CHAPTER 12

Constitutional Law

BERNARD ORTWEIN*

§12.1. Medical Malpractice Statute. In *Paro v. Longwood Hospital*,[1] the Supreme Judicial Court upheld, against a barrage of challenges, the constitutionality of a 1975 statute mandating the submission of all actions for "malpractice, error, or mistake against a provider of health care" to a pre-trial screening panel.[2] The panel is composed of a superior court judge, an attorney, and a representative of the health care industry.[3] Its main function is to evaluate medical claims for malpractice, error, or mistake on the basis of an offer of proof by the com-

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* BERNARD ORTWEIN is an associate professor of law at Suffolk University Law School. The author wishes to acknowledge the able assistance of Ms. Elizabeth Starrs in the preparation of this chapter.

§12.1. [1] 373 Mass. 645, 369 N.E.2d 985 (1977).

[2] G.L. c. 231, § 60B *added by* Acts of 1975, c. 362, § 5 provides in part:

> Every action for malpractice, error or mistake against a provider of health care shall be heard by a tribunal consisting of a single justice of the superior court, a physician licensed to practice medicine in the commonwealth under the provisions of section two of chapter one hundred and twelve and an attorney authorized to practice law in the commonwealth, at which hearing the plaintiff shall present an offer of proof and said tribunal shall determine if the evidence presented if properly substantiated is sufficient to raise a legitimate question of liability appropriate for judicial inquiry or whether the plaintiff's case is merely an unfortunate medical result.
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> Said physician shall be selected by the single justice from a list submitted by the Massachusetts Medical Society representing the field of medicine in which the alleged injury occurred and licensed to practice medicine and surgery in the commonwealth under the provisions of section two of chapter one hundred and twelve. The list submitted to the single justice shall consist only of physicians who practice medicine outside the county where the defendant practices or resides or if the defendant is a medical institution or facility outside the county where said institution or facility is located. The attorney shall be selected by the single justice from a list submitted by the Massachusetts Bar Association. The attorney and physician shall, subject to appropriation, each be compensated in the amount of fifty dollars.
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> Where the action of malpractice is brought against a provider of health care not a physician, the physician's position on the tribunal shall be replaced by a representative of that field of medicine in which the alleged tort or breach of contract occurred, as selected by the superior court justice in a manner he determines fair and equitable.

[3] *See id.*

plainant in order to determine whether a "legitimate question of liability appropriate for judicial inquiry" has been presented.[4] If a decision is made in favor of the plaintiff, then he or she may proceed with the regular civil action appropriate to the claim. If, on the other hand, the decision is in the defendant's favor, the plaintiff must post a bond in order to continue the action.[5] The amount of the bond is set at $2,000 but the judge is granted the discretion to raise it if the judge deems it necessary. If there is cause to believe the plaintiff is indigent, the judge may lower the amount of the bond requirement.[6] The purpose of the bond is to guarantee indemnification to the defendant if the defendant prevails in the trial court. Apparently, the legislature had hoped this provision in particular would serve as a deterrent to frivolous medical malpractice claims.

Similar statutes have been enacted across the country [7] in an apparent effort to discourage frivolous medical malpractice claims, thereby minimizing losses to insurance companies and increasing the likelihood of continued availability of liability coverage at reasonable rates.[8] While courts in other jurisdictions have differed on the constitutionality of the medical-legal screening tribunal procedure,[9] the Supreme Judicial Court in *Paro* systematically and conclusively rejected each constitutional challenge to the Massachusetts statute. The relative ease with which the Court disposed of the constitutional objections is indicative of the prevailing judicial policy of upholding, wherever possible, practical solutions to burdensome societal problems and recognizing the legislature's power to address such problems one step at a time, as long as its purportedly

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[4] *Id.*

[5] *Id.* Paragraph 7 of § 60B provides in relevant part:

> If a finding is made for the defendant the plaintiff may pursue the claim through the usual judicial process only upon filing bond in the amount of two thousand dollars secured by cash or its equivalent with the clerk of the court in which the case is pending, payable to the defendant for costs assessed, including witness and experts fees and attorneys fees if the plaintiff does not prevail in the final judgment. Said single justice may, within his discretion, increase the amount of the bond required to be filed. If said bond is not posted within thirty days of the tribunal's finding the action shall be dismissed. Upon motion filed by the plaintiff, and a determination by the court that the plaintiff is indigent said justice may reduce the amount of the bond but may not eliminate the requirement thereof.

[6] *See id.*

[7] *See* Grossman, *An Analysis of 1975 Legislation Relating to Medical Malpractice* in A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE at 3, 4 (1976).

[8] *See* Note, The Massachusetts Medical Malpractice Statute: A Constitutional Perspective, 11 Suff. L. Rev. 1289 (1977) [hereinafter cited as *Malpractice Statute*].

[9] *Compare* Carter v. Sparkman, 335 So.2d 802 (Fla. 1976) (upholding, but with reservations, the constitutionality of Florida statute) *with* Wright v. Central Dupage Hospital Ass'n, 63 Ill.2d 313, 347 N.E.2d 736 (1976) (declaring similar Illinois statute unconstitutional).

remedial actions are not patently or flagrantly unconstitutional.[10] While the statute under attack in *Paro* may not be unconstitutional on its face, there are some latent issues of at least questionable constitutionality that the Supreme Judicial Court had an opportunity to address directly but chose instead to ignore in favor of a superficial assessment of the problem.

The *Paro* case involved an action originally brought by Robert Paro, in his own right and as next friend for his daughter, Lynn Marie.[11] Lynn Marie was born some ten years before commencement of the action on the premises of the defendant hospital. Employees of the defendant aided in the child's delivery.[12] The plaintiffs claimed that the defendant's negligence in performing a routine application of silver nitrate to the newborn's eyes caused Lynn Marie to suffer "to this day" from a visible scar on her left cheek.[13] They further alleged that insufficient care was taken to correct this mistake.[14]

Following the filing of the complaint and answer, both parties appeared before a malpractice tribunal formed pursuant to the provisions of chapter 231, section 60B.[15] The tribunal found that "the evidence submitted by plaintiffs, even if properly substantiated, [was] not sufficient to raise a legitimate question of liability appropriate for judicial inquiry."[16] As required by the statute, the tribunal set a $2,000 bond as a condition for continuance of the action by the plaintiffs.[17] The Paros moved to have the bond reduced on grounds of financial hardship but the motion was denied.[18] When the thirty-day statutory time period for posting the bond had run out, the action was dismissed.[19] Plaintiffs appealed the dismissal, contending that the tribunal procedure violates equal protection, due process, and separation of powers provisions of the

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10 373 Mass. at 651, 369 N.E.2d at 989. *See also* Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (*per curiam*). In *Murgia* the Supreme Court upheld the constitutionality of G.L. c. 32, § 26(3), which mandated retirement of uniformed state police officers at fifty. Confronted with an equal protection challenge, the Court did not hesitate to apply the "rational relationship" test in assessing the statute. Deferring to the legislature, the Court's concluding remarks are indicative of the prevailing judicial hesitancy to question the legislature's motives in cases of this nature: "We do not decide today that the [Massachusetts statute] is wise, that it best fulfills the relevant social and economic objectives that [Massachusetts] might ideally espouse or that a more just and humane system could not be devised." *Id.* at 317.

11 373 Mass. at 647, 369 N.E.2d at 987.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.* See note 5 *supra.*

16 *Id.* See note 5 *supra.*

17 373 Mass. at 647, 369 N.E.2d at 987.

18 *Id.* See note 12 *supra.*

19 373 Mass. at 647, 369 N.E.2d at 987 see note 5 *supra.*

Massachusetts[20] and United States Constitutions.[21] The Supreme Judicial Court granted their application for direct appellate review.[22]

The Court initially addressed the plaintiffs' equal protection challenges. They claimed that section 60B implicitly contravenes fourteenth amendment guarantees by creating two unlawful classifications: medical malpractice plantiffs versus other tort plaintiffs and plaintiffs versus defendants.[23] In approaching these contentions Justice Quirico, writing for the Court, concluded that because there was no fundamental right or suspect class involved, the applicable test would be the "rational relation" test.[24] In sum, stated Justice Quirico, unless the statute is patently offensive, the reviewing court must uphold its constitutionality and defer to the legislature. The Supreme Judicial Court, finding no such blatant defect in the statute, hypothesized the legislature's rationale and consequently determined that the equal protection challenge had failed.[25]

The mechanical treatment given the equal protection claim in *Paro* provides a classic example of the inadequacies of the traditional standard of review adopted by both the Massachusetts Supreme Judicial Court and the United States Supreme Court.[26] While members of both courts have acknowledged in earlier cases that such a problem exists,[27] neither court appears eager to tackle it head-on. At least one member of the Supreme Judicial Court, however, has alluded to the fact that some steps should be taken to overcome the rigidity of the two-tiered equal protection analysis. In the 1971 case of *Pinnick v. Cleary*,[28] Chief Justice Tauro, in a concurring opinion, indicated the need for judicial examination of the relationship between the objective of a statute and the classification which it creates.[29] Since the fourteenth amendment requires that persons similarly situated must be treated equally, blind

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[20] See Mass. Const. pt. I, art. XXX (separation of powers). The Paros' due process claims involved the contentions that the statute required them to purchase justice, contrary to Mass. Const. pt. I, art. XI, and denied them their right to a jury trial, contrary to Mass. Const. pt. I, art. XV. By cutting off their access to the courts, the Paros claimed, their due process right to be heard was denied. *See* 373 Mass. at 651-52, 369 N.E.2d at 989.

[21] See U.S. Const. amend. art. XIV.

[22] 373 Mass. at 647, 369 N.E.2d at 987. *See* G.L. c. 211A, § 10(A).

[23] *Id.* at 648-49, 369 N.E.2d at 987-88.

[24] *Id.* at 650, 369 N.E.2d at 988-89.

[25] *Id.* at 651, 369 N.E.2d at 989.

[26] *See, e.g.*, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 16-17 (1973); Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 321 N.E.2d 911 (1974).

[27] *See, e.g.*, Massachusetts Board of Retirement v. Murgia, 427 U.S. 307, 318-21 (Marshall, J., dissenting); Pinnick v. Cleary, 360 Mass. 1, 36, 271 N.E.2d 592, 614 (1971) (Tauro, C.J., concurring). *See also Malpractice Statute*, note 8 *supra* at 1300-01, n.62.

[28] 360 Mass. 1, 271 N.E.2d 592 (1971).

[29] *Id.* at 36, 271 N.E.2d at 614 (Tauro, C.J., concurring).

endorsements of legislative enactments (if the subject matter of the statute does not mandate the "strict scrutiny," in-depth analysis) reflect the faulty presumption that the legislature always acts in the best interest of the public.[30] Surely no legislature operates in a vacuum; no legislature is immune to special interest groups and lobbyists.[31] It should, therefore, be the duty of the judiciary to apply the precept that legislative means must substantially further legislative ends.[32]

In the *Pinnick* concurring opinion, Chief Justice Tauro suggested that where an issue is "novel or complex" the Court should intervene and examine the factual basis of the statute in question. Certainly, it has been suggested, and properly so, that the Massachusetts medical malpractice screening panel statute presents such a "novel and complex" issue and thus is an appropriate subject for more intensive review.[33] Nevertheless, the *Paro* Court chose to ignore Chief Justice Tauro's recommendation despite the fact that in no other tort action must a claimant prove the merits of his allegations to an administrative body before being allowed access to the courtroom. The Court seemed equally willing to overlook the distinct procedural and substantive advantages afforded the defendant by the dual requirements of plaintiff's bond and pre-trial proof of a meritorious claim.[34] The Court concluded its equal protection analysis in *Paro* with the recognition that the legislature may be permitted to address a problem one step at a time. It noted further that the existence of other potentially more effective methods of solving the problem forms an insufficient basis from which to strike down a statute.[35]

The second contention which the Court addressed in *Paro* was the plaintiffs' due process challenge. Essentially, this claim was directed toward the statute's bond requirement.[36] The Court viewed the "access to the courts" issue (based on the placing of a financial obstacle to the filing of a civil suit) as avoidable because the statute gives the judge great discretion in setting the amount of the bond. It stated that "[a]s long as the discretion is exercised without unreasonably prohibiting meritorious claims, no constitutional violation will exist."[37] Since no bond is required for claims that the panel has determined as having merit, the Court reasoned that the likelihood of meritorious claimants be-

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30 *See Malpractice Statute,* note 8 *supra* at 1302.
31 *See id.*
32 *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1, 20 (1972).
33 *See Malpractice Statute,* note 8 *supra* at 1303.
34 *See* 373 Mass. at 651, 369 N.E.2d at 989.
35 *Id.*
36 See note 20 *supra.*
37 373 Mass. at 652-53, 369 N.E.2d at 990.

ing required to post a bond is too small to be significant.[38] Without really analyzing this contention, the Court, in upholding the constitutionality of the bond requirement, relied on *Damaskos v. Board of Appeal of Boston*.[39] In *Damaskos* the Supreme Judicial Court upheld the constitutionality of imposing a bond upon one who wishes to appeal a decision made by a zoning board of appeals.[40] The Court reasoned that the judge has discretion in setting the bond amount in order to discourage frivolous appeals but not unreasonably to obstruct those claims with merit.[41]

A second element of the plaintiffs' due process challenge was the claim that the imposition of the bond forced him to purchase justice in contravention of the Massachusetts Declaration of Rights.[42] Since the object of the Declaration is to guarantee "that all litigants similarly situated may appeal to the courts for both relief and for defense under like conditions and with like protection and without discrimination,"[43] the *Paro* Court viewed this claim as analogous on its merits to the equal protection argument previously dismissed. This issue was likewise summarily dismissed.[44]

The Court then proceeded to invalidate plaintiffs' third due process contention that the bond requirement violated the right to a jury trial. Relying on *Orasz v. Colonial Tavern, Inc.*,[45] the Court reiterated the principle that there is no absolute right to a jury trial.[46] Rather, this right may "be regulated as to the mode in which [it] shall be exercised so long as such regulation does not impair the substance of the right."[47] Again, the impact of judicial discretion in setting the bond came into play. The Court held that the obstruction presented by the medical malpractice tribunal procedure does not impair the right of a trial by jury because it is a limited obstruction, subject to judicial discretion in setting a bond requirement so as not to burden unreasonably meritorious suits.[48]

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[38] *Id.* at 653, 369 N.E.2d at 990.

[39] 359 Mass. 55, 267 N.E.2d 897 (1971).

[40] *Id.* at 63-64, 267 N.E.2d at 902-03.

[41] *Id.* at 64, 267 N.E.2d at 903.

[42] *See* Mass. Const. pt. I, art. XI.

[43] 373 Mass. at 654, 369 N.E.2d at 991, *quoting* Old Colony R.R. v. Assessor of Boston, 300 Mass. 439, 450 (1941).

[44] 373 Mass. at 654, 369 N.E.2d at 991. It is interesting to contrast the Court's static due process position relative to the Paros' challenge based on the Massachusetts Constitution with the position taken by the Court in Commonwealth v. Sees, 1978 Mass. Adv. Sh. 536, 373 N.E.2d 1151. In *Sees* the Court was more willing to give independent meaning and rationale to the Massachusetts Constitution. *Sees* is discussed in § 12.4 *infra*.

[45] 365 Mass. 131, 310 N.E.2d 311 (1974).

[46] 373 Mass. at 654, 369 N.E.2d at 991.

[47] *Id.*, *quoting Orasz*, 365 Mass. at 134, 310 N.E.2d at 312.

[48] 373 Mass. at 655, 369 N.E.2d at 991.

The final due process challenge focused on an allegation that the plaintiffs' common law rights had been abrogated without providing a reasonable substitute.[49] Addressing itself to this argument, the Court first emphasized that the medical malpractice tribunal does not eliminate the plaintiff's substantive right of recovery; it merely alters the procedure for enforcing that right.[50] Alternatively, the Court reasoned that even if a substantive right had been abrogated, the tribunal procedure provides a reasonable substitute because any rights lost by plaintiffs are offset by the tribunal's very existence, which keeps the general cost of medical care down. The Court reasoned that the benefit to plaintiffs as consumers outweighs any legal disadvantage to which they may be subjected.[51]

In sum, not one of the due process challenges in *Paro* was considered worthy of in-depth analysis by the Court. Each was systematically and conclusively rejected. The Court appears to have given scant consideration to the potentially prejudicial impact of the bond requirement. Nor was the Court persuaded that the requirement that all claimants *must* present their case before the medical malpractice panel prior to any filing in the trial court places a double burden on the plaintiffs. The Court did not attempt to distinguish its previous holdings establishing that the right to a trial by jury includes guarantees of both fact determination by an impartial body[52] and a full and fair hearing upon all relevant issues.[53] Finally, the Court's treatment of the plaintiffs' claim that their common law rights had been abrogated lacked analytical strength. Conclusory statements without reference to a direct precedent or close analysis of the facts of the instant case reflect insubstantial reasoning and unimpressive law.

The final constitutional question considered by the *Paro* Court was a statutory challenge based on an alleged dual violation of the principle of separation of powers. The plaintiffs here claimed that the malpractice panel falls within the legislative branch of government and that it interferes with the judiciary because its findings are admissible at trial, because it obstructs access to a judicial hearing, and because its two non-judicial members can override decisions of the judge.[54] The Court

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[49] *Id.* The Court identified this challenge not as a procedural due process challenge, but as a substantive due process challenge. *Id.*

[50] *Id.*

[51] *Id.*

[52] *See* Commonwealth v. Bellino, 320 Mass. 635, 639, 71 N.E.2d 411, 415 (1947). *See also Malpractice Statute,* note 8 *supra* at 1304, n.76.

[53] *See* New England Novelty Co. v. Sandberg, 315 Mass. 739, 750, 54 N.E.2d 915, 919 (1954) (a "trial by jury comprehends a full and fair hearing upon all relevant issues . . ." where jury decides all issues of fact). *See also Malpractice Statute,* note 8 *supra* at 1304, n.76.

[54] 373 Mass. at 655-56, 369 N.E.2d at 991-92.

properly refused to address the first of these separation of powers challenges because these plaintiffs did not go to trial and, therefore, were without standing.[55] After discussing the overlap of the three branches of government,[56] the Court determined that the claim that the panel is a legislative body obstructing entrance to the judicial system failed on two grounds. First, because the statute allows judicial discretion in the setting of bond, the Court rejected the idea that the panel is an obstruction of any significance.[57] Second, the Court stated that the tribunal procedure in question is a function of the judicial department and not of the legislature.[58] Here, the Court emphasized the "intimate connection" that the tribunal has with the judiciary.[59] Finally, the Court considered whether the medical malpractice tribunal is unconstitutional because the two lay panel members can override the judge in the decision of purely legal issues, such as questions relating to the admissibility of evidence.[60] In rejecting this claim the Court relied on its interpretation of the statutory language, which led the Court to conclude that it grants the judge the preeminent role in the tribunal proceedings: while the attorney and the health care representative are placed on the panel because of their expertise in relevant fields,[61] the judge chooses these other panel members and sets the bond.[62] The Court viewed the combination of these individuals as essential in the determination of the ultimate issue before the tribunal: whether the plaintiff has a legally sufficient claim.[63] The Court was careful to point out, however, that while *this* decision is a joint one, the responsibility for deciding purely legal issues is left entirely to the judicial member of the panel.[64] Thus, the separation of powers challenge failed because the Court found that the statutory procedure contained no potential for substantial interference with the judicial function.

In the final analysis, it appears that the Supreme Judicial Court of Massachusetts, in the *Paro* decision, has again chosen to accept the judgment of the legislature. The Court appears to view the medical malpractice screening panel as a necessary, albeit imperfect, element in the battle to control the costs of medical care in the Commonwealth. The

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[55] *Id.* at 656, 369 N.E.2d at 992.
[56] *Id.*
[57] *Id.* at 656-57, 369 N.E.2d at 992.
[58] *Id.* at 657, 369 N.E.2d at 992.
[59] The Court stated: "The tribunal's intimate connection with the judicial proceeding makes it clear that the hearing procedure is itself a part of the judicial process." *Id.*
[60] *Id.*
[61] *Id.* at 657, 369 N.E.2d at 992-93.
[62] *Id.* at 657, 369 N.E.2d at 992.
[63] *Id.* at 657, 369 N.E.2d at 992-93.
[64] *Id.* at 657, 369 N.E.2d at 993.

holding in *Paro* may very well reinforce the legislative goal, but the Court's treatment of the issues was unnecessarily vague in some areas. Furthermore, its constant reliance on judicial discretion in setting the bond seems somewhat misplaced for two reasons. First, there is a question as to whether or not indigency is a requisite for lowering the bond amount or merely a guideline to be followed. Second, other than indigency, there are no guidelines for altering the amount of the bond requirement. Should the decision be based on ability to pay or the merit of the claim or both? Since this aspect of the statute is so general and the rights it may affect are so substantial, the *Paro* Court's constant reliance on judicial discretion in setting the bond requirement is misplaced unless buttressed by more specific guidelines to judges concerning the standards to be used in determining indigency.

The medical malpractice screening panel as established by chapter 231, section 60B, may very well prove effective in screening out frivolous claims, thereby minimizing losses to insurance companies and increasing the likelihood of the availability of coverage. Nevertheless, had the *Paro* Court addressed the constitutional challenges to this procedure more thoroughly, its holding might be more acceptable.

§12.2. Freedom of Access to Migrant Farm Labor Camps. In 1971 the General Court amended General Laws chapter 111, section 128H, to require, among other things, reasonable visitation rights for the migrant farm worker who is often compelled to live in housing owned, rented, or leased by the farm operator.[1] In the tension between the farm owner or operator who seeks to control ingress and egress to

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§12.2. [1] G.L. c. 111, § 1284 was amended by Acts of 1971, c. 373 entitled "An Act Further Regulating the Visitation Rights of Migrant Workers Living in Quarters Apart from the Living Quarters of Their Employer." The text of the amendment reads:

> The Department of Public Health shall, as a part of its inspection of a site for a farm labor camp, determine what educational and recreational opportunities may be available for migrant workers, and shall, as far as is practical, encourage the development of such opportunities in cooperation with local and state agencies. The department shall protect the right of the migrant worker to enter and leave the premises of the employer during the period of his employment, and shall include in its certificate of occupancy a notification to the worker that such right exists, notwithstanding any contract provision to the contrary. A worker living in quarters of his employer shall have reasonable rights of visitation in his living quarters outside of regular working hours and the certificate of occupancy issued by the department shall include notification, in English and in Spanish, of said rights. The department shall establish, by promulgation of regulations, such minimum standards relating to the rights of visitation under this section as will ensure the adequate protection of said rights. The superior court shall have jurisdiction in equity upon petition brought by the development in the name of the commonwealth to restrain and enjoin violations of this, or of section one hundred and twenty-eight G, or regulations promulgated thereunder.

camps through exercise of his property rights and the migrant laborers who are generally forced to live on the owner's or operator's land without ready transportation to the outside world,[2] the statute favors the latter.

In *Consolidated Cigar Corp. v. Department of Public Health*,[3] the Supreme Judicial Court was presented during the *Survey* year with an opportunity to address several issues regarding rights of access to labor camps. Consolidated Cigars Corporation ("Consolidated") is a corporation which plants, harvests, and processes shade grown tobacco in the Connecticut River Valley area.[4] The particular controversy centered upon the employment contracts drafted by Consolidated and signed by the teen-aged workers it employed during school vacation periods, contracts which tended to restrict access by visitors to the workers' housing facilities.[5] Consolidated sought declaratory judgments that chapter 111, section 128H and its attendant regulations are unconstitutional on their face and as applied to Consolidated and its facilities.[6] The Department of Public Health ("Department") filed a counterclaim for injunctive relief, and both parties moved for summary judgment.[7] A judge of the Superior Court declared the rights of the respective parties and enjoined Consolidated from any further violations of the regulation in question.[8] The Supreme Judicial Court granted Consolidated's application for direct appellate review and affirmed the lower court's decision.[9]

Consolidated advanced three underlying reasons in support for its claim that the statute and regulations could not be applied to it. First, the young persons employed during school vacations are not "migrant farm workers" within the meaning of the statute and the statute does not apply to its facilities. Second, the statutes and regulations relative to visitor access to worker camps are unconstitutional. Third, even if the regulations are constitutional, they exceed the scope of the enabling statute.[10]

The Court quickly and correctly disposed of the contention that the student workers are not within the class protected by the statute, i.e.,

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[2] *See generally* Sherman & Levy, *Free Access to Migrant Labor Camps*, 57 A.B.A.J. 434 (1971).

[3] 372 Mass. 844, 364 N.E.2d 1202 (1977).

[4] *Id.* at 846, 364 N.E.2d at 1205.

[5] *Id.*

[6] *Id.* at 844-45, 364 N.E.2d at 1204.

[7] *Id.* at 845, 364 N.E.2d at 1204.

[8] *Id.* Consolidated's violation consisted in denying assess to individuals seeking to visit its facilities for teen-aged workers, pursuant to a right reserved in its employment contracts. The Court identified as individuals denied access a paralegal and a chaplain. *Id.* at 846-47, 364 N.E.2d at 1205.

For the text of the regulations adapted by the Department of Public Health, see note 34 *infra*.

[9] 372 Mass. at 858, 364 N.E.2d at 1211.

[10] *Id.* at 847, 364 N.E.2d at 1205.

that they were not "migrant workers."[11] It rejected Consolidated's definition, based on a Congressional report,[12] that a migrant worker "follow[s] the crops"[13] and is thus a person who works primarily in agriculture, taking his family with him to temporary residences.[14] The Court defined for itself migrant workers as "those workers who are employed to perform farm labor and are housed in farm labor camps."[15] The Court inferred that the legislature intended "to insulate farm workers from potential exploitation *while they are housed* in farm labor camps. . . ."[16] It reasoned that this intent would be defeated if protection depended on the individual's activities before or after employment as a farm worker in a camp.[17] The second contention relating to the reach of the statute was that since section 128H applied only where the workers live in "quarters apart from the living quarters of their employer,"[18] it could not be applied to residence halls owned or leased by Consolidated.[19] The Court rejected this contention also, adopting the Department's construction that this phrase means the statute is not to apply to the situation where "the farm operator houses his employees in his own house."[20] Thus the Court held that the operator's ownership of the residence or its agent's presence therein does not cause the exemption in section 128H to apply.[21]

Next the Court turned to Consolidated's three-pronged attack on the statute's constitutionality. Its first constitutional contention was that the

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[11] *See* note 1 *supra.*

[12] *See* H. R. REP. No. 1458, 88th Cong., 2d Sess. (1964) *reprinted in* [1964] U.S. Code Cong. & Admin. News 2900, 2924 [hereinafter cited as House Report].

[13] The quoted language is evidently that of the plaintiff–appellant. *See* 372 Mass. at 849, 364 N.E.2d at 1206.

[14] House Report, note 12 *supra,* defines a "migrant agricultural employee" as a worker "(a) whose primary employment is in agriculture . . . and (b) who establishes with his family . . . a temporary residence."

[15] 372 Mass. at 849, 364 N.E.2d at 1206. In refusing to adopt the federal definition offered by Consolidated, the Court observed another federal definition of the migrant farm worker:

> This argument is eviscerated by the fact that the definition relied on by Consolidated is not even the sole description of the term within the Federal system. Another definition, entitled to no less weight than that cited by Consolidated, is: a "seasonal farmworker who performs or has performed during the preceding twelve months agricultural labor which requires travel such that the worker is unable to return to his/her domicile (accepted place of residence) within the same day." 42 Fed. Reg. 1659 (1977) (to be codified in 29 C.F.R. § 97.203).

Id. n.6.

[16] 372 Mass. at 849, 364 N.E.2d at 1206 (emphasis in the original).

[17] *Id.*

[18] *See* the title to the 1971 legislation, set forth *supra* at note 1.

[19] 372 Mass. at 850, 364 N.E.2d at 1207.

[20] *Id.*

[21] *Id.* The Court also noted that while both sides had argued the "company town" philosophy (*see* Marsh v. Alabama, 326 U.S. 501 (1946)) the analogy was inapplicable. *Id.* at 849-50 n.7, 364 N.E.2d at 1206-07 n.7.

regulations denied it property rights, a due process argument.[22] The Court responded with the truism that enjoyment of private property is not an absolute right but may be "subordinated to reasonable regulations that are essential to place, safety and welfare of the community."[23] Basing its conclusions on a Massachusetts Senate report on migratory labor[24] which significantly influenced the statute under attack,[25] the Court readily accepted the legislative premise that migrant workers need special protections. The statute therefore was found to be rationally related to this need.[26] Furthermore, the Court concluded that creating a right of access to itinerant farm laborers was a reasonable means to attain the legislative goal of regulating reasonably the working and living conditions of migrant workers.[27]

Consolidated directed the second prong of its constitutional attack against the statute's over-inclusiveness, alleging that the statute and its attendant access regulations were so broad as to permit access to those whose presence in the camp would in no way aid in achieving the ultimate legislative goal.[28] Having already adopted a rational-relation standard of review, the Court reiterated that its role was not to evaluate the wisdom of any particular statute or regulation.[29] Thus, it did not feel called upon to compel the Department to find the "least restrictive" regulation possible.[30] Observing that Consolidated had failed to present any concrete facts supporting its allegation of over-inclusiveness, the Court held that the statutes and their attendant regulations are a valid exercise of the state police power and consequently are consistent with established notions of constitutional due process.[31]

The Corporation's final constitutional attack was based on the allegation that a statute exclusively regulating farm labor camps violated its constitutional right to equal protection of the laws, because other types of temporary housing facilities are not regulated in a similar manner.[32] The Court quickly recognized the fundamental weakness in this argu-

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[22] *Id.* at 851, 364 N.E.2d at 1207.

[23] *Id.* Justice Abrams, writing for the Court, conclusively stated that the regulations at issue amounted at most to a "limited incursion" into the owner's property rights. *Id.*

[24] 1967 SENATE DOC. No. 1303 at 14-53 (Massachusetts).

[25] The Court, in relying on legislative history, relied on New Bedford v. New Bedford, Woods Hole, Martha's Vineyard and Nantucket S.S. Auth., 330 Mass. 442, 449, 114 N.E.2d 553, 557 (1953), for the proposition that it may consider such a report in finding legislative intent. 372 Mass. at 852, 364 N.E.2d at 1208.

[26] 372 Mass. at 852, 364 N.E.2d at 1208.

[27] *Id.* at 852-53, 364 N.E.2d at 1208.

[28] *Id.* at 853, 364 N.E.2d at 1208-09.

[29] *Id.*

[30] *Id.*

[31] *Id.* at 854, 364 N.E.2d at 1209.

[32] *Id.*

ment. The Court reasoned that in a situation such as the one in question, where the owner/lessor is also the employer, the employer/employee relationship is sufficiently distinguishable from the typical provision of housing situation to immunize it from a successful equal protection challenge.[33]

The final argument offered by the Corporation in its effort to exempt itself from the statute's effect was that even if the statute were to be upheld, the regulations promulgated by the Department of Public Health[34]

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[33] *Id.*

[34] Department of Public Health, Rights of Visitation for Migrant Workers, 13 Code of Mass. Regs. 825-28 (1971) provides in relevant part:

Definitions

. . . .

C. "Visitor" shall mean any individual or group of individuals seeking to enter a farm labor camp for the purpose of contacting or communicating with one or more workers.

. . . .

2. *Reasonable Rights of Visitation*

Workers living in quarters apart from the living quarters of the operator shall be entitled to receive visitors outside of regular working hours.

A. Visitation hours on working days will begin after working hours or at 6:00 p.m., whichever is the earliest, and end no earlier than four (4) hours after the end of the working day or at 10:30 p.m., whichever is the latest. On non-working days visiting hours will be in effect from at least 10:00 a.m. to 10:30 p.m. . . . .

B. The limitation on hours in subsection A shall *not* apply to the organizations, their agents, employees or representatives listed herein:

(i) Federal, State, local or other governmental agencies, departments or boards;

(ii) Physicians, dentists, and other medical or para-medical personnel;

(iii) Priests, ministers, rabbis;

(iv) Agencies or organizations which are funded in whole or part by governmental funds;

(v) Recognized charitable and social agencies;

(vi) Members of the press [emphasis added].

C. A worker may terminate a visitation with regard to himself only. Such termination must be orally communicated to the visitor by the worker himself, and no operator may deny a visitor access to a worker prior to such communication. *Such termination shall not apply to the Department* [emphasis added].

4. *Visitor Rights*

A. In order for an individual or group of individuals to be regarded as a visitor, it is *not* required:

(i) That the worker or workers initiate the request for the visit;

(ii) That the visitor secure approval of the farm labor camp operator.

B. An operator may ask a visitor for reasonable identification *but shall not deny access on this basis* [emphasis added].

. . . .

7. *Salesmen*

An operator may deny salesmen access to a farm labor camp, provided that:

A. He gains no commercial advantage, directly or indirectly, thereby; or

B. The salesman in question is not the only source of the product or service offered reasonably available to the workers.

exceeded the scope of the delegated authority.[35] The Court again applied the rational relation test to the regulations. It conclusively disagreed with plaintiff's position, finding that the regulations were within the broad authority vested in the Department.[36]

The *Consolidated* Court reviewed in some depth the status of migrant workers in Massachusetts. The Court's conclusion that statutorily guaranteed access rights are reasonable means to attain the legislative goal of improving the conditions of migrant workers, while not surprising, carries great impact. Under its rational relation standard of review, the Court was correct in disregarding the various United States Supreme Court "company town" decisions[37] and assessing the statute along traditional constitutional lines, despite the fact that there are similarities between the labor-management relationship in a "company town" and that same relationship in a migrant labor camp. Rather than using a narrow, technical, legalistic approach to solve a broad sociological problem, the Court deliberately assessed the totality of the situation in arriving at its decision. While the Court did not specifically address these issues, its decision in *Consolidated* was an implicit affirmation of the migrant worker's right to freedom of speech, assembly, and association. Thus, it would appear that when confronted with a challenge to legislative attempts to deal with an overwhelming societal problem, the Court will continue to defer to the wisdom of the legislature absent what it perceives as a blatant transgression of civil liberties or fundamental rights.

§12.3. Statewide Residency Requirements for Police Officers. The Supreme Judicial Court was called upon during the *Survey* year to determine the constitutionality of General Laws chapter 41, section 99A,[1] in two cases decided the same day. In the first case, *Doris v.*

[35] 372 Mass. at 854-55, 364 N.E.2d at 1209. Consolidated's major premise was that the regulations promulgated pursuant to § 128H deviated from the statute's mandates. In other words, the statute spoke to the rights of the farm workers to receive visitors whereas, the Corporation argued, the regulations spoke in terms of the visitors' rights to gain access to the labor camps. The distinction, while potentially valid, was considered insufficient to overcome the presumption that a regulation promulgated under a statute determined valid is also valid so long as it is "reasonably related to the purpose of the enabling legislation," Mourning v. Family Publications Serv. Inc., 411 U.S. 356, 369 (1973), *quoting* from Thorpe v. Housing Auth. of Durham, 393 U.S. 268, 280-81 (1969). Thus construed, the regulations were found to be valid by the Supreme Judicial Court. 372 Mass. at 855-57, 364 N.E.2d at 1209-10.

[36] 372 Mass. at 855-57, 364 N.E.2d at 1209-10.

[37] *See id.* at 849-50 n.7, 364 N.E.2d at 1206-07 n.7.

§12.3. [1] G.L. c. 41, § 99A provides in full:
"The members of the regular police department of a city or town may reside outside said city or town; provided, they reside within the commonwealth and within ten miles of the limits of said city or town."

Police Commissioner of Boston,[2] the plaintiff represented a class of approximately two hundred Boston police officers who resided outside the City of Boston but within the Commonwealth. Their places of residence were all located more than ten miles from the City limits.[3] Some of the officers lived in municipalities that were within ten miles of the Boston city limits, however.[4]

Doris sought injunctive and declaratory relief based upon the alleged unconstitutionality of section 99A and a further declaration that the term "reside" as used in that section is unconstitutionally vague.[5] The Superior Court reserved the case and reported it to the Appeals Court without decision.[6] The Supreme Judicial Court then transferred the case on its own motion.[7]

The major constitutional attack rested on the grounds that section 99A violated the Home Rule Amendment[8] and the *ex post facto* prohibitions of the United States and Massachusetts Constitutions.[9] Section 8 of the Home Rule Amendment provides in part:

> The general court shall have the power to act in relation to cities and towns, but only by general laws which apply alike to all cities, or to all towns, or to all cities and towns, or to a class of not fewer than two, and by special laws . . . .

The plaintiff argued that residency requirements for municipal job holders are of local concern and are best left to the municipalities and that the Commonwealth possessed only a remote interest in matters of this nature.[10] The Court dismissed this home rule challenge rather summarily, indicating that section 99A is not focused merely on the local matters of a particular city or town but rather applies equally to all cities and towns.[11] Further, the Court stressed that the General Court has extremely broad powers, regardless of the Home Rule Amendment, which are limited only to the extent that it may not single out a

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2 1978 Mass. Adv. Sh. 416, 373 N.E.2d 944.
3 *Id.* at 417-18, 373 N.E.2d at 946.
4 *Id.* at 418, 373 N.E.2d at 946.
5 *Id.* at 416-17 n.1 and 421, 373 N.E.2d at 946 n.1 and 948.
6 *Id.* at 416, 373 N.E.2d at 946.
7 *Id.*
8 *See* Mass. Const. amend. art. LXXXIX, § 8.
9 *See* U.S. Const. art. I, § 10 ("No State shall . . . pass any . . . ex post facto Law . . . ."); Mass. Const. part I, art. XXIV ("Laws made to punish for actions done before the existence of such laws, and which have not been declared crimes by preceding laws, are unjust, oppressive, and inconsistent with the fundamental principles of a free government."). By Acts of 1971, c. 956, § 2, § 99A was made applicable to police officers receiving their appointment "prior to and subsequent to the effective date" of the statute.
10 1978 Mass. Adv. Sh. at 419, 373 N.E.2d at 947.
11 *Id.*

city or town for special treatment but must legislate uniformly.[12] In the Court's opinion, the clear intent of the legislature was to withdraw discretion from municipalities on the question of residency of police officers and impose the restriction as a matter of statewide policy, a decision entirely within the legislature's discretion.[13]

The plaintiff also argued that the word "reside" appearing in the statute is ambiguous, thus making the statute unconstitutionally vague.[14] The plaintiff's contention was that the word "reside" could mean either the actual physical location of a house within a municipality or the municipality itself within which the house is located.[15] Under the second construction a police officer would be statutorily permitted to reside anywhere in a municipality whose border is within ten miles of the border of the city or town of employment even though the employee's *house* might lie a greater distance from the city or town of employment.

The Court believed that an attack based upon the constitutional ground of vagueness was an inappropriate challenge to the statute because it is not criminal in nature and does not burden fundamental rights.[16] Nevertheless, the Court recognized its responsibility to correct any ambiguity or vagueness which might exist in the wording of the statute.[17] Relying on both the language and the legislative purpose of the statute,[18] the Court concluded that the statutory terms "reside" and "residence" are to be construed in such a way that the physical location of the employee's dwelling place will be designated as the relevant measuring terminus.[19] The Court then went on to hold that the officer's dwelling place itself must be within ten miles of the nearest border of the city or town of employment.[20]

The Court rejected the *ex post facto* challenge. Like the vagueness doctrine, the *ex post facto* clauses of the state and federal constitutions apply only to criminal statutes.[21] Though the statute might be harsh

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[12] *Id.* at 420, 373 N.E.2d at 947, *quoting* Bloom v. Worcester, 363 Mass. 136, 144 n.4, 293 N.E.2d 268, 273 n.4 (1973), wherein the Court stated that the legislature "may restrict local legislative action or deny municipalities power to act at all."

[13] 1978 Mass. Adv. Sh. at 420, 373 N.E.2d at 947.

[14] *Id.* at 421, 373 N.E.2d at 948.

[15] *Id.*

[16] *Id., citing* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

[17] 1978 Mass. Adv. Sh. at 421, 373 N.E.2d at 948.

[18] *Id.* In the Court's view the "clear objective" of the statutory residency requirement is to ensure the rapid mobilization of police officers in times of emergency. *Id.*

[19] *Id.*

[20] *Id.* at 422, 373 N.E.2d at 948.

[21] *Id.* at 424, 373 N.E.2d at 949. This is obvious even under a cursory reading of the Massachusetts constitutional provision, also set out *supra* note 9. The federal

in requiring some police officers to move their residences in order to keep their employment, as a civil statute "such hardship does not render a statute invalid as an ex post facto law." [22]

The second case raising a challenge to section 99A was *Burke v. Chief of Police of Newton.*[23] *Burke* had all the issues of *Doris,* plus the constructional issue of how to measure the ten mile requirement. The Newton police chief had informed the members of the department that their homes would have to be within ten road miles of Newton's city limits.[24] Burke's contention was that residence within a town that lay within ten miles of Newton's city limits sufficed, thus bringing him in compliance with section 99A.[25] Having already ruled in *Doris* that the statutory distance will be measured from the officer's home to the city limits of the municipality where he worked,[26] the Court in *Burke* only considered how the term "miles" was to be construed.

The Court determined that the ordinary meaning of the phrase "ten miles" is "miles as may be computed by measuring the straight line distance between two points on a map."[27] It rejected the police chief's "road miles" formulation, advanced by the plaintiff, for two reasons. First, the legislature simply used the term "miles." Had it intended that the measure would be by existing roads, the Court assumed it "would have used the term 'road miles.'" [28] Secondly, an "existing road miles" construction was seen as unreasonable by the Court because the fortuity of a road being closed, rerouted, or made one-way could cause an officer with a permissible residence to suddenly become in violation of the statute. Such a change would subject the officer to "unpredictable events over which he has no control."[29]

For these reasons the Court held in *Burke* that the statutory ten miles is to be measured "as the crow flies," so to speak. While the spectre of a change in roads was probably not raised by the record, and thus provides a dubious, speculative ground for the Court's decision, the Court's simple construction is harmonious with the language of the statute. Whatever hardship it might work in borderline cases, this construction does have the virtue of easy application.

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provision, also set out *supra* at note 9, has also been interpreted to apply only to criminal statutes. BLACK'S LAW DICTIONARY 662 (rev. 4th ed. 1968).

22 1978 Mass. Adv. Sh. at 424, 373 N.E.2d at 949.

23 *Id.* at 425, 373 N.E.2d at 949.

24 *Id.* at 426, 373 N.E.2d at 950.

25 *Id.*

26 See text at notes 19 and 20 *supra.*

27 1978 Mass. Adv. Sh. at 428, 373 N.E.2d at 951.

28 *Id.* at 427, 373 N.E.2d at 951.

29 *Id.*

§12.4. Higher Protection under Massachusetts Constitution for Freedom of Speech than under Federal Constitution. Since the appointment of Warren E. Burger as Chief Justice, the United States Supreme Court has substantially curtailed the ability of individuals to vindicate fundamental rights in the federal courts. This has been accomplished both by the Court's purposeful contraction of the substantive content of federal constitutional rights[1] and by the increased number of procedural impediments utilized by the Court to prevent a litigant from gaining access to the federal court system."[2] The attitude displayed by the Burger Court has rekindled the dying ember of the philosophical concept of "states' rights."[3]

By applying their own substantive law, the states can give a more expansive reading to those rights which have been restricted by the Supreme Court. It would appear that as long as the basis for a state court decision is adequate and independent from any federal ground, it will not be subject to review by the United States Supreme Court.[4]

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§12.4. [1] *See, e.g.*, Oregon v. Hass, 420 U.S. 714 (1975) (police need not halt questioning of a suspect after a request for an attorney and statements obtained are admissible to impeach defendant); United States v. Calandra, 414 U.S. 338 (1974) (grand jury witness may not refuse to answer questions on grounds that the questions are based on evidence obtained in violation of fourth amendment).

[2] In addition to affording a greater weight to considerations of comity and federalism, the Court has tightened the requirements of standing and justiciability and has substantially narrowed the situations where federal habeas corpus relief is available. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976) (where state has provided an opportunity for full and fair litigation of a fourth amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial); Warth v. Seldin, 422 U.S. 490 (1975) (imposing a strict requirement of direct causal relationship between the conduct complained of by the plaintiff and the injury alleged); Younger v. Harris, 401 U.S. 37 (1971) (when state has begun prosecution, notions of comity and federalism demand that federal courts not interfere except where there is a great and immediate danger of irreparable loss, or where proscution is in bad faith).

[3] Indeed one of the Court's most ardent activists during the Warren years, the period when the states lost considerable autonomy to the activist Court, ironically has been encouraging development along these lines. In Michigan v. Mosley, 423 U.S. 96 (1975), Justice Brennan opined in dissent:

> In light of today's erosion of *Miranda* standards as a matter of federal constitutional law, it is appropriate to observe that no state is precluded by the decision from adhering to higher standards under state law. Each State has power to impose higher standards police practices under state law than is required by the Federal Constitution.

Id. at 120 (Brennan, J., dissenting). Justice Brennan has renewed his appeal to the state courts on numerous occasions since then. *See* United States v. Miller, 425 U.S. 435, 454 (1976) (Brennan, J., dissenting); Baxter v. Palmigiano, 425 U.S. 308, 338-39 and n.10 (1976) (Brennan, J., dissenting); Paul v. Davis, 424 U.S. 693, 735 and n.18 (1976) (Brennan, J., dissenting).

[4] Herb v. Pitcain, 324 U.S. 117 (1945). Recently, in Oregon v. Hass, 420 U.S. 714 (1975), the Supreme Court acknowledged that "a State is free as a matter of its own law to impose greater restrictions on police activity than those the Court holds to be necessary upon federal constitutional standards. *Id.* at 719.

At least one state has displayed a willingness to take Justice Brennan's cue in this regard[5] and indications are that others will follow.[6] During the *Survey* year the Supreme Judicial Court set Massachusetts on this course, thus indicating a willingness to take the initiative in this regard.

In *Commonwealth v. Sees*,[7] the defendant was the manager of an establishment in Revere which held an entertainment and all alcoholic beverage license. On an evening in July, 1974, a female dancer performed for one or two minutes on the dance floor in the establishment, wearing only a "G-string."[8] The defendant, who was present when the dance occurred, was subsequently charged with the violation of a Revere city ordinance.[9] After conviction in both the district court and the superior court, the defendant was granted direct appellate review by the Supreme Judicial Court.[10]

Having decided in a previous case that the ordinance in question was not on its face inconsistent with either the United States or Massachusetts Constitutions,[11] the Court addressed itself to the validity of the ordinance as applied to the facts of this case. The defendant's contention before the Supreme Judicial Court was that the conduct underlying the charge—dancing—was a form of expression, that the governmental interest in its regulation (the Revere ordinance) suppresses free expression, and that "the incidental restriction of first amendment freedoms involved in this case is greater than is essential to the furtherance of that

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[5] *See* State v. Opperman, 89 S.D. 25, 247 N.W.2d 673 (1976).

[6] Justice Stanley Mosk of the Supreme Court of California has stated that there is "not the slightest impropriety when the highest court of a state invalidates state legislation, state administrative action, or the conviction of a defendant in a state prosecution as being violative of the state constitution." Mosk, *The New States' Rights*, 10 CALIF. L. ENFORCEMENT 81, 82 (1976).

[7] 1978 Mass. Adv. Sh. 536, 373 N.E.2d 1151.

[8] *Id.* at 537-38, 373 N.E.2d at 1153.

[9] *Id.* at 538, 373 N.E.2d at 1154. REVERE, MASS. REV. ORDS. c. 13, art. 3, §§ 13-26 (1972) provided in part:

> The following acts or conduct in or on premises licensed in accordance with Chapter 140, Sec. 181, or Sec. 183A are deemed contrary to the public need and to the common good and therefore no license shall be held for the sale of alcoholic beverages to be served and drunk on the licensed premises where such acts or conduct are permitted.
>
> (a) It is forbidden to employ or permit any person in or on the licensed premises while such person is unclothed or in such attire as to expose to view any portion of the areola of the female breast or any portion of the pubic hair, cleft of the buttocks, or genitals.

[10] 1978 Mass. Adv. Sh. at 538, 373 N.E.2d at 1153.

[11] Revere v. Aucella, 369 Mass. 138, 338 N.E.2d 816 (1975), *appeal dismissed sub nom.* Charger Invs. Inc. v. Corbett, 429 U.S. 877 (1976). In *Aucella* the Court preserved the ordinance's constitutionality against an overbreadth callenge by interpreting it to apply only to "licensed premises" subject both to a license for the sale of alcoholic beverages to be consumed on the premises and to an entertainment license. *Id.* at 146, 338 N.E.2d at 821.

governmental interest."[12] The Court agreed with the defendant's contention, holding "that the application of the ordinance to the circumstances of this case abridges the right of free speech, contrary to art. 16 of the Declaration of Rights of the Massachusetts Constitution."[13] It was the Court's opinion that this holding, while required by the Massachusetts Constitution, was not necessary under an application of the United States Constitution.[14] Recognizing that the United States Supreme Court has included conduct such as "dancing" within the protections afforded by the first amendment, the Court cited two recent decisions which have declared that "[a]s a matter of Federal law 'the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment' outweigh 'any First Amendment interest in nude dancing.'"[15] Therefore, the Court concluded, a state may ban "nude dancing," if it so desires, as part of its liquor program and not be in contravention of the United States Constitution.[16]

Focusing, therefore, on the free speech provision of the Massachusetts Constitution, the Court noted that the provision makes no distinction between free speech in a bar and free speech on a stage. Thus, the Court concluded that the exercise is protected regardless of where it occurs.[17] Even though the ordinance in question is limited to places dispensing alcoholic beverages, the Massachusetts Constitution, unlike the federal constitution, gives no preferred position to the regulation of alcoholic beverages.[18] The Court therefore concluded that the ordinance was invalid as applied to the dancing that had occurred in the instant case.[19] The Court made it clear in its opinion, however, that there may be instances where the ordinance in question would be considered a valid regulation of speech otherwise protected by the Massachusetts Declaration of Rights.[20]

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[12] 1978 Mass. Adv. Sh. at 540, 373 N.E.2d at 1154.

[13] *Id.* at 536-37, 373 N.E.2d at 1153. Mass. Const. pt. I, art. XVI provides: "The Liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this Commonwealth. The right of free speech shall not be abridged."

[14] 1978 Mass. Adv. Sh. at 541, 373 N.E.2d at 1155.

[15] *Id., citing* Doran v. Salem Inn, Inc., 422 U.S. 922, 932-33 (1975).

[16] 1978 Mass. Adv. Sh. at 541, 373 N.E.2d at 1155.

[17] *Id.* at 542, 373 N.E.2d at 1155.

[18] *Id.*

[19] *Id.*

[20] The Court observed:

> We are somewhat troubled by the thought that some such performances may be demeaning to the employees who perform and to others like them. But no argument on these lines seems to have entered into the process of enactment of the ordinance, and no such argument is presented to us. We leave the point to another day.

Id. at 543, 373 N.E.2d at 1156.

The significance of the course the Court has set out on—affording greater individual freedom through the Massachusetts Constitution—is underscored by the two dissenting opinions. Chief Justice Hennessey wrote: "I do not believe that we should apply the First Amendment more broadly [to the area of alcoholic beverage control] than the Supreme Court chose to do; nor should we apply provisions of our State Constitution similarly to limit state control."[21] Justice Quirico wrote: "I would not interpret or apply art. 16 as affording Cindy Martini [the dancer] or the defendant any greater right, or as affording the citizens of Revere any lesser right, than they would have under the First Amendment as construed by the United States Supreme Court in *United States v. O'Brien.*"[22]

§12.5. Vagueness: General Laws Chapter 272, Section 35: "Unnatural and Lascivious Act." One of the basic principles of our system is that a person may do, with impunity, whatever is not forbidden by law. A corollary to this principle is the principle of legality: no person may be punished for conduct unless the law has, with a reasonable degree of certainty, already defined it as criminal.[1] These concepts translate into what has become known as the void-for-vagueness doctrine, a doctrine embodied in the due process clauses of the fifth and fourteenth amendments to the United States Constitution.[2]

The vagueness doctrine is not applied in a literal fashion, since legislation is by no means an exact science and the law is necessarily full of fairly vague statements.[3] When confronted with a statutory challenge

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[21] *Id.* at 545, 373 N.E.2d at 1156 (Hennessey, C.J., dissenting).

[22] *Id.* at 557, 373 N.E.2d at 1160-61 (Quirico, J., dissenting).

§12.5. [1] In Commonwealth v. Sloane, 321 Mass. 713, 75 N.E.2d 517 (1947), the Supreme Judicial Court remarked:

> A statute creating a crime must be sufficiently definite in specifying the conduct that is commended or inhibited so that a man of ordinary intelligence may be able to ascertain whether any act or omission of his, as the case may be, will come within the sweep of the statute. It must fix with a reasonable degree of definiteness what it requires or prohibits. It should furnish a definite standard as a guide to determine what it denounces and condemns. . . . One ought not to be compelled to speculate at his peril as to whether a statute permits or prohibits any action which he proposes to take.

Id. at 715, 75 N.E.2d at 519.

[2] United States v. Harriss, 347 U.S. 612 (1954). *Cf.* Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960). An additional, and no less important, reason why vague statutes are proscribed by the due process clause is that they encourage arbitrary law enforcement. Papachristou v. City of Jacksonville, 405 U.S. 156, 168-69 (1972).

[3] Boyce Motor Lines, Inc. v. United States, 342 U.S. 337 (1952). In this case, Justice Clark stated the approach of the Court as follows:

> [F]ew words possess the precision of mathematical symbols, most statutes must deal with untold and unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibitions. Consequently,

the Court will characteristically engage in a process of balancing competing interests. On the one hand, the individual has a right to know in advance where he stands, so that he may understand just what conduct is forbidden. On the other hand, written language is at best a deficient medium for expressing ideas, and legislatures should not be held to impossible standards of specificity.

Vagueness has become a routine, although generally unsuccessful, challenge to criminal statutes.[4] Courts are inclined to defer to legislative wisdom in this procedural due process area, as they are so inclined in the area of substantive due process. In order to uphold statutes attacked on vagueness grounds, the courts traditionally have relied on the common usage of the statutory language, previous judicial explanations of the statute's meaning, and previous applications of the statute to the same or similar conduct.[5] Under the first approach, the court determines that the language chosen by the legislature is not vague. Under the second and third approaches the court may concede that the language of the statute is impermissibly vague, but the defect is cured by prior judicial constructions that gives the statute meaning.[6]

Statutes regulating sexual conduct often foster vagueness challenges because the legislatures are too embarrassed to spell out what is being proscribed. Moreover, given our rapidly changing sexual mores, conduct once considered "unnatural" by most of society ceases to be so regarded by many members of society. Prior to and during the *Survey* year, just such a statute was under attack in one case that wended its way through the Supreme Judicial Court,[7] a federal district court,[8] and the Court of Appeals for the First Circuit.[9]

In 1973, Richard Balthazar was tried and convicted in the Superior Court for Norfolk County for the crime of committing an "unnatural

no more than a reasonable degree of certainty can be demanded. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

Id. at 340.

[4] But a vagueness challenge was recently mounted against a civil statute in Doris v. Police Commissioner of Boston, 1978 Mass. Adv. Sh. 416, 373 N.E.2d 944. The Court rebuffed the challenge in part because the vagueness doctrine is not applied to civil statutes. See § 12.3 *supra.*

[5] Rose v. Locke, 423 U.S. 48 (1975). In *Rose* the Court rejected a vagueness challenge to a Tennessee statute proscribing "crimes against nature" as applied to cunnilingus. The Court did so relying on prior Tennessee precedents and the recognized common law meaning of the term "crimes against nature." The Court stated that "anyone who cared to do so could certainly determine what particular acts have been considered crimes against nature . . . ." *Id.* at 50.

[6] *See Rose*, note 5 *supra.*

[7] Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974).

[8] Balthazar v. Superior Court, 428 F. Supp. 424 (D. Mass. 1977), *aff'd*, 573 F.2d 698 (1st Cir. 1978).

[9] Balthazar v. Superior Court, 573 F.2d 698 (1st Cir. 1978).

and lascivious act with another person," in contravention of General Laws chapter 272, section 35.[10] At Balthazar's trial, the victim of the alleged crime testified that she mistakenly entered a car being driven by the defendant and was prevented from leaving it at knifepoint.[11] Balthazar then drove her to a secluded area and ordered her to take off her blouse and pants. He then ordered her to commit an act of fellatio on him and "to put . . . [her] tongue on his backside."[12] She complied. Subsequently, the defendant drove her to Boston and let her go. Later, the defendant was apprehended at a time and place where the victim said she had agreed to meet him. Balthazar did not testify at the trial and there were no other witnesses to the alleged crime.[13] He was acquited on an assault charge tried with the unnatural act charge.[14]

Balthazar appealed his conviction to the Massachusetts Supreme Judicial Court, alleging *inter alia,* that chapter 272, section 35, was unconstitutionally vague.[15] The Supreme Judicial Court, relying on a previous decision which had upheld the constitutionality of the statute, affirmed the trial court's decision.[16] The Court recognized that the language of the statute, standing alone, did present some problems. However, the judicial construction afforded the statute in *Jacquith v. Commonwealth*[17] was enough in the Court's opinion to render the statute sufficiently precise to pass muster under the due process clause.[18]

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[10] G.L. c. 272, § 35 provides: "Whoever commits any unnatural and lascivious act with another person shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment in the state prison for not more than five years or in jail or the house of correction for not more than two and one half years."

[11] Commonwealth v. Balthazar, 366 Mass. at 299, 318 N.E.2d at 479.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 299-300, 318 N.E.2d at 479.

[15] *Id.* at 300, 318 N.E.2d at 480. Balthazar first made a motion in superior court to dismiss the indictment on the grounds of vagueness. The superior court denied the motion, suggesting that such an argument was more appropriately addressed to the Appeals Court or the Supreme Judicial Court. 428 F. Supp. at 431.

[16] 366 Mass. at 304, 318 N.E.2d at 482.

[17] 331 Mass. 439, 120 N.E.2d 189 (1954). The *Jacquith* Court defined the words "unatural and lascivious" in the following way:

> They signify irregular indulgence in sexual behavior, illicit sexual relations and infamous conduct, which is lustful, obscene, and in deviation of accepted customs and manners [citations ommited] . . . . It is enough to say that it generally has been held that the common sense of the community, as well as the sense of decency, propriety, and morality which all respectable persons usually entertain, is sufficient to apply the statute to a situation and determine what particular kind of conduct offends.

Id. at 442-43, 120 N.E.2d at 192.

[18] 366 Mass. at 300-01, 318 N.E.2d at 480. The Court significantly narrowed the reach of section 35, however, by holding that it does not apply to private consensual adult sexual conduct. *Id.* at 302, 318 N.E.2d at 481.

Balthazar, after being denied a rehearing by the Supreme Judicial Court, then sought a writ of *habeas corpus* in federal district court.[19] The court directed Balthazar to seek a new trial in superior court in order to exhaust his state court remedies.[20] When this was done, and proved of no avail, he renewed his petition in the federal court.[21] The court, in 1977, held that Balthazar had met the requirements of the exhaustion of remedies doctrine, and proceeded to decide the vagueness claim.[22]

The district court framed the issue as "whether the language of § 35 or the state court constructions of it, indicate that it applies to fellatio or oral-anal contact."[23] The court then stated that it would determine the vagueness of section 35 as of two dates, the time of the petitioner's arrest and conviction (July, 1972 to June, 1973)[24] and the present time.[25]

The Commonwealth argued that the statute was sufficiently narrowed in scope by the 1954 decision of *Jacquith v. Commonwealth*,[26] thus providing fair warning sufficient to meet the due process mandate.[27] The court disagreed, holding that *Jacquith* did not define the phrase "unnatural and lascivious acts" with sufficient specificity.[28] Indeed, the court pointed out that *Jacquith*, by referring to dictionary meanings, actually defined another statute, chapter 272, section 34.[29] It concluded that *Jacquith* "seems to compound rather than resolve the ambiguity."[30] The court thus held:

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[19] Balthazar v. Superior Court, 428 F. Supp. 424, 426 (D. Mass. 1977). The writ was brought under 28 U.S.C. § 2241 (1970).

[20] 428 F. Supp. at 429. The requirement of exhaustion of state court remedies is codified in 28 U.S.C. § 2254 (1976).

[21] 428 F. Supp. at 429.

[22] *Id.* at 427, 429.

[23] *Id.* at 432.

[24] *Id.* The court's reference to construing the vagueness of section 35 as of the time of Balthazar's conviction does not seem correct. A person cannot be given fair warning to enable him to conform his conduct to the law's requirements if the fair warning comes only as he is tried and convicted. The only relevant measuring period is the time that the conduct took place. In fact, the court only looked to this point, noting that Commonwealth v. Deschamps, 1 Mass. App. 1, 294 N.E.2d 426 (1972) applied § 35 to fellatio; but was decided after Balthazar's arrest. 428 F. Supp. at 433 n.10. Since *Deschamps* was decided in December 1972, several months before Balthazar's conviction in June 1973, the court seems to have implicitly disregarded *Deschamps* as relevant to the issue of fair warning to the petitioner.

[25] 428 F. Supp. at 432.

[26] See note 17 *supra*.

[27] 428 F. Supp. at 431.

[28] *Id.* at 433.

[29] *Id.* G.L. c. 272, § 34 provides: "Whoever commits the abominable and detestable crime against nature, either with mankind or with a beast, shall be punished by imprisonment in the state prison for not more than twenty years."

[30] 428 F. Supp. at 433. A major infirmity of the *Jacquith* formulation to the district court was its direction to define the proscribed conduct by community sensi-

> The Massachusetts cases prior to July 1972, the date of petitioner's conduct, did not perform that remedial function. They did not serve to provide "fair warning." On the contrary, those cases are distinguished by their delicate and ambiguous discussions of the conduct involved in § 35 cases. No reported case in the Commonwealth had expressly applied the "unnatural and lascivious" act prohibition to fellatio or oral-anal contact.[31]

While holding that section 35 was unconstitutionally vague at the time of Balthazar's conduct, the court held that section 35 was no longer vague, due to subsequent Massachusetts decisions. These decisions were *Commonwealth v. Deschamps,*[32] holding that fellatio constitutes an unnatural act, *Commonwealth v. LaBella,*[33] holding that cunnilingus constitutes an unnatural act, and petitioner's own appeal to the Supreme Judicial Court, which held that section 35 does not apply to such conduct where it takes place in private between consenting adults.[34] The court concluded that "[t]he clear impact of these decisions was to put the public on notice that § 35 forbids specific types of non-consensual sexual conduct . . . ."[35]

The Commonwealth appealed the district court's decision, and in April 1978 in *Balthazar v. Superior Court,*[36] the First Circuit affirmed the district court as to the unconstitutional vagueness of the statute as applied to Balthazar's conduct.[37] Essentially, the circuit court in its opinion adopted the same reasoning and rationale as the district court. Most significantly, the court of appeals, like the district court, held that while section 35 at the time of Balthazar's conduct had no well-defined and generally accepted meaning, the subsequent decisions of the Massachusetts courts narrowing the definition of conduct proscribed by section 35 had rendered it sufficiently precise to survive any further attacks for unconstitutional vagueness.[38]

The *Balthazar* cases provide an excellent study of the vagueness doctrine in operation, in an area where statutes tend to be vague. They demonstrate good and bad instances of the curative process of judicial

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bilities, which are subject to subtle shifting. The court stated: "[T]he public should not be required at its peril to anticipate a judicial pronouncement that public standards of morality have changed. It is the function of the legislature, not the judiciary, to establish what conduct is to be proscribed." *Id.*

31 *Id.* at 433-34.

32 1 Mass. App. 1, 294 N.E.2d 426 (1972).

33 364 Mass. 550, 306 N.E.2d 813 (1974).

34 Commonwealth v. Balthazar, 366 Mass. 298, 318 N.E.2d 478 (1974).

35 428 F. Supp. at 434.

36 573 F.2d 698 (1st Cir. 1978).

37 *Id.* at 699.

38 *Id.* at 702.

definition. The process has been enhanced by the readily apparent degree of forthrightness the courts now use in defining the statute, which stands in marked contrast to the unsatisfactory definition by innuendo provided by the Supreme Judicial Court two decades ago in *Jacquith.* Though some readers of the reports may find such explicitness somewhat offensive, it does not compare to the offensiveness caused by a vague or vaguely defined sexual statute in an era of rapidly changing sexual mores where one man's passion is another man's moral poison.

§12.6. Scope of Exclusionary Rule in Noncriminal Cases in which Government Is a Party. In *Board of Selectmen of Framingham v. Municipal Court of the City of Boston,*[1] decided during the *Survey* year, the Supreme Judicial Court had the opportunity to address the scope of the rule excluding evidence obtained in an illegal search. Before discussing the case, however, a brief history of the rule will be set forth.

In 1914 the United States Supreme Court first recognized that, in criminal cases, the sanction of exclusion is absolutely necessary in order to give force and effect to the fourth amendment to the United States Constitution.[2] Prior to this time, the common law rule had been that otherwise competent evidence was admissible even though it was secured by means of an illegal search and seizure.[3] The states, however, were free to reject the *Weeks* rule until the landmark case of *Mapp v. Ohio,*[4] decided in 1961. In *Mapp,* Justice Clark, in an exhaustive opinion, wrote that twenty-three states had voluntarily chosen to follow the exclusionary rule without federal compulsion.[5] He also maintained that other possible remedies for unlawful searches and seizures, such as criminal prosecutions and suits for damages, had proved both "worthless and futile."[6] The conclusion of the Court in *Mapp* was that the exclusionary rule is an essential part of the right of privacy, and no person can be convicted by unconstitutional evidence, whether in a state or federal court.[7] The purpose and underlying rationale of the

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§12.6. [1] 373 Mass. 783, 369 N.E.2d 1145 (1977).

[2] Weeks v. United States, 232 U.S. 383 (1914). *Weeks* involved a pretrial motion for the return of papers that were seized unlawfully. A federal trial court denied the motion and a unanimous Supreme Court ruled that such denial was prejudicial error. Justice Day, speaking for the Court, stated that if the documents in question could be held and used in evidence in a criminal trial, then the protection of the fourth amendment might just as well be stricken from the Constitution. *Id.* at 393.

[3] *See* People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926).

[4] 367 U.S. 643 (1961).

[5] *Id.* at 651.

[6] *Id.* at 652.

[7] *Id.* at 660.

rule, as articulated by one commentator, is "to deter unlawful or undesirable or unconstitutional police conduct, and . . . to insure some integrity in the judicial process by not having the judicial process sanction, approve, and be party to constitutional violations or undesirable or unlawful police conduct in allowing evidence to be used notwithstanding the manner in which it was seized."[8]

The Warren Court, which extended the exclusionary rule to the states, made clear that state searches and seizures were to be evaluated according to federal standards as spelled out in the fourth amendment and the interpretive decisions of the Court.[9] In addition, the Court ultimately ruled that the exclusionary rule is not limited to criminal prosecutions but applies to forfeiture proceedings as well, such proceedings being regarded as quasi-criminal in nature.[10]

The retirement of Chief Justice Warren and subsequent appointment of Chief Justice Burger brought a stern and seasoned critic of the rule to the Supreme Court. The Chief Justice announced in an early dissenting opinion that the exclusionary rule "is both conceptually sterile and practically ineffective," and altogether too inflexible, though he stated that he hesitated to abandon it until some "meaningful substitute" is developed.[11] While not abandoning the rule completely, the Burger Court has clearly signalled that it will not be extended.[12] Moreover, the Court has recently shifted away from a judicial integrity rationale for the rule, emphasizing instead the deterrence purpose. The Court stated in *United States v. Janis*[13] that "the 'prime purpose' of the rule, if not the sole one, is to deter future unlawful police misconduct."[14] In *Janis*, evidence seized by state officers acting in good faith under an invalid search warrant was held admissible in a civil action for refund or collection of federal taxes.[15] In allowing the evidence, the Court reasoned that "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the

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[8] Remarks of Mr. Donald E. Santarelli at a conference on the exclusionary rule before the 1972 Judicial Conference of the United States Court of Appeals for the Ninth Judicial Circuit, *reproduced in* 61 F.R.D. 259, 273 (1972).

[9] Kerr v. California, 374 U.S. 23 (1963).

[10] One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

[11] Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting).

[12] United States v. Calandra, 414 U.S. 338 (1974). In *Calandra*, the Court, by a 6-3 vote, decided that the exclusionary rule does not apply to testimony before grand juries. In the majority opinion, Justice Powell suggested that the prime purpose of the exclusionary rule is not to redress an injury to the privacy of the search victim, but rather, "to deter future unlawful police conduct." *Id.* at 347.

[13] 428 U.S. 433 (1976).

[14] *Id.* at 446, *quoting Calandra*, 414 U.S. at 347.

[15] 428 U.S. at 459-60.

offending criminal officer is the removal of that evidence from a civil suit by or against a different sovereign."[16]

In *Board of Selectmen of Framingham,* an off-duty Framingham police officer was shot and wounded at his home.[17] He was found in front of the house next door and was taken by the police to a hospital.[18] At 4:30 A.M. on that same day, the police, without a search warrant, gained access to the wounded officer's home and discovered a spent bullet casing and an automatic pistol which was concealed under clothing in a drawer in a bedroom on the second floor of the house.[19]

Upon his recovery, the wounded officer was charged with insubordination at a hearing before the Framingham Board of Selectmen.[20] At the hearing, substantial reliance was placed on the evidence obtained by the police in the warrantless search of the officer's home without his consent.[21] The Board of Selectment of Framingham discharged the officer, which action was affirmed by the Civil Service Commission.[22] The decision of the Civil Service Commission was set aside by a judge of the Municipal Court of the City of Boston and in a certiorari action, the superior court affirmed the municipal court decision.[23]

On appeal, the Supreme Judicial Court affirmed the decision of the lower court.[24] The Court held that the warrantless search of the wounded officer's home was illegal, that the evidence obtained as a result of the illegal search was thus inadmissible, and that the Civil Service Commission's ("the Commission") decision was not supported by substantial evidence, once the illegally obtained evidence had been excluded.[25]

In reaching its conclusion that the search had been illegal, the Court rejected the Commission's contention that the failure of the police to obtain a warrant was justified because of exigent circumstances.[26] The Court observed that when searches are conducted without a warrant, the burden falls upon the government to show that the particular situation was within "a narrow class of exigent circumstances."[27] The Court

[16] *Id.* at 457-58.
[17] 373 Mass. at 784, 369 N.E.2d at 1146.
[18] *Id.*
[19] *Id.* at 785, 369 N.E.2d at 1146.
[20] *Id.* at 784, 369 N.E.2d at 1146. The board charged that the officer had refused to state facts, of which he had knowledge, to investigating officers and had refused to cooperate in an official investigation at the direction of his superior. *Id.*
[21] *Id.* at 784-85, 369 N.E.2d at 1146.
[22] *Id.* at 784, 369 N.E.2d at 1146.
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.* at 785-86, 369 N.E.2d at 1146-47.
[27] *Id.* at 785, 369 N.E.2d at 1146-47, *citing* Commonwealth v. Forde, 367 Mass. 798, 800-01, 329 N.E.2d 717, 719 (1975).

went on to note that the warrantless search of a dwelling place will be subject to particularly close judicial scrutiny.[28] Subjecting the situation in question to this close scrutiny, the Court concluded that the facts fell far short of establishing the urgent need required to mitigate the lack of a search warrant.[29]

Having found the search itself illegal, the Court then proceeded to address the issue of the admissibility of its fruits in a situation in which the government opposes an individual in a non-criminal proceeding. The Court found ample precedent in other jurisdictions for use of the exclusionary rule in cases involving the discharge of a public employee.[30] The Court concluded that in the situation presented by *Board of Selectmen of Framingham* judicial integrity was at stake, in the sense that, as the Court saw it, "government is seeking to take advantage of its own lawbreaking to punish the victim of that illegality."[31] Thus, the Court found the evidence in question inadmissible.

While the Court's decision in *Board of Selectmen of Framingham* is factually compatible with *Janis*, in that the searching officers there were found to have executed an invalid warrant in good faith, the Supreme Judicial Court has gone a step further than the United States Supreme Court. *Janis* stressed the deterrent role of the exclusionary rule, referring to judicial integrity as "a relevant, albeit subordinate, factor."[32] But the Supreme Judicial Court, after examining the *Janis* decision,[33] has resurrected the preservation of judicial integrity as a primary purpose behind the rule. The Court's position, resting on state law,[34] is consistent with the view of Justice Brennan of the Supreme Court. Justice Brennan has asserted that the exclusionary rule was designed mainly to enable the judiciary to avoid the taint of partnership in official lawlessness and to assure the people that the government would not profit by its own lawless behavior.[35]

§12.7. Constitutionality of Chapter 94C, Section 34. For the first time in almost a decade the Supreme Judicial Court was presented during the *Survey* year with a constitutional challenge to the legislative prohibitions on the use and possession of marijuana. In *Marcoux v.*

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[28] 373 Mass. at 785, 369 N.E.2d at 1147.

[29] *Id.* at 785-86, 369 N.E.2d at 1147.

[30] *Id.* at 787, 369 N.E.2d at 1148, *citing* Powell v. Zuckert, 366 F.2d 634 (D.C. Cir. 1966); Saylor v. United States, 374 F.2d 894, 989-901 (Ct. Cl. 1967); Rinderknecht v. Maricopa County Employees Merit System, 21 Ariz. App. 419, 520 P.2d 332, *vacated due to settlement*, 111 Ariz. 174, 526 P.2d 713 (1974).

[31] 373 Mass. at 787, 369 N.E.2d at 1147.

[32] 428 U.S. at 458 n.35.

[33] 373 Mass. at 786, 369 N.E.2d at 1147.

[34] *See* Mass. Const. pt. I, art. XIV.

[35] United States v. Calandra, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting).

Attorney General,[1] the constitutionality of General Laws chapter 94C, section 34,[2] was considered by the Court. Plaintiff Marcoux and others requested a declaratory judgment on the application of section 34 to the possession of a small amount of marijuana for personal use.[3] The Attorney General responded to the complaint with a motion to dismiss.[4] While recognizing the existence of a controversy suitable for a declaration, a single justice of the Supreme Judicial Court nevertheless upheld the statute's constitutionality,[5] relying essentially on the 1969 decision of *Commonwealth v. Leis*.[6] The Supreme Judicial Court, refusing to overrule *Leis*, affirmed the judgment of the single justice.[7]

At the outset of its opinion in *Marcoux*, the Court stated that the use of marijuana does not involve a liberty of high constitutional rank such that governmental infringement would demand extremely close scrutiny by the Court.[8] Reviewing its analysis in *Leis*, the Court noted that in applying a rational relation test in that case, it had drawn the conclusion that "the Legislature could believe with reason that use

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§12.7. [1] 1978 Mass. Adv. Sh. 1011, 375 N.E.2d 688. The action was a class action brought by thirty-seven individuals.

[2] G.L. c. 94C, § 34, *as amended by* Acts of 1975, c. 369, provides in part:

> No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. . . . [A]ny person who violates this section by possession of marihuana or a controlled substance in Class E of section thirty-one shall be punished by imprisonment in a house of correction for not more than six months or a fine of five hundred dollars or both . . . .

[3] 1978 Mass. Adv. Sh. at 1011, 375 N.E.2d at 688.

[4] *Id.*

[5] *Id.* at 1011-12, 375 N.E.2d at 688.

[6] 355 Mass. 189, 243 N.E.2d at 898 (1969).

[7] 1978 Mass. Adv. Sh. at 1012, 375 N.E.2d at 689.

[8] *Id.* The Court indicated that it had tested the validity of the legislation in question in the *Leis* case by inquiring whether the complete prohibition of the use of marijuana bore a *reasonable relation to* any permissible legislative objective, such as protection of public health or safety.

This standard is typical of the type of analysis utilized by the United States Supreme Court in situations where the Court believes that governmental action interferes with an individual's freedom in an area which has not been characterized as fundamental. *See* Meyer v. Nebraska, 262 U.S. 390 (1923). Contrast this standard with one the Supreme Court often utilizes when governmenal action infringes upon what the Court characterizes as a fundamental right of an individual. "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Roe v. Wade, 410 U.S. 113, 155 (1973).

The Supreme Judicial Court made it clear that merely because it was using a *rational relation* standard of review did not indicate that it had reached a preordained conclusion favorable to the legislation. Interestingly, the Court went on the imply that it would utilize a standard of inquiry which closely approximates that suggested by Justice Marshall in his dissenting opinion in San Antonia Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

of marijuana created dangers both to users and to others justifying public control."[9] The *Marcoux* Court went on to state that if the plaintiffs could establish that "doubts about . . . [marijuana] had been resolved in its favor beyond reasonable scientific dispute,"[10] a different result might be reached using the same standard used in the *Leis* case.[11] As the Court noted, however, the plaintiffs had conceded that the continuing medical and social debate as to the dangers of marijuana use had not eliminated the apprehension of dangers to health and safety that were present when the *Leis* case was decided.[12] The thrust of the plaintiff's argument in *Marcoux* was that notwithstanding these concessions the legislation in question was constitutionally infirm because it invaded a "zone of privacy" and thus was required to be justified by a substantial governmental interest.[13]

While admitting that judicial protection of privacy has grown in recent years, the *Marcoux* Court was careful to note that this expansion has been directly related to "individual choice as to procreation and other core concerns of human existence."[14] Further, the Court accentuated its own perspective on the growth of a "zone of privacy" by citing its recent decision in *Superintendent of Belchertown State School v. Saikewicz*,[15] in which the Court recognized, as part of a protected zone of privacy, the right of an individual to choose whether to accept or decline medical treatment without governmental interference.[16] The *Marcoux* Court stated: "[T]he right to possess or use marijuana cannot be readily assimilated in character or importance to the kinds of rights just mentioned."[17]

The Court then turned its attention to the plaintiffs' argument that *Stanley v. Georgia*, decided after *Leis*, supported a right to privacy protecting personal consumption of marijuana.[18] The plaintiffs likened the possession and use of marijuana in the home to the possession of obscene material in the home, which the Supreme Court held to be beyond the pale of the Georgia obscenity statute.[19] The *Stanley* Court

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[9] 1978 Mass. Adv. Sh. at 1013, 375 N.E.2d at 689.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 1014, 375 N.E.2d at 690. The plaintiffs were attempting to bring the use of marijuana into the fold of an expanding concept of personal autonomy as a fundamental right. Thus their argument was that there is a constitutionally recognized "zone of privacy" in one's home for which legislation attempting to regulate in this area, must be supported by a compelling governmental interest.

[14] *Id.* at 1015, 375 N.E.2d at 690.

[15] 373 Mass. 728, 370 N.E.2d 417 (1977).

[16] *Id.* at 739-40, 370 N.E.2d at 424.

[17] 1978 Mass. Adv. Sh. at 1015, 375 N.E.2d at 690.

[18] 394 U.S. 557 (1969).

[19] *See id.* at 565.

reasoned that: "[i]f the First Amendment means anything, it means that a state has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch." [20] Later Supreme Court opinions seemed to suggest, in *dicta*, that the *Stanley* case was decided "on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" [21]

The Supreme Judicial Court minimized the impact of the *Stanley* rationale as developed by its progeny by suggesting that the first amendment protection afforded in those cases was based on the completely private nature of the activities sought to be forbidden.[22] The use of marijuana presented an entirely different situation in the Court's view.

> [W]e are bound to assume for constitutional purposes that the private use [of marijuana] does have public results, does spill over into the public domain and touch matters of legitimate State interest, while the freedom impaired by the penal statute, taken at its highest evaluation, does not reach the level of that freedom conceived by the [Supreme] Court to be implicated in *Stanley*.[23]

The Court then cited a number of post-*Stanley* decisions from other jurisdictions which, with one exception, rejected a privacy protection for marijuana use.[24] It then reaffirmed the legislature's broad power to act where it supposes marijuana use is harmful to its users. The Court identified the individual interest in using marijuana free from the reach of the police power as "in essence merely recreational." [25] This interest was then placed "on the continuum of constitutional vulnerability . . . where judicial nullification of the proscriptive legislation appears unwarranted." [26] Finally the Court, referring to the vigor of the debate on the subject and recent activity by the General Court that lessened penalties,[27] concluded that it is for the legislature "to decide, perhaps at the plaintiffs' urging, whether the present statute attains to the best solution." [28]

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[20] *Id.*

[21] Paris Adult Theatre I v. Slayton, 413 U.S. 49, 66 (1973). *Cf.* United States v. Orito, 413 U.S. 139, 142 (1973), where the Court stated that the "Constitution extends special safeguards to the privacy of the home, just as it protects other special privacy rights such as those of marriage, procreation, motherhood, childrearing, and education."

[22] 1978 Mass. Adv. Sh. at 1016-17, 375 N.E.2d at 691.

[23] *Id.* at 1017, 375 N.E.2d at 691.

[24] *See id.* at 1018, 375 N.E.2d at 691 for cases cited.

[25] *Id.* at 1020, 375 N.E.2d at 692.

[26] *Id.* at 1018, 375 N.E.2d at 693.

[27] *Id.* at 1021, 375 N.E.2d at 693.

[28] *Id.* at 1021-22, 375 N.E.2d at 693.