statute except insofar as it allowed a superior court judge to refuse an abortion request to a "minor . . . 'capable of making and [who] has made an informed and reasonable decision to have an abortion'" on his own determination of the best interests of the minor. *Id.,* slip op. at 2 (Julian, J., dissenting). Judge Julian was convinced that the Massachusetts statute was a legitimate attempt by the state to protect its minor residents "from undue outside influences and hasty, unreasoned decisions on abortions." *Id.,* slip op. at 28 (Julian, J., dissenting).

§ 10.5 [1] 1976 Mass. Adv. Sh. 2795, 359 N.E.2d 4.

[2] *See, e.g.,* New York Times, Feb. 16, 1975, at 1, col. 3; Boston Globe, Feb. 16, 1975, at 1, col. 3.

[3] The facts and the setting of *Edelin* were unique and are unlikely to recur. The case arose in Massachusetts during a period after the United States Supreme Court decided Roe v. Wade, 410 U.S. 113 (1973), and Doe v. Bolton, 410 U.S. 179 (1973), striking on constitutional grounds the abortion statutes in all states, including G.L. c. 272, § 19, and before the Massachusetts legislature could formulate an abortion statute that would satisfy the *Wade-Bolton* standards. The unusual circumstances of the case prompted Justice Kaplan to state in the prevailing opinion (agreed to in its entirety by only Justices Braucher and Wilkins) that:

> We are conscious that the significance of our decision as precedent is still further reduced by the fact that the case arose in an interregnum between the Supreme Court's abortion decisions of 1973 and the adoption of legislation intended to conform to those decisions—a kind of interval not likely to be repeated.

1976 Mass. Adv. Sh. at 2823, 359 N.E.2d at 18.

In September of 1973 a patient entered Boston City Hospital and requested an abortion. The Chief of Obstetrics and Gynecology interviewed and examined the patient and concluded that the gestational age of the fetus was twenty weeks.[4] Based on the estimates of the gestational age, the physician decided to abort by the saline method.[5] Dr. Kenneth Edelin, Chief Resident of the obstetric service, was the surgeon assigned to carry out the procedure. After an unsuccessful attempt to induce the

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The precedential value of *Edelin* is further reduced by the wide split among the six justices who heard the appeal:

> All six Justices who heard the appeal, holding that there was error in the proceedings at trial, vote to reverse the conviction. Five Justices also vote to direct the entry of a judgment of acquittal; the Chief Justice, dissenting in part in a separate opinion, would order a new trial. The five Justices are agreed that there was insufficient evidence to go to a jury on the overarching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the "wanton" or "reckless" conduct resulting in a death required for a conviction herein, and that motions for a directed verdict of acquittal should have been granted accordingly. Three of the five Justices would reach the same result of reversal and acquittal on each of the additional, independent grounds (a) that there was insufficient evidence to go to a jury of a live birth, an indispensable element for conviction of manslaughter, (b) that there was prejudicial divergence between the accusation against Dr. Edelin and the instructions to the jury. The two other Justices in a separate opinion explain their concurrence on the issue of wanton or reckless conduct; they decline to accept ground (a) or (b).

Id. at 2795-96, 359 N.E.2d at 5 (footnotes omitted).

The Supreme Court in *Wade* and *Bolton* effectively held that a woman has a constitutional right of privacy encompassing a right to terminate a pregnancy without state intervention. Specifically, the woman's right to privacy precludes any state intervention relative to an abortion decision arrived at between the woman and her physician at the state prior to approximately the end of the first trimester of the pregnancy term. *Wade,* 410 U.S. at 152-54. Because of the state's interest in protecting maternal health, the state may regulate the abortion procedure during the stage from the end of the first trimester. Moreover, because of the state's interest in both the health of the mother and the potentiality of human life, the state may regulate abortions for the stage of the pregnancy subsequent to "viability" of the fetus. *Id.* at 164-165.

While the Supreme Court did not decide the issue of when "viability" occurs, the Court nevertheless stated, "Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.* at 160 (footnote omitted). The Court further indicated that at "viability" the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid," and "presumably has the capability of meaningful life outside the mother's womb." *Id.* at 160, 163 (footnote omitted).

In August, 1974, the Massachusetts legislature ultimately enacted legislation consistent with the *Wade* and *Bolton* guidelines. *See* G.L. c. 112, §§ 12H-12R. The facts of the *Edelin* case, however, occurred prior to the enactment of the new statutory scheme.

[4] The patient was subsequently examined by two other physicians, including Dr. Edelin, and a medical student. They estimated gestational age variously between twenty and twenty-four weeks. *Edelin,* 1976 Mass. Adv. Sh. at 2798-99, 359 N.E.2d at 6-7.

[5] The saline method is a commonly accepted medical procedure for aborting a pregnancy during the second trimester. The procedure involves "inducing fetal death and a miscarriage by introducing a salt solution into the amniotic sac containing the fetus." *Id.* at 2799, 359 N.E.2d at 7.

abortion utilizing the saline method, Dr. Edelin consulted with his department supervisor and then aborted the pregnancy by utilizing a procedure termed "hysterotomy."[6]

On April 11, 1974 a grand jury returned an indictment against Dr. Edelin, alleging that he killed "a male child . . . by . . . assault and beating."[7] At trial, the commonwealth theorized that the fetus became a "person" for purposes of the manslaughter statute at the time the placenta was detached from the uterine wall.[8] At that time, the commonwealth argued, the fetus was killed by a wanton and reckless act by Dr. Edelin.[9]

The defense contended that for the manslaughter statute to apply a fetus must be "born alive" completely outside the mother's body. In addition, any homicidal acts must be committed after the fetus is "born alive," not before.[10]

After a lengthy trial where hosts of prosecution and defense witnesses gave testimony on such issues as viability, gestational age, respirational activity and actual life, a jury returned a verdict of guilty against Dr. Edelin.[11] On appeal, five of the six justices hearing the case agreed that "there was insufficient evidence to go to a jury on the overarching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the 'wanton' or 'reckless' conduct resulting in a death required for a conviction."[12]

To reach this result, the Court assumed that there was sufficient

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[6] Hysterotomy is a procedure whereby an incision is made through the abdominal wall and into the uterus. The surgeon then sweeps the uterine cavity with his fingers in order to detach the placenta from the uterine wall so that the amniotic sac can be removed through the incision. *Id.* at 2800, 359 N.E.2d at 7.

[7] *Id.* at 2805, 359 N.E.2d at 9. Dr. Edelin was charged with violation of the Massachusetts manslaughter statute. G.L. c. 265, § 13.

[8] 1976 Mass. Adv. Sh. at 2806, 359 N.E.2d at 10.

[9] *Id.*

During the performance of the abortion by hysterotomy, Dr. Edelin, "after he manually separated the placenta from the uterine wall and before he removed [the fetus] from the abdominal cavity," waited for a period of from three to five minutes. *Id.* It was this wait which the prosecution characterized as the act for the charge of manslaughter.

The prosecution offered testimony on this issue to the effect that while Dr. Edelin was performing this procedure he remained motionless for at least three minutes with his eyes fixed on a clock in the operating room.

Dr. Edelin responded in testimony at trial that after he had detached the placenta from the uterine wall and began to remove the amniotic sac through the incision, the sac ruptured. He then attempted to take hold of a lower extremity of the fetus in order to draw the fetus through the incision, a procedure that would explain the three to five minute delay. *Id.* at 2801, 359 N.E.2d at 7.

[10] *Id.* at 2806, 359 N.E.2d at 10.

[11] *Id.* at 2808, 359 N.E.2d at 11.

[12] *Id.* at 2795-96, 359 N.E.2d at 5.

evidence to allow the jury to find a "live" birth and subsequent death of the fetus. The Court also interpreted the trial judge's instructions as meaning that only Dr. Edelin's conduct during the postnatal stage of the abortion[13] could be considered for conviction of manslaughter.[14] Given the facts in *Edelin,* the Court concluded that there was no significant evidence to establish or even to permit submission to the jury of the question whether Dr. Edelin had engaged in wanton or reckless conduct after the birth of the fetus.[15]

However, the commonwealth also contended that Dr. Edelin's conduct during the prenatal stage of the abortion could be considered on the issue of recklessness and the trial judge's instructions should be read to allow this consideration.[16] The Court indicated that there were three reasons why the commonwealth's contention was unacceptable and in any event would not change the result. First, the Court was in doubt as to whether the manslaughter statute spoke to prenatal conduct.[17] Sec-

[13] Upon removal of the fetus from the uterus, to all appearances the fetus was dead. It evinced no signs of breathing or life. Nonetheless, Dr. Edelin placed his hand on the fetal chest to check for a heartbeat and found no additional signs of life. *See id.* at 2809, 359 N.E.2d at 11.

[14] The instructions of the trial judge were of particular significance in the case. He recognized that the manslaughter charge in the case was "inextricably intertwined" with the Supreme Court's *Wade-Bolton* abortion decisions. Except in the limited situations where the state could constitutionally regulate abortions, the decision must be left to the woman and her physician. Thus, a physician is constitutionally protected in performing an abortion during the entire nine months of the patient's pregnancy unless the state has acted to promote either its interest in the health of the mother or its interest in the potentiality of human life. *Id.* at 2807-08, 359 N.E.2d at 10-11.

On the question whether the fetus was "born alive," the judge instructed the jury that "birth" was "the process which causes the emergence of a new individual from the body of its mother." *Id.* at 2807, 359 N.E.2d at 10. However, the judge did not discuss the meaning of "alive." In addition, the judge did not instruct the jury on the importance of determining the "viability" of the fetus. He "left it to the jury in their 'consideration of the facts' . . . to 'determine' whether viability had 'any applicability.'" *Id.* at 2808, 359 N.E.2d at 11.

[15] *Id.* at 2795-96, 359 N.E.2d at 5.

[16] *Id.* at 2810, 359 N.E.2d at 11-12.

[17] The Court concluded that it is well understood that manslaughter assumes a live and independent person as the victim. Destruction of a fetus in utero at common law was not manslaughter but rather abortion or perhaps feticide. Recognizing that there was some conflict at common law as to whether a defendant could be tried for manslaughter for injuring a fetus in utero when subsequently that fetus is born alive and then dies from the pre-inflicted injury, the Court concluded on the basis of dicta in an early Massachusetts opinion of Justice Holmes that the Commonwealth prefers the view that prenatal acts can not be grounds for manslaughter despite a later live birth and death. *Id.* at 2811, 359 N.E.2d at 12. *See* Dietrich v. Northampton, 138 Mass. 14, 15, 17 (1884) (Holmes, J.).

In his dissent, Chief Justice Hennessey disputes this conclusion. While recognizing that there is no case in Massachusetts on point, on the basis of decisions in other jurisdictions and English common law he concludes that "conduct toward a subject prenatally may

ond, even if the manslaughter statute were interpreted to include consideration of prenatal conduct such an interpretation would be unconstitutional following the *Wade-Bolton* decisions.[18] Third, even if Dr. Edelin's conduct in the prenatal stage of the procedure could be considered for purposes of the manslaughter statute, nevertheless, there was still no evidence of his recklessness that would require submission to a jury.[19]

Speaking only for themselves, Justices Braucher, Kaplan and Wilkins believed that there was insufficient evidence of live birth in the instant case and thus that issue should not have gone to the jury. These three justices believed that the trial judge correctly charged the jury that "there could be no subject of manslaughter unless and until the fetus was live born."[20]

The only evidence of postnatal life presented at the trial was testimony elicited from a pathologist who had conducted a microscopic examination of the fetus' lung tissue and concluded that there was some "breathing" outside the uterus.[21] The three justices assumed that the

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give rise to criminal liability if it results in the death of the child after its live birth." 1976 Mass. Adv. Sh. at 2841, 359 N.E.2d at 25, *citing, e.g.*, Morgan v. State, 148 Tenn. 417, 256 S.W. 433 (1923); Abram v. Foshee, 3 Iowa 273, 278 (Cole's ed. 1856).

[18] *Edelin*, 1976 Mass. Adv. Sh. at 2811-12, 359 N.E.2d at 12-13. See note 3 *supra*.

Justices Reardon and Quirico as well as Chief Justice Hennessey were at variance with the majority on this issue. It was their opinion that viability is the key factor, since they felt that *Wade-Bolton* held that the state's interest in protecting the potentiality of human life may outweigh the woman's interest in abortion at the stage of the pregnancy subsequent to the "viability" of the fetus. Thus, any constitutional protection afforded a physician extends only to that stage of the pregnancy preceding viability. *Id.* at 2829, 359 N.E.2d at 20 (Reardon, J., dissenting in part). Justices Reardon and Quirico were of the opinion that there was ample evidence for the jury to conclude that the fetus in the instant case was viable; thus the jury could constitutionally consider the post viability prenatal conduct along with the postnatal conduct of the physician to determine whether he was wanton and reckless. *Id.* at 2830, 359 N.E.2d at 20-21.

The majority did not necessarily disagree with the reasoning of the dissenters, but believed that state regulation of abortions after viability had to be expressed in "tailored" legislation specifically establishing guidelines and procedures. Since the manslaughter statute is "flat and contains no such detail," the majority was of the opinion that it would be unconstitutional to attempt to tailor it to bear on a "physician as he went about the predelivery process of performing an abortion." *Id.* at 2811-12, 359 N.E.2d at 12. The majority further believed that even if the manslaughter statute could be read to implement the state's interest in the potentialty of human life after viability, nevertheless, it would have been necessary for the judge to have instructed the jury as to how the manslaughter statute should be applied consistent with *Wade-Bolton*. This would have required at a minimum an instruction as to the definition of "viability" which was omitted from his charge. *Id.* at 2812, 359 N.E.2d at 12.

[19] *Id.* at 2814, 359 N.E.2d at 14.

[20] *Id.* at 2816, 359 N.E.2d at 15.

[21] The medical examiner also examined lung tissue of the fetus and found that there was "partial expansion of some of the alveoli." This suggested some respiratory activity but left the question where it had taken place. Three possibilities existed on this question.

evidence therefore was sufficient to entitle a jury to conclude that some breathing occurred after delivery of the fetus. However, the question still remained as to whether it was sufficient to establish postnatal life.[22] The defense had proposed that the judge instruct the jury according to the definition of "live-born infant" formulated and published by the Committee on Terminology of the American College of Obstetricians and Gynecologists.[23] The justices were of the opinion that this definition was less exacting of proof and thus more favorable to the commonwealth than any standard applied in manslaughter cases throughout the country.[24] Even if the jury had applied this standard, based upon the facts of the instant case, it could not have concluded that the fetus was "born alive." Thus, the three justices believed that the commonwealth had failed in its proof on this issue and acquittal was necessary.

Justices Reardon and Quirico disagreed with the three justices on the issue of live birth. They were of the opinion that the trial judge's instructions were explicit enough so that:

> [N]o jury under any plain understanding of the English language could conclude that the conviction of the defendant could occur unless there had been a live birth of a child outside the body of the mother and that *subsequently* there were wanton or reckless acts of the defendant, which acts caused the death of that child.[25]

Justices Braucher, Kaplan and Wilkins further believed that acquittal was necessary in this case because of a prejudicial shift from the accusation as specified by the commonwealth to the crime as defined in the trial judge's instructions.[26] The indictment of defendant as parti-

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Either "the fetus had sucked amniotic fluid," or had taken in room air through the uterine incision, or had done so after delivery clear of the uterus. *Id.* at 2817 & n. 34, 359 N.E.2d 15 & n.34.

[22] Since the trial judge did not instruct the jury as to what legal standard they should apply to determine "born alive," the three Justices could have concluded that a new trial with appropriate instructions on this issue was necessary. However, they went further and considered the evidence to see whether it would have satisfied any acceptable standard of "born alive." Finding the evidence did not satisfy any standard, the three Justices believed an acquittal necessary and not mere reversal with a new trial. *Id.* at 2818, 359 N.E. 2d at 15.

[23] "Liveborn infant is a fetus, irrespective of its gestational age, that after complete expulsion or extraction from the mother, shows evidence of life—that is, heartbeats or respirations. Heartbeats are to be distinguished from several transient cardiac contractions; respirations are to be distinguished from fleeting respiratory efforts or gasps." *Id.* at 2818, 359 N.E.2d at 16, *quoting* AMERICAN COLLEGE OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE ON TERMINOLOGY, OBSTETRIC-GYNECOLOGIC TERMINOLOGY 454 (Hughes ed. 1972).

[24] The standard simply required some minimal demonstration of independent existence beyond "fleeting respiratory efforts or gasps." 1976 Mass. Adv. Sh. at 2817, 359 N.E.2d at 16.

[25] *Id.* at 2827, 359 N.E.2d at 19 (emphasis in original).

[26] According to the three justices:

cularized by the commonwealth asserted that the fetus died either while it was in utero or when it was partially removed.[27] However, the trial judge's instructions indicated that conviction depended upon a live birth after delivery free of the mother. Also, the indictment as particularized asserted that the criminal conduct of defendant was the three to five minute pause while the fetus was in utero.[28] However, the instructions confined the jury's consideration to the postnatal conduct of the defendant. The three justices were of the opinion that if the commonwealth had offered proof as to the elements of the criminal offense as particularized there could not be a conviction because the trial judge's instruction essentially placed different elements before the jury for consideration. Therefore, "conviction must be taken to have rested on elements forming no part of the accusation as particularized."[29]

Justices Reardon and Quirico also disagreed with the others on the question of variance. In their opinion, the defendant was not prejudiced by the variance between allegations and proof.[30] To support this conclusion the justices cited numerous situations both before and during the course of the trial where the commonwealth made it known to the defendant that it:

> [W]as not proceeding against him criminally on any theory that his action in performing an effective abortion per se constituted the crime of manslaughter. Rather he knew, or should have known, from those statements that his prosecution was based on the alleged premise that, although he had undertaken and intended to perform an effective abortion, his efforts had instead resulted in an unintended and perhaps unexpected, birth of a child, and that he had caused the death of the child by his subsequent wanton or reckless conduct.[31]

Perhaps the more far-reaching ramification of the *Edelin* case is the practical effect it will have on physicians performing abortions in the

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> The policy of the statute of "variance," G.L. c. 277, § 35, tends to support acquittal in the present case. It says that a defendant "shall not be acquitted on the ground of variance between the allegations and (the) proof," but this is conditioned on the "essential elements of the crime" being "correctly stated." That was not the case here. The statute indicates, further, that even when the condition is met, acquittal is called for where the defendant was "thereby prejudiced [i.e., by the variance] in his defense."

1976 Mass. Adv. Sh. at 2820, 359 N.E.2d at 17 (footnoted omitted).

[27] *Id.* at 2819, 359 N.E.2d at 16.

[28] *Id.*

[29] "The offense must not only be proved as charged, but it must be charged as proved." *Id.* at 2820, 359 N.E.2d at 16, *quoting, e.g.*, Commonwealth v. Blood, 70 Mass. (4 Gray) 31, 33 (1855).

[30] *Id.* at 2831, 359 N.E.2d at 21.

[31] *Id.* at 2832-33, 359 N.E.2d at 22.

future. While Justice Kaplan in his opinion for the Court expressed the view that even though physicians are accountable criminally for their conduct, nevertheless, due regard should be afforded the "unavoidable difficulties and dubieties of many professional judgments."[32]

Shortly after the *Edelin* decision, the medical community focused discussion on the difficulty of finding gestational age accurately, and the increasingly difficult medico-legal questions of viability in a field where technical advance, now can sustain younger and smaller fetuses to independent life. Practically speaking, doctors are likely to become more reluctant, after *Edelin*, to perform abortions after the twentieth week of the pregnancy.

The Massachusetts abortion statute, which did not govern the *Edelin* facts but which currently regulates abortions in Massachusetts, sets out procedures and states judgments which a physician must make before performing an abortion on a woman beginning her twenty-fourth week of pregnancy.[33] This statute, in conjunction with the *Edelin* decision, seems certain to have a "chilling effect" on the performance of abortions in the hazy 20-24 week gestational period.

§ 10.6 Omitted Child Statute: Equal Protection. Since 1968, the United States Supreme Court has on twelve occasions considered the constitutionality of statutes allegedly discriminating on the basis of illegitimacy.[1] These cases consistently present challenges based on the equal protection clause of the fourteenth amendment to the United States Constitution. While it is not entirely clear from previous Supreme Court opinions whether classifications based on illegitimacy are "suspect," requiring that any justifications must survive "strict scrutiny" under equal protection analysis, it is clear that the scrutiny afforded is not to be "a toothless one."[2] Thus, it seems clear from the

[32] *Id.* at 2824, 359 N.E.2d at 18 (footnoted omitted). The effect of Justice Kaplan's statement is somewhat reduced by the comment made by Chief Justice Hennessey, dissenting in *Edelin:* "I trust that no language in any of the three opinions in this case will be construed so as to overstate the constitutional protections against criminal prosecution afforded doctors charged with crimes arising out of abortions." *Id.* at 2849, 359 N.E.2d at 28.

[33] G.L. c. 112 §§ 12H-12R, added by c. 706 of the Acts of 1976.

§ 10.6 [1] Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495 (1976); Weinberger v. Beaty, 418 U.S. 901 (1974) (Mem.), *aff'g* 478 F.2d 300 (5th Cir. 1973); Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Gomez v. Perez, 409 U.S. 535 (1973); Richardson v. Griffin, 409 U.S. 1069 (Mem.), *aff'g* 346 F. Supp. 1226 (D. Md. 1972); Richardson v. Davis, 409 U.S. 1069 (Mem.), *aff'g* 342 F.Supp. 588 (D. Conn. 1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Glona v. American Guarantee & Liab. Ins. Co., 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

[2] *See* Mathews v. Lucas, 427 U.S. 495, 510 (1976).

Supreme Court opinions that when a classification is based on illegitimacy the Court will not defer completely to the articulated legislative purpose justifying the classification, but rather will analyze the relation of the purpose to the means by which it chooses to carry out that purpose.

During the *Survey* year, the Supreme Judicial Court was called upon to decide whether the Massachusetts omitted child statute,[3] interpreted as having no application to illegitimate children not legitimated,[4] was constitutional. In *Hanson v. Markham,*[5] applying what can best be termed a "toothless"[6] scrutiny, the Court upheld the constitutionality of the statute.

In *Hanson,* the decedent left a will naming his wife, daughter and two other individuals as legatees. However, the decedent failed to provide in his will for the plaintiff, his illegitimate daughter. Plaintiff filed a complaint alleging that she was the decedent's daughter[7] and that "the omission of her name (in his will) was unintentional and occasioned by accident and mistake."[8] The trial judge granted the defendants' motion for summary judgment on the grounds that the plaintiff was not a lawful heir.[9] The plaintiff appealed, grounding her claims in the theory that the omitted child statute was violative of the equal protection clause of the United States Constitution.[10]

The Supreme Judicial Court[11] summarily dismissed the plaintiff's

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[3] G.L. c. 191, § 20, *amended by* Acts of 1969, c. 479, § 2, provides in pertinent part: If a testator omits to provide in his will for any of his children, whether born before or after the testator's death, or for the issue of a deceased child, whether born before or after the testator's death, they shall take the same share of his estate which they would have taken if he had died intestate, unless they have been provided for by the testator in his life time or unless it appears that the omission was intentional and not occasioned by accident or mistake. . . ."

[4] G.L. c. 190, § 7 provides:
An illegitimate child whose parents have intermarried and whose father has acknowledged him as his child or has been adjudged his father under chapter two hundred and seventy-three shall be deemed legitimate and shall be entitled to take the name of his parents to the same extent as if born in lawful wedlock.

[5] 1976 Mass. Adv. Sh. 2504, 356 N.E.2d 702. For additional discussion of *Hanson,* see *Trusts & Estates* § 3.7 *supra.*

[6] See text at note 2 *supra.*

[7] The plaintiff's allegation was not contested. Indeed, the father had acknowledged paternity in a Michigan support action in 1936. 1976 Mass. Adv. Sh. at 2505, 356 N.E.2d at 702.

[8] *Id.,* 356 N.E.2d at 703. The trial judge ruled that an illegitimate child is not the lawful heir of her father in these circumstances and granted defendant's motion for summary judgment.

[9] *Id.*

[10] *Id.* at 2506, 356 N.E.2d at 703. *See* U.S. CONST., amend. XIV.

[11] Plaintiff appealed to the Court of Appeals. The Supreme Judicial Court transferred the case in its own motion. 1976 Mass. Adv. Sh. at 2505, 356 N.E.2d at 703.

equal protection challenge for two reasons. First, the Court relied on an earlier Massachusetts case, *Boston Safe Deposit Trust Co. v. Fleming,*[12] for the principle that United States Supreme Court opinions on illegitimacy "have no application to the interpretation of a will and the legal effect of words used."[13] The Court, moreover, found "nothing invidious in a legislative judgment that omission of a legitimate child from a will is an indication of possible mistake but that omission of an illegitimate child is not."[14] On the contrary, the Court characterized the omitted child statutes as "merely [providing] a framework within which private testamentary decisions may be freely made."[15]

The second justification the Court offered for upholding the challenged classification was that even including illegitimates within the omitted child statute[16] would not benefit the plaintiff, since section 5 of chapter 190 provides that "an illegitimate child inherits from her mother but not from her father."[17]

Five months after *Hanson,* the United States Supreme Court announced *Trimble v. Gordon,*[18] a case which casts considerable doubt on the constitutional viability of *Hanson.* In *Trimble,* the Supreme Court declared unconstitutional an Illinois statute[19] that essentially provided that illegitimates were heirs only of the mother for purposes of that state's intestacy laws.[20]

A state court found decedent Sherman Gordon to be the father of Dela Mona Trimble in 1973.[21] The decedent supported the illegitimate and openly acknowledged her as his child.[22] However, the decedent died intestate and the illegitimate child was excluded as an heir on the force of the Illinois statute.[23] The illegitimate's equal protection challenge was unsuccessful in the Illinois state courts.[24]

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[12] 361 Mass. 172, 279 N.E.2d 342, *appeal dismissed,* 409 U.S. 813 (1972).

[13] *Id.* at 179 n.7, 279 N.E.2d at 346 n.7.

[14] *Hanson,* 1976 Mass. Adv. Sh. at 2507, 356 N.E.2d at 703.

[15] *Id.*

[16] G.L. c. 191, § 20 provides that the child would take the same share of the decedent's estate which she would have taken if the decedent had died intestate. For the text of § 20, see note 3 *supra.*

[17] 1976 Mass. Adv. Sh. at 2507, 356 N.E.2d at 703.

[18] 430 U.S. 762 (1977).

[19] ILL. REV. STAT. c. 3, § 12 (1961) (current version at ILL. REV. STAT. c. 3, § 2-2 (1977 Supp.)).

[20] 430 U.S. at 766.

[21] *Id.* at 764.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 764-65. The Illinois Supreme Court affirmed the decision against Dela Mona Trimble on the authority of its opinion in In re Karas, 61 Ill. 2d 40, 329 N.E.2d 234 (1975). In *Karas,* the statute challenged in *Trimble* was upheld against similar constitutional attacks. *Karas,* 61 Ill. 2d at 56, 329 N.E.2d at 242.

The mode of analysis adopted by the Illinois courts to uphold the statute was surprisingly similar to the method employed by the Supreme Judicial Court to uphold section 20 of chapter 191 of the General Laws.[25] In both cases, the state courts relied on *Labine v. Vincent*[26] for the proposition that a state's interest in encouraging family relationships and in establishing an accurate and efficient method of disposing of property at death justifies a classification based upon illegitimacy.[27] However, the United States Supreme Court in *Trimble* criticized the Illinois court for failing to analyze the statute to determine whether it truly promoted the purpose suggested.[28] Moreover, the Supreme Court observed that decisions subsequent to *Labine* clearly reject the argument that a "State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships,"[29] thereby promoting "legitimate" family relationships. In its cursory treatment the Supreme Judicial Court in *Hanson* did not attempt to analyze the statute as being justified by either the state's interest in the familial relationship or any other interest. Instead, the Court merely cited *Labine* in support of its conclusion that the omitted child statute was constitutional.[30] In the wake of *Trimble,* the validity of this approach seems problematic.

The Illinois Supreme Court in *In Re Karas*[31] also relied on *Labine* for a second justification of its illegitimacy classification scheme: the state interest in "establish[ing] a method of property disposition."[32] The United States Supreme Court once again criticized the Illinois court for an incomplete analysis.[33] Recognizing that a state has a valid interest in assuming the accuracy and efficiency in the disposition of property at death, the Supreme Court nevertheless observed that "[f]or at least some significant categories of illegitimate children of intestate men, inheritance rights can be recognized without jeopardizing the orderly settlement of estates . . . ."[34] The Court noted that when constitutional rights are at stake, the wording of the statute must be "carefully tuned

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[25] See text and notes 3-17 *supra.*

[26] 401 U.S. 532 (1971).

[27] *Id.* at 538-39. *See Hanson,* 1976 Mass. Adv. Sh. at 2507, 356 N.E.2d at 703-04; In re Karas, 61 Ill. 2d 40, 52-53, 329 N.E.2d 234, 240-41 (1975).

[28] 430 U.S. at 769 ("the Equal Protection Clause requires more than the mere incantation of a proper state purpose").

[29] *Id.*

[30] 1976 Mass. Adv. Sh. at 2507, 356 N.E.2d at 703-04.

[31] 61 Ill. 2d 40, 329 N.E.2d 234 (1975).

[32] *Id.* at 48, 329 N.E.2d at 238. Analyzing the challenged statute with this justification in mind, the Illinois court focused on the difficulty of proving paternity and concomitant danger of spurious claims.

[33] 430 U.S. at 770.

[34] *Id.* at 771.

to alternative considerations."[35] Thus, "[d]ifficulties of proving paternity in some situations do not justify the total statutory disinheritance of illegitimate children whose fathers die intestate."[36]

In *Hanson,* the Supreme Judicial Court provided no analysis to support a legislative presumption that the omission of a legitimate child from a will is more likely to be the result of mistake than the omission of an illegitimate child.[37] Even assuming the propriety of such a legislative presumption, the Court failed to consider the possibility of some middle ground between the extremes of complete exclusion of the illegitimate and case-by-case determination of whether the omission is occasioned by mistake or accident. It seems clear that if the Supreme Court in *Trimble* refused to accept the Illinois court's reasoning in *Karas* because the statute was not "tuned to alternative considerations,"[38] the same result would obtain in *Hanson.*[39] In *Hanson,* the decedent was adjudged the father of the illegitimate in a Michigan court proceeding and was ordered to pay support for the child.[40] If the decedent actually had intended to preclude his illegitimate child from taking under his will, he could have specifically indicated his intent in the instrument itself. Absent any such indication, it would seem that the inference is equally strong that decedent omitted his illegitimate child from his will by accident and mistake and not by intention. Therefore, the purpose of the Massachusetts omitted child statute is not satisfied, the reach of the statute extends beyond its asserted purpose, and the statute is constitutionally flawed.[41]

The second justification advanced by the Supreme Judicial Court in *Hanson* to sustain the statute is equally suspect after *Trimble.* The Court in *Hanson* concluded that even if the omitted child statute were interpreted as including illegitimates, the plaintiff would not be entitled to relief because "its effect would be that she 'would take the same share

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[35] *Id.* at 772, *quoting* Mathews v. Lucas, 421 U.S. 495, 513 (1976).

[36] 430 U.S. at 772.

[37] *See* 1976 Mass. Adv. Sh. at 2507, 356 N.E.2d at 703.

[38] 430 U.S. at 772.

[39] The Supreme Court in *Trimble* criticized the Illinois court for failing to consider adequately the relation between the Illinois statute, which made illegitimates heirs of the mother and the mother's ancestors but not heirs of the father and the father's ancestors for purposes of intestate succession, and the state's proper purpose of assuring accuracy and efficiency in the disposition of property at death. Therefore the Court found the Illinois statute constitutonally flawed. See text at note 34 *supra.* The Court found that the statute extended well beyond its asserted purposes, because "[the] adjudication [of paternity] should be equally sufficient to establish [the illegitimate's] right to claim a child's share of [decedent's] estate, for the State's interest in the accurate and efficient disposition of property at death would not be compromised in any way by allowing her claim in these circumstances." *Trimble,* 430 U.S. at 772 (footnote omitted).

[40] 1976 Mass. Adv. Sh. at 2505, 356 N.E.2d at 702.

[41] *Compare* note 39 *supra.*

of' the decedent's estate which she 'would have taken if he had died intestate.' G.L. c. 191, § 20, as amended by St. 1969, c. 479, § 2. Under G.L. c. 190, § 5, an illegitimate child *inherits from her mother but not from her father.*"[42] After *Trimble,* section 5 of chapter 190 is most likely unconstitutional.[44]

Certainly, one cannot fault the Supreme Judicial Court for failing to anticipate the Supreme Court's decision in *Trimble.* However, it seems clear that in light of past Supreme Court cases involving equal protection challenges to illegitimacy classification schemes, the Supreme Judicial Court was remiss in failing to analyze closely the plaintiff's challenge to the omitted child statute. While past Supreme Court decisions are at best vague concerning whether illegitimacy is a "suspect" classification requiring close judicial scrutiny,[45] nevertheless, they are clear that any classification based on illegitimacy deserves more scrutiny than the Court normally affords state statutes of an economic or social regulatory nature.[46] It is fair to say that the Supreme Judicial Court erred in deferring completely to the legislature in *Hanson* by applying a method of analysis clearly inconsistent with the equal protection considerations generally afforded illegitimates aggrieved by a legislative classification scheme which discriminates on the basis of illegitimacy.

§ 10.7. Sunday Closing Laws: Equal Protection. Sunday closing or "Blue"[1] laws may be traced to the colonial period of American history.[2] Generally, these laws attempt to prohibit various types of commercial activity on the first day of every week. Almost from their inception, numerous attempts have been made to challenge these laws on constitutional grounds.[3] However, it has been only recently that a growing number of state courts have sustained such challenges, invalidating Sunday closing laws on constitutional grounds.[4] During the *Survey* year,

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[42] *Id.* at 2507, 356 N.E.2d at 703 (emphasis added).

[43] G.L. c. 190, § 5 provides in pertinent part: "An illegitimate child shall be heir of his mother and any maternal Ancestor. . . ."

[44] The Illinois statute declared unconstitutional in *Trimble,* ILL. REV. STAT. c. 3 § 12 (current version at ILL. REV. STAT. c. 3, § 2-2 (1977 Supp.)), provides in pertinent part: "An illegitimate child is heir of its mother and of any maternal ancestor. . . ."

[45] *Trimble,* 430 U.S. at 777-78 (Rehnquist, J., dissenting).

[46] *Id.* at 781.

§ 10.7. [1] This term may have originated in the late eighteenth century in New Haven, Connecticut, when that city's Sunday laws were printed on blue paper. *See* Note, *Sunday Closing Laws in the United States: An Unconstitutional Anachronism,* 11 SUFFOLK U.L. REV. 1089, 1089 n.1.

[2] *See generally* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 493 (rev. ed. 1975).

[3] *See, e.g.,* Soon Hing v. Crowley, 113 U.S. 703, 710 (1885) (a state may prohibit Sunday labor).

[4] *See, e.g.,* People v. Abrahams, 40 N.Y. 2d 277, 353 N.E.2d 574, 386 N.Y.S.2d 661

the Supreme Judicial Court was presented with an opportunity to rule on the constitutionality of the commonwealth's Sunday closing laws[5] in *Zayre Corp. v. Attorney General.*[6]

Zayre is a Delaware corporation which operates thirty-four retail discount department stores in Massachusetts.[7] On Sunday, November 28, 1976, Zayre opened its store in Springfield, Massachusetts for business, and a criminal complaint was filed in the district court against Zayre for violation of the Sunday closing statute.[8] Zayre subsequently filed a complaint in the county court seeking "declaratory and injunctive relief against the enforcement of G.L. c. 136, §§ 5, 6, and the pending criminal prosecutions."[9]

Before the Supreme Judicial Court, Zayre advanced two arguments. First, Zayre maintained that the scheme of statutory exemptions is arbitrary and not rationally related to a legitimate state purpose.[10] Second, Zayre urged the Court to find that because certain types of stores are able to operate on Sundays due either to statutory exemptions[11] or patterns of local enforcement, the statute operates in an arbitrary or irrational manner.[12]

(1976); Rutledge v. Gaylord's, Inc., 233 Ga. 694, 213 S.E.2d 626 (1975); Spartan's Indus., Inc. v. Oklahoma City, 498 P.2d 399 (Okla. 1972). *But cf.* Woonsocket Prescription Center, Inc. v. Michaelson, 417 F. Supp. 1250, 1259 (D.R.I. 1976) (blanket retail exemption based on small size a reasonable classification scheme).

[5] G.L. c. 136, §§ 5, 6.

Section 5 provides:

> Whoever on Sunday keeps open his shop, warehouse, factory or other place of business, or sells foodstuffs, goods, wares, merchandise or real estate, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not less than twenty dollars nor more than one hundred dollars for a first offense, and a fine of not less than fifty dollars nor more than two hundred dollars for each subsequent offense, and each unlawful act or sale shall constitute a separate offense.

Section 6 lists 49 types of activity exempted from the coverage of § 5.

[6] 1977 Mass. Adv. Sh. 819, 362 N.E.2d 878.

[7] *Id.* at 822, 362 N.E.2d at 880.

[8] *Id.* at 821, 362 N.E.2d at 880.

[9] *Id.*

On December 10, 1976, the matter was presented to a single justice of the Supreme Judicial Court, who refused to grant the injunction but indicated that the Sunday closing law was prima facie unconstitutional. *See* Boston Globe, Dec. 11, 1976, at 1, col. 5. On December 24, 1976, the single justice certified a class represented by Zayre Corp. and consisting of "retailers who wish to open for business on Sundays." The members of the class included, among others, various department stores, discount, hardware and home supply stores. 1977 Mass. Adv. Sh. at 821-22, 362 N.E.2d at 880-81.

[10] *Id.* at 823, 362 N.E.2d at 881.

[11] *See* G.L. c. 136, § 6.

[12] 1977 Mass. Adv. Sh. at 823, 362 N.E.2d at 881.

It is interesting to note that the plaintiffs conceded the state's power to enact Sunday closing legislation. Therefore, the plaintiffs rested their constitutional challenge solely on

By focusing exclusively on the equal protection claims, the plaintiffs allowed the Court to apply a rational relationship test to the challenged statute.[13] Applying this traditional equal protection analysis, the Court concluded that the plaintiff had failed to demonstrate "a lack of any conceivable basis" for the statutory provisions and therefore had not overcome the presumption of constitutional validity.[14]

The Court further indicated that the pattern of statutory exemptions to the Sunday closing laws did not invalidate the statutory scheme.[15] The Court granted that, taken as a totality, the exemptions seemed less than cogent, but observed that "[s]o long as the particular exemptions have a rational basis consistent with the statutory purposes they will pass constitutional muster."[16] The Court thereupon concluded that, while the statute was hardly "a model of clarity and precision,"[17] it was not unconstitutional.

In *Zayre,* the Court devoted a substantial part of its opinion[18] to the task of distinguishing a recent opinion of the Court of Appeals of New York, *People v. Abrahams,*[19] which held a similar New York statute unconstitutional on equal protection grounds.

The statute in Abrahams was in many ways similar to the Massachusetts statute.[20] Its origins were of a religious nature, it had undergone a series of revisions since its inception and each revision had resulted in an expansion of exceptions to the general prohibition of public selling.[21] The plaintiff in *Abrahams,* an employee in a New York pharmacy who was charged with breaking the Sabbath for selling an item not specifically exempted in the statute, challenged the statute as violative of the equal protection clause of the fourteenth amendment to the United States Constitution.[22]

The plaintiff in *Abrahams* argued that the many exceptions to the New York statute had eliminated any rational nexus between the stat-

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equal protection grounds, and raised no due process challenge. *Id.* at 824, 362 N.E.2d at 882.

[13] *Id.* at 829-30, 362 N.E.2d at 884.

[14] *Id.* at 836, 362 N.E.2d at 886; *see* Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 541, 320 N.E.2d 911, 913 (1974).

[15] 1977 Mass. Adv. Sh. at 837, 362 N.E.2d at 887.

[16] *Id.; see, e.g.,* Hall-Omar Baking Co. v. Commissioner of Labor & Indus., 344 Mass. 695, 700, 184 N.E.2d 344, 348 (1962) ("If a rational basis may be discerned for distinguishing between businesses which in many respects are similar, Sunday closing laws which exempt some such businesses are not unconstiutional because of the exemptions").

[17] 1977 Mass. Adv. Sh. at 844, 362 N.E.2d at 890 (footnote omitted).

[18] *Id.* at 833-35, 362 N.E.2d at 895-86.

[19] 40 N.Y.2d 277, 353 N.E.2d 574, 386 N.Y.S.2d 661 (1976).

[20] *See* N.Y. GEN. BUS. LAW § 9 (McKinney 1968 & 1977 Supp.).

[21] 40 N.Y.2d at 280, 353 N.E.2d at 575, 386 N.Y.S.2d at 662 (a "gallimaufry of exceptions").

[22] *Id.*

ute and its purpose of providing a day of rest and relaxation.[23] While recognizing that there may be arbitrary distinctions as part of a rational legislative pattern, the New York Court of Appeals nevertheless held that "where a statute encompasses a haphazard and anachronistic amalgamation of exceptions lacking discernible connection to the law's purpose, it cannot be judicially condoned."[24]

The New York Court of Appeals in *Abrahams* thus applied the same equal protection analysis utilized by the Supreme Judicial Court in *Zayre,* but arrived at the opposite conclusion. The Supreme Judicial Court attempted to explain this anomaly on traditional jurisprudential grounds.[25] However, it seems more likely that the real explanation for the differing results in *Abrahams* and *Zayre* lies more in the practical recognition by the New York court that the Sunday closing law had become a hodgepodge of exceptions and no longer accomplished any religious or business purpose.[26]

Noble though the day of rest may be, neither state's "Blue" law as written could accomplish this result and neither state's legislature had taken the initiative to correct the situation. Societal and business interests have changed since the early days of the Sunday closing laws and legislatures in attempting to respond piecemeal to these changes created in both New York and Massachusetts statutes which are utterly lacking in cohesive scheme and which are thus irrational for constitutional purposes. The New York Court of Appeals in *Abrahams* was willing to take a bold step and to recognize that a gradual erosion of the societal basis for an ancient statutory scheme has rendered that scheme unconstitutional. The Supreme Judicial Court was not willing to take such a step.[27]

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[23] *Id.*

[24] *Id.* at 285, 353 N.E.2d at 578, 386 N.Y.S.2d at 665.

[25] According to the Court,

> [S]ince each State court must examine a challenged statute in light of its own constitutional requirements (as well, perhaps under the Federal constitutional requirements) on the particular record placed before it, we considered *Abrahams* to be illuminating but not controlling. It seems clear to us that the substantial differences in history, experience and statutory structures, as well as the record before a court, make each decision one which is the peculiar responsibility of the State court before which such an issue is raised.

1977 Mass. Adv. Sh. at 835, 312 N.E.2d at 886.

[26] See text at notes 19-24 *supra.*

[27] In November, 1977 the legislature passed Acts of 1977, c. 722, which provides:

> Section 6 of chapter 136 of the General Laws, as most recently amended by chapter 697 of the acts of 1975, is hereby further amended by adding the following clause:—
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> (50) The keeping open of a store or shop and the sale at retail of goods therein, but not including the retail sale of goods subject to chapter one hundred and thirty-eight, and the performance of labor, business, and work connected therewith on those Sundays following the fourth Thursday in November and preceding Christ-

> mas. Work performed under this clause shall be compensated at a rate not less than one and one-half times the employee's regular rate, provided that no employee shall be required to perform such work. Any violation of the provisions of this clause shall be deemed an unfair labor practice under the provisions of chapter one hundred and forty-nine.

Unfortunately, instead of revising the Sunday closing laws to reflect modern concerns, the addition is but another amendment to an already overburdened statutory scheme. *See* G.L. c. 136 § 6(1)-(49).