CHAPTER 11

Evidence

SURVEY *Staff*†

§ 11.1. Expert Testimony on Eyewitness Identification.* Evidence is generally considered a proper subject for expert testimony if the evidence is beyond the knowledge and experience of the average layman[1] and will assist the jury in determining a fact in issue.[2] In recent years, courts in several jurisdictions have addressed the question of whether expert testimony is admissible when offered to demonstrate the unreliability of eyewitness identification. Both state[3] and federal[4] courts have consistently upheld the trial judges' decisions to exclude this type of testimony. Courts which have held against admissibility of such testimony have generally expressed concern that the testimony will cause unnecessary delay and increased cost,[5] invade the province of the jury,[6] and distract the jury from its factfinding duties with extraneous information having an aura of scientific reliability.[7] Massachusetts courts have followed this approach and excluded expert testimony impeaching eyewitness iden-

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§ 11.1. [1] MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 13 (2d ed. 1972); FED. R. EVID. 704.

[2] FED. R. EVID. 704; *see* United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973).

[3] *See, e.g.*, People v. Plasencia, 140 Cal. App. 3d 853, 858-59, 189 Cal. Rptr. 804, 809, (1983); Dyas v. United States, 376 A.2d 827, 831-32 (D.C.), *cert. denied*, 434 U.S. 973 (1977); State v. Stucke, 419 So. 2d 939, 944-45 (La. 1982); State v. Fernald, 397 A.2d 194, 197 (Me. 1979); *contra* State v. Chapple, 135 Ariz. 281, 290-92, 660 P.2d 1208, 1223-24 (1983).

[4] *See, e.g.*, United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); United States v. Fosher, 590 F.2d 381, 382 (1st Cir. 1979); United States v. Brown, 540 F.2d 1048, 1053-54 (10th Cir. 1976), *cert. denied*, 429 U.S. 100 (1977); United States v. Collins, 395 F. Supp. 629 (M.D. Pa.), *aff'd*, 523 F.2d 1051 (3d Cir. 1975).

[5] United States v. Brown, 540 F.2d 1048, 1053-54 (10th Cir. 1976); United States v. Amaral, 448 F.2d 1148, 1152 (9th Cir. 1973).

[6] Caldwell v. State, 267 Ark. 1053, 1059, 594 S.W.2d 24, 28-29 (1980); People v Johnson, 38 Cal. App. 3d 1, 6-7, 112 Cal. Rptr. 834, 836-37 (1974); Pankey v. Commonwealth, 485 S.W.2d 513, 521-22 (Ky. Ct. App. 1972).

[7] United States v. Amaral, 448 F.2d 1148, 1152 (9th Cir. 1973); Commonwealth v. Kater, 388 Mass. 519, 525, 447 N.E.2d 1190, 1195 (1983); Commonwealth v. Vitello, 376 Mass. 426, 444, 381 N.E.2d 582, 593 (1978).

tification when the judge determined that the subject matter was not beyond the common knowledge and experience of the trier of fact.[8]

During the *Survey* year, the Supreme Judicial Court twice considered the issue of admissibility of expert testimony on eyewitness unreliability. Both *Commonwealth v. Francis*[9] and *Commonwealth v. Sowers*[10] involved the admissibility of expert testimony relating to the reliability of a key witness's identification of a criminal defendant. In *Francis*, the Court upheld the trial judge's exclusion of testimony by a psychologist and a psychiatrist,[11] who were to testify on the effects of post-event information on a witness's identification of the defendant.[12] In *Sowers*, the Court upheld the admission of testimony of an opthalmologist concerning the legally blind witness's ability to identify the defendant.[13]

The defendant in *Francis* was charged with armed robbery of a supermarket and assault and battery with a dangerous weapon in connection with the alleged robbery.[14] Betty Southworth, a principal witness for the prosecution, was a courtesy booth clerk at the supermarket.[15] Southworth testified at a probable cause hearing, before the grand jury, and at trial that the person who robbed the store wore a short-sleeved shirt and had no distinctive features.[16] The defendant, however, had tattoos on his arms both at the time of the robbery and at the 1980 trial.[17] The defendant displayed his arms to the jury as part of his defense.[18] The jury was unable to reach a verdict and a new trial was scheduled.[19]

Southworth had been a sequestered witness at the first trial,[20] but prior to the second trial she overheard a conversation between a police officer and the assistant district attorney and learned that the defendant had tattoos on his arms.[21] Shortly thereafter, Southworth advised an assistant district attorney that she had remembered that the person who robbed the store wore a long-sleeved jacket.[22] In February, 1981, in compliance with

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[8] Supreme Malt Prods. Co. v. Alcoholic Beverages Control Comm'n, 334 Mass. 59, 63-64, 133 N.E.2d 775, 779 (1946); Meehan v. Holyoke St. Ry., 186 Mass. 511, 514, 72 N.E. 61, 62-63 (1904); Perkins v. Augusta Ins. & Banking Co., 76 Mass. (10 Gray) 312, 324 (1858); Commonwealth v. Middleton, 6 Mass. App. Ct. 902 (1978) (rescript).

[9] 390 Mass. 89, 453 N.E.2d 1204 (1983).

[10] 388 Mass. 207, 446 N.E.2d 51 (1983).

[11] 390 Mass. at 102, 453 N.E.2d at 1210-11.

[12] *Id.* at 93-94, 453 N.E.2d at 1206.

[13] 388 Mass. at 218, 446 N.E.2d at 57-58.

[14] 390 Mass. at 89, 453 N.E.2d at 1204.

[15] *Id.* at 90, 453 N.E.2d at 1204.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

a motion for disclosure of exculpatory evidence, the assistant district attorney informed defense counsel of Southworth's change in memory.[23]

A subsequent motion by the defendant for extra fees and costs for expert assistance to assess the eyewitness testimony was denied by the superior court judge,[24] who reasoned that the expert's testimony would be inadmissible because it would be information within the scope of the average juror's knowledge.[25] The denial of the motion was vacated by an appeals court justice, who regarded the defendant's request as directed specifically to explaining post-event information's effect on Southworth's memory, not to explaining generally the reliability of eyewitness testimony.[26]

At the October 1981 trial, Southworth testified that the defendant was the robber, and had taken a gun from underneath a jacket he was wearing.[27] On cross-examination, Southworth admitted that before the grand jury and at the 1980 trial she had testified that the man wore a short-sleeved jersey and no jacket, and pulled a revolver out from under his shirt.[28] She also admitted having overheard that the defendant had tattoos on his arms.[29]

The defendant presented alibi witnesses and exhibited his arms to the jury.[30] The judge then conducted an examination out of the presence of the jury to determine whether to admit the testimony of two expert witnesses proposed by the defense to the effect that a person at a high level of stress usually has a reduced ability to remember what he observes,[31] and that a person can incorporate post-event information in his memory, thereby changing prior memory.[32]

The judge refused to admit the expert testimony.[33] He reasoned that the proposed testimony was not beyond the common knowledge and experi-

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[23] *Id.* at 90-91, 453 N.E.2d at 1205.

[24] *Id.* at 91, 453 N.E.2d at 1205.

[25] *Id.*

[26] *Id.* Conrad Berube, assistant manager of the market, also testified at trial. He identified the defendant as the robber but said he was too nervous during the robbery to remember what the robber was wearing or any distinctive features of the robber. *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.* at 93, 453 N.E.2d at 1206. The proposed witnesses were Elizabeth Loftus, Ph.D., an experimental psychologist specializing in human memory and perception, and Margaret Hagen, an associate professor of psychiatry at Boston University. *Id.* Dr. Loftus testified on voir dire that witnesses are influenced "rather unconsciously" by post-event information, and are not lying when their memory is altered. *Id.* She further testified that there is little relationship between the certainty and the accuracy of the witness's identification. *Id.*

[30] *Id.*

[31] *Id.* at 94, 453 N.E.2d at 1206.

[32] *Id.*

[33] *Id.*

ence of the average juror, and that it would not aid the jury in its duties.[34] Additionally, he stated that the proposed testimony was not based on scientific evidence.[35] Subsequently, verdicts of guilty were returned against the defendants on all counts.[36]

The Supreme Judicial Court granted a request for direct appellate review.[37] The sole issue in the appeal was whether the trial judge erred in excluding the expert testimony.[38] The Court found no error, noting that trial judges have discretion in the admission or exclusion of expert testimony.[39] In reaching this result, the Court first recognized that courts in other states have "almost uniformly" upheld the trial judge's exclusion of testimony on the unreliability of eyewitness testimony.[40] The Court stated that most opinions note that when matter is within the knowledge of the jury, cross-examination and jury instructions can protect the defendant's rights.[41] The Court also recognized that some courts have been concerned about the effect that the aura of reliability of expert testimony may have on the jury.[42]

The Court then noted that Massachusetts has followed the majority view that if the testimony offered by a proposed expert is not within the common knowledge or experience of the jury, such testimony is admissible, subject to the discretion of the trial judge.[43] The Court observed that in recent years, while following the same basic principles, their inquiry has focused on whether, subject to the wide discretion of the trial judge, an expert's testimony would be of assistance to the jury.[44]

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[34] *Id.*

[35] *Id.* at 94-95, 453 N.E.2d at 1207.

[36] *Id.* at 89, 453 N.E.2d at 1204.

[37] *Id.*

[38] *Id.* at 101, 453 N.E.2d at 1210-1211.

[39] *Id.* at 95, 453 N.E.2d at 1207 (citing People v. Plasencia, 140 Cal. App. 3d 853, 189 Cal. Rptr. 804 (1983); Dyas v. United States, 376 A.2d 827 (D.C.), *cert. denied*, 434 U.S. 973 (1977); Jones v. State, 232 Ga. 762, 208 S.E.2d 762 (1974); State v. Hoisington, 104 Idaho 153, 657 P.2d 17 (1983); State v. Warren, 230 Kan. 385, 635 P.2d 1236 (1981)).

[40] *Id.*

[41] *Id.* In addition, the Court cited several federal court cases which dealt with the issue and found that the basic reasoning in those cases was the same as in the state cases, regardless of whether the matters arose before or after the effective date of Rule 702 of the Federal Rules of Evidence. *Id.* (citing United States v. Thevis, 665 F.2d 616, 641 (5th Cir.), *cert. denied*, 456 U.S. 1008 (1982); United States v. Fosher, 590 F.2d 381, 382-84 (1st Cir. 1979); United States v. Watson, 587 F.2d 365, 368-369 (7th Cir. 1978), *cert. denied sub nom.* Davis v. United States, 439 U.S. 1132 (1979)).

[42] *Id.* at 98, 453 N.E.2d at 1209 (citing Commonwealth v. Boyle, 346 Mass. 1, 189 N.E.2d 844 (1963); Commonwealth v. Makarewicz, 333 Mass. 575, 132 N.E.2d 294 (1956); New England Glass Co. v. Lovell, 61 Mass. (7 Cush.) 319, 321-22 (1851)).

[43] *Id.* (citing Commonwealth v. Gaulden, 383 Mass. 543, 420 N.E.2d 905 (1981); Bernier v. Boston Edison Co., 380 Mass. 372, 403 N.E.2d 391 (1980); Commonwealth v. Fournier, 372 Mass. 346, 361 N.E.2d 1294 (1977)).

[44] *Id.* at 99, 453 N.E.2d at 1209.

The Court noted that the line between common knowledge and expert knowledge varies over time and is often difficult to draw, and that the circumstances of each case will determine whether the testimony ought to be admitted.[45] Additionally, the Court recognized that when the question of whether or not testimony will aid the jury is a close one, the likelihood of prejudice resulting from an erroneous admission or exclusion is slight.[46] Consequently, the Court noted, appellate courts have given great deference to the rulings of trial judges concerning the admissibility of expert testimony.[47]

The Court further reasoned that other protections are available to reduce the likelihood of erroneous eyewitness identifications.[48] The Court pointed out that in *Commonwealth v. Rodriguez*[49] it had held that if a defendant fairly raises the issue of misidentification, appropriate instructions should be given to the jury.[50] The Court also noted that traditionally, cross-examination and closing arguments are relied on to develop enough weaknesses in the eyewitness testimony to establish reasonable doubt.[51]

The Court asserted, moreover, that expert testimony concerning eyewitness identification has not been a standard safeguard against misidentification.[52] Such testimony, the Court stated, in addition to increasing costs and introducing collateral issues, raises more fundamental problems of intruding into an area that has traditionally been exclusively a jury function.[53] The jury, the Court stated, must decide what testimony to believe.[54] The judge may, and sometimes must,[55] instruct the jury as to factors which may make eyewitness testimony unreliable.[56] The Court noted, however, that the judge may not tell the jury what weight to give those factors,[57] and it is in that area that expert testimony might aid the jury.[58]

In this case, however, the Court reasoned that the testimony sought to

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[45] *Id.*

[46] *Id.*

[47] *Id.* at 100, 453 N.E.2d at 1210 (citing Simmons v. United States, 390 U.S. 377, 384 (1968) (convictions set aside if photographic identification procedure is impermissibly suggestive); Stovall v. Denno, 388 U.S. 293, 298 (1967) (presence of counsel at a show-up); United States v. Wade, 388 U.S. 218, 232 (1967) (presence of counsel at a line-up)).

[48] *Id.*

[49] 378 Mass. 296, 302, 391 N.E.2d 889, 893 (1979).

[50] *Francis*, 390 Mass. at 100, 453 N.E.2d at 1210.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 100-01, 453 N.E.2d at 1210.

[55] *See* Commonwealth v. Rodriguez, 378 Mass. 296, 302, 391 N.E.2d 889, 893 (1979).

[56] 390 Mass. at 101, 453 N.E.2d at 1210.

[57] *Id.*

[58] *Id.*

be introduced dealt only with general principles which the jury was already able to understand.[59] Specifically, the Court noted that juries are aware of the fact that memories fade over time, that people under a great amount of stress are not as perceptive as alert persons not under stress, and that people tend to unconsciously resolve inconsistencies between their memories and after-acquired facts.[60] The Court concluded that on the basis of these principles, as well as facts presented at trial, the jury could weigh the witness's credibility without the aid of an expert.[61]

In summary, the Court in *Commonwealth v. Francis* found no reason to depart from the general rule allowing the trial judge discretion in excluding expert testimony concerning the accuracy of eyewitness identification.[62] The Court concluded that the testimony would not have assisted the jury, and expressed concern that it in fact may have prolonged the trial and distracted the jury.[63]

Commonwealth v. Sowers,[64] like *Francis*, involved expert testimony which related to the reliability of an identification. In *Sowers*, however, the Court upheld a trial judge's admission of expert testimony by an ophthalmologist concerning a witness's ability to identify the defendant.[65] The victim in *Sowers* was a legally blind woman who was also an albino.[66] She alleged that the defendant attacked her on a Brighton street around midnight on July 15, 1979.[67] According to the victim's testimony, the defendant dragged her into an alley, beat her, held a knife to her throat, and finally forced her into a room in a burned out building beside the alley.[68] There he raped her, went through her pocketbook, and took her watch from her wrist.[69] The room in which this took place was illuminated by a street light shining through the windows.[70] The victim studied her attacker's face during the half-hour she was with him, so as to be able to identify him.[71]

The victim gave the police a description of her assailant while she was still at the scene of the attack.[72] The next morning she selected a picture of

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 102, 453 N.E.2d at 1211.
[63] *Id.* at 101, 453 N.E.2d at 1210.
[64] 388 Mass. 207, 208, 446 N.E.2d 51, 52 (1983).
[65] *Id.*
[66] *Id.* at 208-09, 446 N.E.2d at 52.
[67] *Id.* at 209, 446 N.E.2d at 52.
[68] *Id.* at 209, 446 N.E.2d at 53.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.* The defendant presented alibi witnesses at the trial. They testified that the defendant did not own clothes such as those described by the victim. *Id.*

the defendant out of a book of photographs at the police station.[73] She later identified the defendant at a show-up,[74] and again at trial.[75]

At trial, a qualified expert in opthalmology, with a specialty in the field of albinism,[76] testified that he had seen the victim as a patient on three occasions, and that she was an albino and legally blind.[77] He explained the victim's visual disturbances, but noted that she was used to the effects of these diseases, and actually saw better at night.[78] Most importantly, the expert testified that the victim would be able to identify a person at a certain distance, and could pick a picture out of a book of photographs.[79]

The defendant was convicted on charges of unnatural rape, kidnapping, armed robbery, and assault and battery.[80] The Appeals Court confirmed the convictions.[81] One of the bases of the defendant's appeal was that the trial judge improperly admitted the opinion testimony of the ophthalmologist expert concerning the victim's ability to identify the defendant.[82] The defendant argued that the expert's testimony was beyond the scope of his expertise, based on scientific principles not yet accepted as a proper basis for expert testimony, and unnecessary to the jury's determination whether the victim's identification was unreliable.[83]

The Supreme Judicial Court recognized the possibility that a jury might rely on the apparent trustworthiness of an expert's opinion "to erase otherwise reasonable doubts in their minds."[84] It concluded, however, that there was no such danger in this case.[85] The Court emphasized that the expert used the term "identify" to describe the victim's visual ability to distinguish the features of a person she saw at a certain distance, not to refer to her ability to identify an individual as a person she had seen earlier.[86] Because the doctor's testimony referred only to the victim's visual acuity, the Court stated it was well within his field of expertise and

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[73] *Id.* at 214, 446 N.E.2d at 56.

[74] *Id.* at 214-15, 446 N.E.2d at 56.

[75] *Id.* at 208, 446 N.E.2d at 52.

[76] Commonwealth v. Sowers, 13 Mass. App. Ct. 975 (1982).

[77] 388 Mass. at 208, 446 N.E.2d at 52. The defendant also contended on appeal that the judge's questions to prospective jurors at voir dire did not sufficiently seek potential racial bias. *Id.*

[78] *Id.* at 215, 446 N.E.2d at 56.

[79] *Id.*

[80] *Id.*

[81] *Id.*

[82] *Id.* at 215-16, 446 N.E.2d at 56. The Court compared Commonwealth v. Middleton, 6 Mass. App. Ct. 902 (1978) (rescript), which upheld exclusion of expert testimony concerning stress and cross-racial eyewitness identification. 388 Mass. at 215-16, 446 N.E.2d at 56.

[83] 388 Mass. at 218, 446 N.E.2d at 57.

[84] *Id.* at 218, 446 N.E.2d at 57-58.

[85] *Id.*

[86] *Id.* at 215, 446 N.E.2d at 56.

was concerned with a matter on which the jury was not equally capable of drawing conclusions.[87] The Court also noted that the trial judge gave lengthy and correct instructions to the jury, and advised it that it could accept or reject the expert's testimony, and that an expert was no more or less believable than any other witness.[88] Because the jury most likely understood the doctor's testimony solely as expert medical opinion on the victim's visual capabilities, the Court held that its admission was not improper.[89]

Francis and *Sowers* clarify the generally accepted rule that expert testimony on the reliability of eyewitness identification is inadmissible. While the Court in *Sowers* held that testimony by an ophthalmologist concerning an eyewitness's ability to identify the defendant was admissible,[90] it did not depart from the basic reasoning of earlier cases. The expert testimony in *Sowers* dealt with the eyewitness's ability to see *any* person, and was only necessary because her vision differs from that of the average juror's.[91] In contrast, in *Francis*, the expert testimony concerned the eyewitness's identification and recollection of the defendant's face in particular. The Court used the same inquiry in both cases: is the proposed testimony apt to be of assistance to the jury? The Court came to different conclusions in the two cases, however, because general principles of memory and perception have consistently been held to be within the common knowledge of the jury, and so not of any assistance.[92] Conversely, the seeing ability of one who is legally blind and an albino is a subject which requires expert opinion before a just result can be reached.

In summary, the Supreme Judicial Court in *Francis* reaffirmed the principle that expert testimony impeaching the reliability of eyewitness testimony is properly excludable subject to the discretion of the trial judge.[93] In *Sowers*, however, the Court distinguished such general testimony from medical opinion on a particular witness's ability to see.[94] The Court's decisions are consistent with the prior law in the Commonwealth, and with the policy of leaving to the jury the determination of a witness's credibility.

§ 11.2. Admissibility of Hypnotically Aided Testimony at Criminal Trial.* The question whether the hypnotically aided testimony[1] of a prosecution

[87] *Francis*, 390 Mass. at 95, 453 N.E.2d at 1207.
[88] *Sowers*, 388 Mass. at 218, 446 N.E.2d at 57-58.
[89] *Id.*
[90] *Id.*
[91] *Id.* at 215, 446 N.E.2d at 56.
[92] 390 Mass. at 95, 453 N.E.2d at 1207.
[93] *Id.*
[94] 388 Mass. at 218, 446 N.E.2d at 57.

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§ 11.2. [1] The expression "hypnotically aided testimony" refers to testimony by a

witness is admissible at trial has been an unsettled one since the Supreme Judicial Court first confronted the issue in the 1980 case of *Commonwealth v. A Juvenile*.[2] When *Juvenile* was decided, the majority rule in other jurisdictions was to admit post-hypnotic testimony, viewing the fact of hypnosis as going merely to the credibility of the witness rather than to the admissibility of the evidence.[3] Consistent with that view, the Supreme Judicial Court in *Juvenile* showed an inclination to admit hypnotically aided testimony and leave for the jury any decision as to the weight to be accorded to such evidence.[4] In that case, however, due to the incomplete state of the record developed at trial, the Court raised, but could not reach, the issue of whether the hypnotically aided evidence should be suppressed.[5] The Court's inability to take an authoritative position in *Juvenile* left many questions unanswered, including whether evidence elicited under hypnosis is admissible; whether post-hypnotic statements that were developed as a result of hypnosis are inadmissible or whether the hypnosis underlying a witness's testimony is merely a factor going to credibility; and whether a hypnotized witness is disqualified from testifying as to matters recalled before the hypnosis.[6]

During the *Survey* year, the Supreme Judicial Court in *Commonwealth v. Kater*[7] answered all the questions left open by *Commonwealth v. A Juvenile*. In *Kater* the Court held that the testimony of a prosecution witness as to matters recalled only following hypnosis is per se inadmissible in criminal trials in Massachusetts.[9] The Court also held that testimony by a witness, who has been the subject of hypnotic sessions, as to matters the witness recalled *before* hypnosis, is normally admissible subject to certain guidelines to guarantee the reliability of pre-hypnotic memory.[10] Moreover, the Court held that even if certain testimony as to pre-hypnotic memory from a previously hypnotized witness is admitted into evidence, the opponent is entitled to demonstrate to the jury the possible effects of hypnosis on the credibility of the testimony.[11]

The defendant in *Kater* had been convicted of kidnapping and murder-

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witness as to a fact that became available as a result of or following hypnosis. It refers not only to statements made by the witness during the state of hypnosis, but also to statements made after hypnosis as to facts that the witness could not recall before hypnosis.

[2] 381 Mass. 727, 412 N.E.2d 339 (1980). See Note, *Evidence*, 1980 ANN. SURV. MASS. LAW § 1.3, for a detailed analysis of the case.

[3] Note, *Evidence*, *supra* note 2, at 27 n.3.

[4] 381 Mass. at 730, 412 N.E.2d at 342.

[5] *Id.* at 729, 412 N.E.2d at 341.

[6] *See* Note, *Evidence*, *supra* note 2.

[7] 388 Mass. 519, 447 N.E.2d 1190 (1983).

[9] *Id.* at 520, 447 N.E.2d at 1193-94.

[10] *Id.* at 521, 447 N.E.2d at 1194. *See infra* note 58 and accompanying text.

[11] 388 Mass. at 533-34, 447 N.E.2d at 1198.

ing a high school girl.[12] The girl's body was recovered in a forest two months after her bicycle had been found lying on a street near her home.[13] Shortly before the time when the girl was last seen riding her bicycle on that street, five witnesses saw the defendant's car on or near the same street.[14] Two of the witnesses identified the defendant as the driver of the car.[15] There was other circumstantial evidence of the fact that defendant had been driving his car on the street where the girl's bicycle was found and that the defendant had struck the bicycle.[16] Four witnesses were subjects of hypnotic sessions in the course of the investigation.[17] At least one witness made statements after the hypnotic session as to matters that she could not remember before hypnosis.[18] The police did not make a record of what each witness knew before hypnosis, what the hypnotist knew of the crime, or what occurred just before and during each session.[19] The "hypnotist" was a barely or minimally qualified police officer.[20] It was uncertain what parts, if any, of the witnesses' testimony were developed through, during, or subsequent to the hypnotic sessions and what parts were the product of pre-hypnotic memory.[21] Over the defendant's objection, the trial judge ruled the testimony of the hypnotized witnesses admissible.[22]

The defendant was convicted of murder in the first degree and kidnapping, from which he appealed.[23] The Supreme Judicial Court reversed the

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[12] *Id.* at 520, 447 N.E.2d at 1193.

[13] *Id.* at 522, 447 N.E.2d at 1193.

[14] *Id.* at 522, 447 N.E.2d at 1193-94.

[15] *Id.*

[16] *Id.* at 522, 447 N.E.2d at 1194. In particular, the defendant's car had a nine-inch black mark on its right front fender. The girl's bicycle had a nine-inch rubber plug around the left end of the handlebar. *Id.* at 522-23, 447 N.E.2d at 1194. A handprint was noticed by a witness near where the girl's bicycle was found. *Id.* at 523, 447 N.E.2d at 1194. A print found to be from the defendant's car tire was also found on the street. *Id.* The defendant had his car washed twice on the day the bicycle was found, once before and once after the time when the girl was discovered missing. *Id.*

[17] *Id.* at 523, 447 N.E.2d at 1194. The Court found that at least three of the witnesses had actually been hypnotized. *Id.* at 524, 447 N.E.2d at 1194.

[18] *Id.* at 532, 447 N.E.2d at 1199. The witness testified that before hypnosis she recalled that the driver of the car had a bulky object on the passenger's seat. *Id.* After the hypnotic sessions, the same witness recalled that the driver's arm was stretched out across the passenger's side as if he were holding some object and that the material of the bulky object was "like a blanket-type." *Id.*

[19] *Id.* at 524, 447 N.E.2d at 1194.

[20] *Id.* The police officer who conducted the hypnotic sessions was so poorly qualified that the judge did not permit him to give an opinion whether the witnesses had been hypnotized at all. *Id.*

[21] *Id.* at 524, 447 N.E.2d at 1194-95.

[22] *Id.* at 524, 447 N.E.2d at 1194.

[23] *Id.*

judgment, on the grounds that it was at least partially based on inadmissible hypnotically aided testimony.[24] The *Kater* Court took for granted that in Massachusetts, as in most jurisdictions, testimony given under hypnosis as well as pretrial statements made by a hypnotized subject are always inadmissible at trial.[25] The Court in *Kater* focused on post-hypnotic testimony concerning either matters remembered by the witness before hypnosis or matters that became available only after hypnosis and concluded that, in the circumstances of the *Kater* case, the unqualified admission of testimony from hypnotized witnesses created a substantial likelihood that a miscarriage of justice had occurred.[26] The Court therefore ordered a new trial.[27]

The *Kater* Court adopted the modern test for the admissibility of hypnotically-aided testimony, which is modeled after the standard developed in *Frye v. United States*[28] for the admissibility of the results of a lie-detector test.[29] The *Frye* standard considers whether the contested procedure has gained such standing and recognition among authorities in the field as to justify the courts in admitting expert testimony in support of its reliability in any given case.[30] The Court in *Kater* held that hypnotically aided testimony will be rejected unless and until the reliability of hypnosis as a means of refreshing recollection has gained general acceptance by experts in the field.[31]

Regardless of whether hypnosis may or may not be considered a scientific process, the Court reasoned, the fundamental concern is whether a jury can realistically evaluate the effect of hypnosis on the reliability of

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[24] *Id.* at 520, 447 N.E.2d at 1194.

[25] *Id.* at 524-25, 447 N.E.2d at 1195; *see also* Commonwealth v. A Juvenile, 381 Mass. 727, 412 N.E.2d 339 (1980). *See generally* Note, *Evidence*, *supra* note 2, at 24, 26.

[26] 388 Mass. at 520-21, 447 N.E.2d at 1192.

[27] *Id.* at 521, 534, 447 N.E.2d at 1193, 1200. The Court noted that since the evidence against the defendant was circumstantial only, the testimony of the four witnesses who had been hypnotized was crucial for the prosecution. *Id.* at 534, 447 N.E.2d at 1200. Such testimony was admitted by the trial court judge in its entirety, although some of it was developed through and after hypnosis. *Id.* Moreover, there was no record as to what the witnesses recalled before hypnosis and no safeguards that would tend to assure that the pre-hypnotic memory of witnesses would not be affected by hypnosis. *Id.* Finally, the jury was not made aware that hypnosis would have a negative rather than positive effect on the reliability of a witness's testimony. *Id.* The Court found, however, that even apart from the hypnotically aided testimony, there was sufficient evidence to warrant the defendant's conviction, and therefore required a new trial. *Id.* at 521, 447 N.E.2d at 1193.

[28] 293 F. Supp. 1013 (D.D.C. 1923).

[29] *Id.* at 1014. The Court in *Frye* held that the "systolic blood pressure deception test" had not gained sufficient scientific recognition among physiological and psychological authorities to make its results admissible as evidence. *Id.*

[30] *Id.*

[31] 388 Mass. at 525-27, 447 N.E.2d at 1195.

testimony.[32] The Court relied on the reasoning of a recent Arizona Supreme Court case[33] that the "aura of mysticism" surrounding hypnosis in the layperson's mind is likely to lead the jury to place greater emphasis on hypnotically aided testimony than it deserves.[34] The Court in *Kater* took the position that the likelihood of prejudice inherent in the danger of misuse of hypnotically aided testimony by the jury warrants a per se rule of inadmissibility for such evidence, so long as there is no general scientific acceptance of hypnosis as a reliable means of refreshing recollection.[35] The *Kater* Court refused to adopt the approach taken by other courts[36] which would allow each party in every case to offer expert testimony on the effect of hypnosis in the specific circumstances.[37] According to the Court, the status of hypnosis under the *Frye* "general acceptance" standard is such that a time-consuming and expensive case-by-case approach to the admissibility of hypnotically aided testimony is simply not justified.[38]

The Court in *Kater* briefly mentioned some of the reasons offered by experts, and noted by other courts, to support its conclusion that hypnosis is not a generally accepted method of refreshing recall.[39] The Court first noted the danger of suggestion and confabulation in the development of evidence through hypnosis.[40] Other courts have pointed out, the Court stated, that hypnotized persons, being extremely susceptible, tend to superimpose onto their memories any fantasies or suggestions deliberately or unintentionally communicated by the hypnotist.[41] The Court observed that the hypnotized witness becomes attuned to the hypnotist

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[32] *Id.* at 526, 447 N.E.2d at 1195. The Court in *Kater* relied on several cases from other jurisdictions, which had changed the status of the law concerning hypnotically aided testimony since its 1980 decision in *Commonwealth v. A Juvenile*. *See, e.g.*, State *ex rel.* Collins v. Superior Court for the County of Maricopa, 132 Ariz. 180, 644 P.2d 1266 (1982); People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982); State v. Mack, 292 N.W.2d 764 (Minn. 1980); People v. Hughes, 88 A.D.2d 17, 452 N.Y.S.2d 929 (1982); Commonwealth v. Nazarovitch, 496 Pa. 97, 436 A.2d 170 (1981).

[33] State *ex rel.* Collins v. Superior Court for the County of Maricopa, 132 Ariz. 180, 644 P.2d 1266 (1982).

[34] *Id.* at 186, 644 P.2d at 1272.

[35] 388 Mass. at 526, 447 N.E.2d at 1195-96 (citing State *ex rel.* Collins v. Superior Court for the County of Maricopa, 132 Ariz. 180, 198-99 nn.3 & 4, 644 P.2d 1266, 1284-85 nn.3 & 4 (1982)).

[36] State v. Hurd, 86 N.J. 525, 538, 432 A.2d 86, 93 (1981); State v. Beachum, 97 N.M. 682, 691, 643 P.2d 246, 252 (1981).

[37] 388 Mass. at 526, 447 N.E.2d at 1196.

[38] *Id.*

[39] *Id.* at 527, 447 N.E.2d at 1196.

[40] *Id.* at 528, 447 N.E.2d at 1196.

[41] *See, e.g.*, State *ex rel.* Collins v. Superior Court for the County of Maricopa, 132 Ariz. 180, 183-85, 644 P.2d 1266, 1269-71; People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

and tends to desire to please him.[42] According to the Court, the witness may then tend to respond in accordance with what he or she perceives the desired response to be and to fill the gaps in his or her memory.[43] Another result of hypnosis, the Court said, may be to decrease the subject's critical judgment, so that what the subject "remembered" during hypnosis becomes his or her permanent memory regardless of what in fact he or she previously remembered.[44] No expert, the Court found, can determine whether the evidence developed through hypnosis is the product of actual memory, pseudo-memories, outright falsehood, suggestion, or confabulation.[45] For all these reasons,[46] the Court held that no procedural safeguards can insure the reliability of hypnotically aided testimony so as to render it admissible in a criminal trial.[47]

The Court in *Kater* pointed out a further effect of hypnosis on both hypnotically aided testimony and post-hypnotic testimony concerning matters that the witness remembered before trial. A previously hypnotized witness, the Court stated, shows an increased confidence and conviction as to the veracity of his or her memory of matters discussed during the hypnotic sessions, even though neither the witness himself nor the hypnotist has any way of distinguishing between actual memories and pseudo-memories.[48] According to the Court, this effect of hypnosis on the attitude of a witness may affect the jury's evaluation of the credibility of testimony and may tend to immunize the witness from cross-examination.[49] As a result, the Court held that hypnotically aided testimony concerning matters not remembered before hypnosis is always inadmissible, and a witness's testimony as to his *pre*-hypnotic recollections is not automatically admissible.[50] The Court refused, however, to

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[42] 388 Mass. at 528, 447 N.E.2d at 1196.

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] More exhaustive and detailed analyses of all the reasons mentioned by the *Kater* Court for excluding hypnotically aided testimony are contained in State *ex rel.* Collins v. Superior Court for the County of Maricopa, 132 Ariz. 180, 644 P.2d 1266 (1982), and People v. Shirley, 31 Cal. 3d 18, 641 P.2d 775, 181 Cal. Rptr. 243 (1982).

[47] 388 Mass. at 528, 447 N.E.2d at 1196.

[48] *Id.* at 528, 447 N.E.2d at 1197.

[49] *Id.* Another court wrote that "prehypnosis uncertainty becomes molded, in light of additional recall experienced under hypnosis, into certitude, with the subject unaware of any suggestions that he acted upon or any confabulation in which he engaged. The subject's firm belief in the veracity of his enhanced recollection is honestly held and cannot be undermined through cross-examination." State *ex rel.* Collins v. Superior Court for the County of Maricopa, 132 Ariz. 180, 188, 644 P.2d 1266, 1274 (quoting Commonwealth v. Nazarovitch, 496 Pa. 97, 105, 436 A.2d 170, 174 (1981)).

[50] 388 Mass. at 528, 447 N.E.2d at 1197.

take the extreme position, as have other courts,[51] of disqualifying a previously hypnotized witness from testifying as to matters remembered beforehand.[52]

The Court's ruling in *Kater* on the issue of the admissibility of post-hypnotic testimony concerning pre-hypnotic memory distinguished between (1) pre-hypnotic recollections which were not the subject of inquiry during the hypnotic sessions and (2) pre-hypnotic memory discussed under hypnosis.[53] In the former case, the Court held, the testimony is always admissible, since hypnosis in no way affects its reliability.[54] In the latter case, however, according to the *Kater* Court, the effect of hypnosis on the witness's manner and confidence as to pre-hypnotic recollections must be considered by the judge in deciding initially whether the testimony should be admitted into evidence.[55] For purposes of this ruling, the Court held that the proponent has the burden of establishing what the witness remembered before hypnosis by producing a careful record of it.[56] The opponent, the Court suggested, should challenge the admissibility of the evidence in a motion to suppress or a motion in limine.[57] According to the *Kater* Court, the judge may rely on the presence or absence of the procedural safeguards listed by the Court in *Commonwealth v. A Juvenile*[58] as guidelines to decide whether the hypnotic sessions were

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[51] *See, e.g.*, People v. Shirley, 31 Cal. 3d 18, 51-56, 66-67, 641 P.2d 775, 787-89, 794-95, 181 Cal. Rptr. 243, 285-86, 302 (1982).

[52] 388 Mass. at 528, 528-29 nn.5 & 7, 447 N.E.2d at 1197 & nn. 5 & 7.

[53] *Id.* at 529, 447 N.E.2d at 1197.

[54] *Id.*

[55] *Id.* at 529, 531, 447 N.E.2d at 1197, 1198.

[56] *Id.*

[57] *Id.* at 531, 447 N.E.2d at 1198.

[58] 381 Mass. 727, 732-33 n.8, 412 N.E.2d 339, 343 n.8 (1980). The following procedural safeguards were listed by the Court in *Commonwealth v. A Juvenile*:

> (1) The hypnotic session should be conducted by a licensed psychiatrist or psychologist trained in the use of hypnosis. (2) The qualified professional conducting the hypnotic session should be independent of and not responsible to the prosecutor, investigator or the defense. (3) Any information given to the hypnotist by law enforcement personnel prior to the hypnotic session must be in written form so that subsequently the extent of the information the subject received from the hypnotist may be determined. (4) Before induction of hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them, carefully avoiding adding new elements to the witness's description of the events. (5) All contacts between the hypnotist and the subject should be recorded so that a permanent record is available for comparison and study to establish that the witness has not received information or suggestion which might later be reported as having been first described by the subject during hypnosis. Videotape should be employed if possible, but should not be mandatory. (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and post-hypnotic interview.

Id. The Court in *Kater*, however, noted that these safeguards should not be applied

conducted in such a manner as not to undermine the reliability of testimony on the witness's pre-hypnotic memory.[59] The *Kater* Court held that if the judge admits the testimony, the opposing party must be given an opportunity to demonstrate to the jury the effects of hypnosis on the witness's credibility.[60] In appropriate circumstances, the Court stated, the opponent may be entitled to an instruction that the jury consider the fact of hypnosis and the circumstances under which it was conducted in evaluating the weight of the evidence presented.[61]

The *Kater* Court specified exactly how the rules it announced should be applied to future cases. According to the Court, the absolute bar to the admissibility of hypnotically aided testimony will make its admission reversible error in every case still in the process of being appealed, so long as the issue was properly presented for appellate review and there was prejudice to the defendant.[62] The Court held, however, that the rule permitting the use of testimony from a previously hypnotized witness concerning matters remembered before hypnosis, so long as appropriate safeguards guarantee its reliability, will only be applied to hypnotic sessions taking place after the date of the *Kater* opinion.[63] Finally, the Court indicated in dicta that these rules would seem equally applicable in civil as well as in criminal cases.[64]

The Court recognized that its holding in *Kater* will have the effect of reducing substantially the use of hypnosis to develop evidence against a criminal defendant.[65] The Court, however, left open the possibility that future developments in the scientific knowledge about hypnosis will, pursuant to the *Frye* approach,[66] justify a change in the law of evidence concerning hypnotically aided testimony.[67] Until that happens, the Court noted, not all possible uses of hypnosis as an aid to gather evidence in the

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inflexibly. 388 Mass. at 530 n.8, 447 N.E.2d at 1198 n.8. The hypnotist need not always be a licensed psychiatrist or psychologist, so long as he or she is qualified in the use of hypnosis and independent of the investigation of the crime. *Id.* In special circumstances, third parties, such as the parent of a child, may be present at the hypnotic sessions. *Id.* The preservation of the witness's pre-hypnotic memory does not require that all interrogations of potential witnesses be tape recorded. *Id.*

[59] 388 Mass. at 529-30, 447 N.E.2d at 1197-98.

[60] *Id.* at 531, 447 N.E.2d at 1198.

[61] *Id.*

[62] *Id.* at 530, 447 N.E.2d at 1198. The Court stated that after *Juvenile* it expected counsel to raise a timely objection to the admission of testimony from a previously hypnotized witness. *Id.* The Court therefore indicated that it would not allow counsel to raise the issue for the first time on a motion for a new trial in a post-*Juvenile* case. *Id.*

[63] *Id.* at 530, 447 N.E.2d at 1198.

[64] *Id.* at 530 n.9, 447 N.E.2d at 1198 n.9.

[65] *Id.* at 531, 447 N.E.2d at 1198.

[66] *See supra* notes 28-30 and accompanying text.

[67] 388 Mass. at 531, 447 N.E.2d at 1198.

context of criminal prosecutions are precluded.[68] Although hypnosis may not be used to develop evidence at the judicial stages of a prosecution, the Court noted that it is a valuable tool at the investigative stages.[69] The *Kater* Court stated in dicta that evidence, other than hypnotically aided testimony, discovered as a result of the hypnotism of a witness is not necessarily inadmissible, because corroborating evidence is not susceptible to the same dangers of unreliability as hypnotically aided testimony.[70] The Court even raised the possibility that the hypnotically aided testimony itself may become admissible when the memory restored by hypnosis is corroborated by sufficient tangible evidence.[71] Finally, the Court pointed out that a criminal defendant who has been the subject of hypnosis may have a constitutional right to testify, even though his testimony includes matters not remembered prior to the hypnosis.[72]

The Court in *Kater* provided clear and certain answers to all of the questions left open in *Commonwealth v. A Juvenile*. The Court correctly rejected the view that the use of hypnosis goes only to the credibility of testimony, rather than to its admissibility. The danger inherent in the "credibility" approach is that the jury will place undue weight on hypnotically aided testimony and that the judge's limiting instructions will be ineffective in preventing such misuse of evidence by the jury. The "general acceptance" approach of *Frye v. United States*,[73] adopted by the Court in *Kater*, is the proper standard because it prevents arguably unreliable evidence from being presented to the jury, as long as experts do not generally agree that the process used to develop such evidence offers sufficient guarantees of reliability to eliminate the danger that the jury will be misled. At the present time hypnosis does not offer sufficient guarantees in this regard and, therefore, hypnotically aided testimony must be suppressed. It is quite possible that in the future hypnosis will reach a stage where experts will generally agree that the process is not so suggestive as to preclude reliability. At that time, the *Frye* test will allow the courts to take notice of such developments and to admit hypnotically aided testimony at trial.

The *Kater* Court also took the appropriate course in distinguishing between hypnotically aided testimony and post-hypnotic statements as to matters remembered by the witness before hypnosis. The Court properly refused to hold that, once hypnotized, a witness is forever disqualified from testifying at trial as to any matter discussed during the hypnotic

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[68] *Id.* at 528 n.6, 447 N.E.2d at 1197 n.6.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *See supra* notes 28-30 and accompanying text.

sessions, even though certain events were remembered by the witness prior to the sessions. Such an absolute rule would be easy to apply, but would most likely suppress important and reliable evidence. The Court, therefore, was correct in adopting the "credibility" approach with regard to post-hypnotic testimony concerning pre-hypnotic memory, because here the dangers attendant on hypnotically aided testimony are greatly reduced.

The "credibility" approach, when applied to testimony as to pre-hypnotic memory, offers several advantages. First, it does not exclude a priori important and arguably reliable evidence, while at the same time it allows the defendant to present evidence of the possible unreliability of such testimony. Second, the credibility approach creates an incentive for the prosecution to conduct the hypnotic sessions in such a way as not to undermine the reliability of such testimony by, for example, preserving an accurate record of the witness's pre-hypnotic memory and adopting appropriate procedural safeguards during hypnosis. Third, the usefulness of hypnosis in the investigative process is preserved by allowing police and prosecutors to hypnotize a potential witness, without having to make the difficult choice concerning whether the likelihood of uncovering additional evidence warrants the sacrifice of the witness's testimony at trial. Finally, the use of limiting instructions to the jury, when warranted, reduces the risk that the jury will place undue weight on the testimony of a previously hypnotized witness, when the fact of hypnosis affects the witness's attitude and demeanor.

The significance of *Kater* for the practitioner is threefold. First, defense attorneys in the process of appealing convictions where hypnotically aided testimony was admitted at trial against the defendant will be able to secure an automatic reversal, so long as prejudice is shown and the issue of admissibility was preserved for appellate review.[74] Second, the defense

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[74] This application of *Kater* is illustrated by Commonwealth v. Brouillet, 389 Mass. 605, 451 N.E.2d 128 (1983), a case decided by the Supreme Judicial Court three months after *Kater*. In *Brouillet* the defendant was convicted of aggravated rape and unarmed burglary. *Id.* at 605, 451 N.E.2d at 129. Prior to being hypnotized the victim gave a description of her assailant, but did not identify the defendant as the assailant. *Id.* at 606, 451 N.E.2d at 129. In the course of a hypnotic session, the victim was shown an array of photographs including a picture of the defendant. *Id.* at 606-07, 451 N.E.2d at 129. Although the victim could not make a positive identification while under hypnosis, she was shown the same array of photographs eight days after being hypnotized and at that point identified the defendant as her assailant. *Id.* at 607, 451 N.E.2d at 129. The victim's testimony, including her identification of the defendant, was admitted at trial. *Id.* at 607, 451 N.E.2d at 130. The Court reversed the conviction, finding that the case was controlled entirely by *Kater*. *Id.* Since the victim's identification of the defendant as her assailant became available *after* the hypnotic session, the case was clearly within the *Kater* absolute bar against hypnotically aided testimony, and the testimony of the victim had to be excluded. *Id.* at 608, 451 N.E.2d at 131. The Court in *Brouillet* could not conclude that without referring to the victim's identification the prosecu-

attorney seeking to have the testimony of a previously hypnotized witness excluded can raise the issue in a pre-trial motion to suppress or in a motion in limine. The ruling on the motion will turn on three different elements: whether the testimony concerned matters that became available through or after the hypnotic sessions as opposed to matters that the witness remembered prior to hypnosis; whether the matters of pre-hypnotic memory were the subject of inquiry during the hypnotic session; and, if this second condition existed, whether the hypnotic sessions were conducted with the procedural safeguards suggested by the Court to minimize the adverse effects of hypnosis on the reliability of testimony. Finally, even if the pretrial motion or motion in limine to suppress is denied, defense counsel still has an opportunity at trial to present evidence to the jury to show that hypnosis adversely affected the credibility of the testimony, in terms of the witness's attitude, confidence, and manner of testifying.

§ 11.3. Admissibility of Composite Sketches.* While law enforcement officials have successfully used composite sketches to facilitate witness identification during criminal investigations, courts in Massachusetts[1] as well as other jurisdictions[2] have disagreed on the evidentiary value of composite sketches presented during the course of a trial. The Massachusetts Supreme Judicial Court, when first presented with the issue of the admissibility of these sketches in evidence, disallowed the introduction of a composite, treating it as equivalent to extrajudicial statements made by the witness to the police.[3] As a result of this view, composite sketches were deemed inadmissible as hearsay evidence.[4]

In recent years, however, the Supreme Judicial Court has demonstrated an increasing tendency to permit the use of other forms of extrajudicial identifications as evidence.[5] For example, in several cases the Court has

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tion would be unable to make out a prima facie case and therefore declined to dismiss the indictment. *Id.* at 608-09, 451 N.E.2d at 131. Accordingly, the Court set aside the verdict and remanded the case for a new trial. *Id.* at 609, 451 N.E.2d at 131.

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§ 11.3. [1] *Compare* Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969) (conviction reversal due in part to admission of composite) *with* Commonwealth v. Blaney, 387 Mass. 628, 442 N.E.2d 389 (1982) (conviction affirmed where admission of composite did not prejudice defendant).

[2] *Compare* United States v. Moskowitz, 581 F.2d 14, 20 (2d Cir.), *cert. denied*, 439 U.S. 871 (1978) (composite admissible because not hearsay) *with* Commonwealth v. Rothlisberger, 197 Pa. Super. 451, 178 A.2d 853 (1962) (composite inadmissible hearsay evidence).

[3] Commonwealth v. McKenna, 355 Mass. 313, 327, 244 N.E.2d 560, 567 (1969).

[4] *See* P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 170-71, 246 (5th ed. 1981).

[5] In addition to composite sketches, examples of extrajudicial evidence include identifications by witnesses at lineups and identification by a witness from an array of police photographs.

allowed the admission of extrajudicial statements, made by a witness in the course of a pre-trial identification, for the purpose of corroborating that witness's in-court identification.[6] The Court reasoned that extrajudicial statements, when used to corroborate in-court testimony, are not offered to prove the truth of the matter asserted, but instead to establish the reliability of the testimony. Such statements, therefore, do not constitute hearsay.[7] In other decisions, the Court has relaxed even further the rule prohibiting the admission of extrajudicial identifications by allowing prior identifications not only as corroboration of in-court testimony, but also as substantive evidence of a defendant's guilt, despite the hearsay rule.[8] According to the Court, prior identifications are frequently more reliable than in-court identifications because they are made under less suggestive circumstances and at a time closer to the commission of the offense.[9] As a result of these rulings, it became unclear whether the Court would continue to find composite sketches inadmissible or would further expand the use of extrajudicial identifications by allowing introduction of the sketches into evidence.[10]

During the *Survey* year, in *Commonwealth v. Weichell*,[11] the Supreme Judicial Court reassessed its position regarding the use of composite sketches during a criminal trial. The Court held that a composite sketch, prepared by police with the aid of an Identikit,[12] was admissible as substantive evidence of a defendant's guilt absent proof that it had been prepared under suggestive circumstances.[13] In allowing the prosecutor to use the composite as substantive evidence, the Court relied extensively

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[6] Commonwealth v. Sheeran, 370 Mass. 82, 87, 345 N.E.2d 362, 366 (1976); Commonwealth v. Swenson, 368 Mass. 268, 273, 331 N.E.2d 893, 897 (1975); Commonwealth v. Vanetzian, 350 Mass. 491, 497, 215 N.E.2d 658, 662 (1966).

[7] *See* Commonwealth v. Sheeran, 370 Mass. 82, 87, 345 N.E.2d 362, 366 (1976). For a brief overview of the hearsay rule and the rationale behind the rule, see Robertson, *Evidence*, 1980 ANN. SURV. MASS. LAW § 1.1, at 1.

[8] Commonwealth v. Vitello, 376 Mass. 426, 458, 381 N.E.2d 582, 600 (1978); Commonwealth v. Fitzgerald, 376 Mass. 402, 408, 381 N.E.2d 123, 129 (1978); Commonwealth v. Torres, 367 Mass. 737, 738-39, 327 N.E.2d 871, 873-74 (1975).

[9] Commonwealth v. Torres, 367 Mass. 737, 737, 327 N.E.2d 871, 873 (1975).

[10] The Court was confronted with the issue of the admissibility of composite sketches in Commonwealth v. Blaney, 387 Mass. 628, 442 N.E.2d 389 (1982). The Court avoided making a ruling, however, by deciding the case on other grounds. *See infra* notes 23-25 and accompanying text.

[11] 390 Mass. 62, 453 N.E.2d 1038 (1983).

[12] An Identikit is a device whereby a witness, using transparent overlays, reconstructs the face of a suspect feature by feature. This process allows the witness to constantly change facial features until he is satisfied with the picture of the suspect. *See* Cohen, *Number of Features and Alternatives Per Feature, in Reconstructing Faces With the Identi-kit*, 1 J. POLICE SCIENCE & ADMIN. 349 (1973). All of the composites discussed in this chapter were prepared with the aid of an Identikit.

[13] 390 Mass. at 73, 453 N.E.2d at 1045.

on its liberalized approach to the evidentiary use of other forms of extra-judicial identifications.[14]

In *Weichell*, a witness testified that upon returning from a drive-in movie, during which he consumed four or five beers, he heard four "bangs" and turned to see a man running from a parking lot.[15] The witness claimed that he viewed the man's face for approximately one second as the man passed under a street light.[16] Shortly after making these observations, the witness assisted a police detective in constructing a composite sketch with the aid of an Identikit.[17] The witness, after slightly modifying the composite with a pencil, stated that it represented an accurate depiction of the man he had seen.[18] In addition to aiding in the construction of the composite, the witness selected the defendant's picture from an array of nine photographs and pointed out the defendant to the police while the defendant was on the street.[19]

Based on this evidence, the police arrested the defendant, and he was tried for murder.[20] During his trial the prosecutor successfully introduced into evidence the composite sketch of the suspect.[21] In addition, the prosecutor emphasized during his closing argument the likeness between the composite and the defendant.[22] After the jury convicted the defendant, he appealed to the Supreme Judicial Court on various grounds,[23] including the trial court's decision to admit the composite sketch in evidence.[24]

The Supreme Judicial Court affirmed the conviction.[25] In considering the admissibility of the sketch, the Court first discussed two of its prior decisions involving the use of composites as evidence in criminal trials. The Court noted that in the most recent of these cases, *Commonwealth v.*

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[14] *Id.* at 71, 453 N.E.2d at 1044.

[15] *Id.* at 65-66, 453 N.E.2d at 1041.

[16] *Id.* at 66, 453 N.E.2d at 1041.

[17] *Id.*

[18] *Id.*

[19] *Id.* at 66-67, 453 N.E.2d at 1041.

[20] *Id.* at 63, 453 N.E.2d at 1040.

[21] *See id.* at 68, 453 N.E.2d at 1042.

[22] *Id.* at 69 & n.6, 453 N.E.2d at 1042-43 & n.6.

[23] In addition to the issue of the composite, the defendant claimed that the trial judge had erred in 1) refusing to exclude evidence relating to the defendant's motive; 2) allowing the motion which excluded evidence tending to show that other persons possessed a motive; 3) refusing to exclude the defendant's profile mugshot; 4) allowing an enlarged copy of a photograph of the defendant taken at the time of his arrest; and 5) excluding photographs of the scene of the crime at night and the testimony of the photographer who took them. *Id.* at 73-78, 453 N.E.2d at 1045-48. The Court, however, found no error and affirmed the conviction. *Id.* at 64, 453 N.E.2d at 1040.

[24] *Id.* at 63, 453 N.E.2d at 1040.

[25] *Id.* at 64, 453 N.E.2d at 1040.

Blaney,[26] it had not reached the issue of whether the trial court had improperly admitted the composite because it found that the admission of the composite had not prejudiced the defendant.[27] The Court acknowledged, however, that in *Weichell*, the composite, if wrongly admitted, probably prejudiced the defendant because the prosecutor emphasized the composite's resemblance to the defendant during the closing argument.[28]

In addition to *Blaney*, the Court also referred to an earlier case, *Commonwealth v. McKenna*,[29] in which the Court had disallowed the admission of a composite in evidence, ruling that a composite could not be used to prove the truth of the matter asserted.[30] The Court limited *McKenna*, however, by reasoning that the *McKenna* Court had not considered the use of a composite for the purpose of corroborating the in-court identification of the witness.[31] The *Weichell* Court then cited several cases which had allowed in evidence other methods of extrajudicial identification for the purpose of corroborating in-court identifications.[32] These decisions, according to the Court, were justified on the grounds that the out-of-court identifications had not been offered to prove the truth of the matter asserted, and therefore did not constitute hearsay.[33]

The Court, however, did not rely entirely on a corroborative function analysis. Emphasizing its more recent decisions, the Court pointed to its own liberalization of the admission of extrajudicial identifications, permitting their use as substantive evidence of guilt.[34] The Court noted that the admissibility of such evidence could not be justified in these recent cases under a theory that the evidence performed solely a corroborative function, since no in-court identification was involved.[35] The identifications could not, therefore, in the Court's view, escape being categorized as hearsay evidence.[36] The Court concluded, nevertheless, that it had admit-

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[26] 387 Mass. 628, 442 N.E.2d 389 (1982).

[27] *Weichell*, 390 Mass at 68-69, 453 N.E.2d at 1042. *See Blaney*, 387 Mass at 633, 442 N.E.2d at 393.

[28] 390 Mass. at 69, 453 N.E.2d at 1042-43.

[29] 355 Mass. 313, 244 N.E.2d 560 (1969).

[30] *Id.* at 326-27, 244 N.E.2d at 567.

[31] 390 Mass. at 70, 453 N.E.2d at 1043.

[32] *Id.* For cases holding that extrajudicial identification is not hearsay when introduced for the purpose of corroborating prior out-of-court identification, see *supra* note 5.

[33] 390 Mass. at 70, 453 N.E.2d at 1043.

[34] *Id.* at 71, 453 N.E.2d at 1044. For cases holding that extrajudicial identification can be used as substantive evidence, see *supra* note 7.

[35] 390 Mass. at 71, 453 N.E.2d at 1044. This issue often arose in cases where a witness had positively identified a suspect soon after the incident, but due to a time lapse, could not make a positive identification in court. *See, e.g.*, Commonwealth v. Vitello, 376 Mass. 426, 459, 381 N.E.2d 582, 600 (1978).

[36] 390 Mass. at 71, 453 N.E.2d at 1044.

ted these statements because the pre-trial identification, made in less suggestive surroundings, probably had greater testimonial value than the one made in court.[37] Furthermore, the Court noted, both the Federal Rules of Evidence and the Proposed Massachusetts Rules of Evidence had adopted this position allowing prior identifications provided the declarant testified at trial and was subject to cross-examination.[38]

Having established that a court could properly admit prior identifications at a criminal trial, including statements by a witness describing the suspect, the Court stated that it would be illogical to admit descriptive statements into evidence but exclude a composite sketch.[39] The Court claimed that a composite sketch constituted merely the sum of the identifying statements.[40] Accordingly, the Court found that trial courts could admit a composite in evidence by treating it in the same manner as it treated the statement which led to its creation.[41]

The Court concluded its discussion by imposing two conditions on the admissibility of a composite. First, the Court suggested that it would require more evidence of a composite's reliability absent other evidence of identification.[42] Second, the Court stated that it would not allow the use of a composite for identification purposes where the assembling of the composite was tainted, as by police suggestions during preparation.[43] In *Weichell*, however, the Court held that neither of these potential obstacles existed.[44] In fact, the Court noted that the defendant had not even sug-

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[37] *Id.* For a list of the cases cited, see *supra* note 7.

[38] 390 Mass. at 71-72, 453 N.E.2d at 1044. Rule 801(d)(1)(C) of the Federal and the Proposed Massachusetts Rules of Evidence states: "A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . one of identification of a person made after perceiving him."

[39] 390 Mass. at 72, 453 N.E.2d at 1044.

[40] *Id.*

[41] *Id.* Alternatively, according to the Court, it could have allowed the composite on the grounds that composites do not constitute a statement within the hearsay rule. *Id. See* United States v. Moskowitz, 581 F.2d 14, 20 (2d Cir.), *cert. denied*, 439 U.S. 871 (1978); State v. Packard, 184 Conn. 258, 273-74, 439 A.2d 983, 991-92 (1981).

Courts are not in total agreement as to the admissibility of composites. For cases holding that composites, as hearsay evidence, are inadmissible, see People v. Turner, 91 Ill. App. 2d 436, 235 N.E.2d 317 (1968); Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969); People v. Jennings, 23 A.D.2d 621, 257 N.Y.S.2d 456 (1965); Commonwealth v. Rothlisberger, 197 Pa. Super. 451, 178 A.2d 853 (1962). For a case allowing admission of composite for corroboration only, see State v. Lancaster, 25 Ohio St. 2d 83, 54 Ohio Op. 2d 222, 267 N.E.2d 291 (1971). For a case in agreement with the reasoning of the *Weichell* Court, see State v. Ginardi, 111 N.J. Super. 435, 268 A.2d 534, *aff'd*, 57 N.J. 438, 273 A.2d 353 (1970).

[42] 390 Mass. at 72 n.8, 453 N.E.2d at 1044-45 n.8.

[43] *Id.* at 72-73, 453 N.E.2d at 1045.

[44] *See supra* note 16 and accompanying text.

gested that the drawing of the composite was tainted.[45] Having previously found that the composite did not constitute hearsay evidence,[46] the Court ruled that the composite was admissible as substantive evidence of identification.[47]

Two justices filed dissenting opinions focusing on the issue of the composite's admissibility.[48] Justice O'Connor argued that, for the reason stated in his dissenting opinion in *Commonwealth v. Blaney*,[49] the Court had improperly admitted the composite.[50] In *Blaney*, Justice O'Connor had reviewed the Court's rationale in earlier cases for allowing extrajudicial identifications in evidence to prove a defendant's guilt.[51] According to Justice O'Connor, the Court had viewed such evidence as more reliable than in-court identification and thus allowed its admission as an exception to the hearsay rule.[52] Justice O'Connor argued, however, that composites were not as reliable as other methods of prior identification and that the Court should treat them as falling within the hearsay rule.[53] He thus suggested that the Court should allow composites only for purposes of impeachment and rehabilitation, and not for purposes of proving the defendant's guilt.[54]

Justice Liacos also filed a dissenting opinion.[55] Like Justice O'Connor in *Blaney*, Justice Liacos distinguished the Identikit process from other methods of extrajudicial identification, arguing that given the current knowledge on the subject, composites might be less reliable than the other identification methods.[56] Justice Liacos suggested several reasons to question the reliability of a composite. He discussed the process by which a police official and witness construct a composite and questioned the ability of a witness to assemble an accurate picture of a suspect through this process.[57] He noted the differences between the reconstruction of a

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[45] 390 Mass. at 73, 453 N.E.2d at 1045.

[46] *Id.* at 72, 453 N.E.2d at 1044.

[47] *Id.* at 73, 453 N.E.2d at 1045.

[48] *Id.* at 79, 453 N.E.2d at 1048 (Liacos, J., dissenting); *id.* at 88, 453 N.E.2d at 1053 (O'Connor, J., dissenting). For a list of the other issues on appeal, see *supra* note 20.

[49] 387 Mass. 628, 640-43, 442 N.E.2d 389, 397-99 (1982) (O'Connor, J., dissenting).

[50] *Weichell*, 390 Mass. at 88, 453 N.E.2d at 1053 (O'Connor, J., dissenting).

[51] 387 Mass. 628, 641-42, 442 N.E.2d 389, 397-98 (1982) (O'Connor, J., dissenting).

[52] *Id.* at 642, 442 N.E.2d at 398 (O'Connor, J., dissenting).

[53] *Id.* at 642-43, 442 N.E.2d at 398 (O'Connor, J., dissenting).

[54] *Id.* at 643, 442 N.E.2d at 398 (O'Connor, J., dissenting).

[55] 390 Mass at 79, 453 N.E.2d at 1048 (Liacos, J., dissenting).

[56] *Id.* at 81, 453 N.E.2d at 1049 (Liacos, J., dissenting).

[57] Justice Liacos stated:

> To produce a composite, the witness's mental image of the offender first must be matched with individual facial features. Only after a number of individual features have been selected and assembled is the witness able to determine whether his mental image of the offender comports with the composite. By that point, either the witness's

face and the selection of a face from a photographic array.[58] Additionally, Justice Liacos expressed concern as to the inherent suggestiveness of the Identikit method, particularly in two situations.[59] First, he perceived difficulty where the police had already identified a suspect and thus prepared the composite with that individual in mind.[60] Second, Justice Liacos argued that when a witness had only a limited view of the suspect, his description of that suspect was particularly susceptible to suggestion.[61]

As a result of these perceived inadequacies in the Identikit process, Justice Liacos argued that the Court should require trial courts to place the burden on the proponent of a composite to lay a foundation detailing the process by which the composite had been constructed.[62] This foundation, according to Justice Liacos, should address the reliability of the composite process in general, and the reliability of the procedures used in the particular composite being offered.[63] A court would then determine the composite's admissibility according to traditional standards of relevancy.[64]

In *Weichell*, Justice Liacos would not have admitted the composite sketch for either substantive or corroborative purposes due to the absence of evidence demonstrating its reliability.[65] In addition to his general reservations toward the reliability of composites, Justice Liacos stressed that the witness had viewed the defendant at night and for only a matter of seconds.[66] He also noted that the prosecutor had emphasized the composite during her closing argument.[67]

Justice Liacos' and Justice O'Connor's emphasis on the reliability of composites as identification evidence highlights the difference between the viewpoints of the Court and of the dissenters. Both the majority and the dissent acknowledged that pre-trial identifications, due to their greater accuracy, serve a valuable function as substantive evidence.[68] The disagreement centered on whether to include composite sketches in that group of pre-trial identification procedures which are admissible. The

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image may have been altered or the witness may be unable to decide which facial features are correct.

Id. at 84, 453 N.E.2d at 1051 (Liacos, J., dissenting).

[58] *Id.* at 81, 453 N.E.2d at 1049 (Liacos, J., dissenting).

[59] *Id.* at 84, 453 N.E.2d at 1051 (Liacos, J., dissenting).

[60] *Id.*

[61] *Id.* at 84-85, 453 N.E.2d at 1051 (Liacos, J., dissenting).

[62] *Id.* at 81-82, 453 N.E.2d at 1049 (Liacos, J., dissenting).

[63] *Id.*

[64] *Id.* at 83, 453 N.E.2d at 1050 (Liacos, J., dissenting).

[65] *Id.* at 79-81, 453 N.E.2d at 1048-49 (Liacos, J., dissenting).

[66] *Id.* at 80, 453 N.E.2d at 1048 (Liacos, J., dissenting).

[67] *Id.* at 80, 453 N.E.2d at 1049 (Liacos, J., dissenting).

[68] *Id.* at 71, 453 N.E.2d at 1044; *id.* at 87, 453 N.E.2d at 1052 (Liacos, J., dissenting).

majority treated composites in the same manner as it did other identification methods.[69] Given this view, the holding of *Weichell* that composites are admissible as substantive evidence follows naturally from previous cases. The dissenters, on the other hand, distinguished between identification by composite and identification by other means,[70] arguing that courts should treat composite sketches differently because of the inherent potential for error in transcribing a witness's verbal description into an accurate picture and the potential for police suggestiveness.[71] As a result, the majority and the dissenters suggested different precautions to avoid these problems. The majority's approach allows the courts to limit the admission in evidence of unreliable or tainted composites.[72] In contrast, the dissenters would place the burden on the plaintiff to demonstrate the reliability of the composite process. Absent that demonstration, the dissenters would establish a blanket rule disallowing composite sketches as either corroborative or substantive evidence.[73]

The accuracy of a composite in depicting the likeness of a suspect is necessarily dependent on a variety of factors, ranging from the length of time that the witness observed the defendant to the skill and objectivity of the police officer using the Identikit. While the dangers of allowing in evidence an inaccurate or dishonestly prepared composite are significant, a strict rule preventing their admission seems unnecessarily binding. Given the correct circumstances, a carefully prepared composite can be a valuable piece of evidence. With close monitoring and with careful application by trial court judges, the Court's more flexible rule appears to be the sensible approach.

In future cases where the admission of the composite is at issue, questions concerning the preparation of the sketch will certainly be critical. A defendant in opposing the admission of a composite should formulate arguments around the two areas specifically mentioned by the *Weichell* Court: one, the extent of other identification evidence;[74] and two, the possibility that the pre-trial identification process was impermis-

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[69] *See id.* at 71-72, 453 N.E.2d at 1044.

[70] *Id.* at 87, 453 N.E.2d at 1053 (Liacos, J. dissenting); *Blaney*, 387 Mass. at 641, 442 N.E.2d at 397 (O'Connor, J., dissenting).

[71] 390 Mass. at 87, 453 N.E.2d at 1053 (Liacos, J., dissenting); *Blaney*, 387 Mass. at 642, 442 N.E.2d at 398 (O'Connor, J., dissenting).

[72] 390 Mass. at 72-73, 453 N.E.2d at 1045.

[73] *Id.* at 88, 453 N.E.2d at 1053 (Liacos, J., dissenting); *Blaney*, 387 Mass. at 643, 442 N.E.2d at 398 (O'Connor, J., dissenting). While Justices Liacos and O'Connor authored separate dissents, their views appear similar. In fact, in *Blaney*, Justice Liacos stated in a concurring opinion that he agreed with the views set forth in Justice O'Connor's dissent. The two justices, however, disagreed over the issue of whether the composite had prejudiced the defendant. *See* 387 Mass. at 640, 442 N.E.2d at 397 (Liacos, J., concurring).

[74] For a case admitting a composite in evidence where the defendant was identified by only one witness, see People v. Fair, 45 Ill. App. 3d 301, 359 N.E.2d 848 (1977).

sibly suggestive. The success of these arguments will remain unclear until future cases more carefully define the standards governing admissibility under the *Weichell* rule. Regardless of the eventual standards chosen, *Weichell* will remain significant through its rendering of composites as important tools not only to police officers in the apprehension of suspects, but also to prosecutors in the conviction of defendants.

§ 11.4. Expert Testimony in Obscenity Litigation.* Massachusetts statutory law makes it a criminal offense to disseminate obscene material.[1] The courts are therefore often faced with the difficult issue of determining whether or not a particular item is obscene. While the statutory definition provides the trier of fact with some guidance, the definition is framed in general terms.

Integral to a determination of whether material is statutorily obscene is an evaluation of both the artistic value of the material and the prevailing community standards.[2] The necessity of this evaluation has increased the acceptability of expert testimony.[3] The Supreme Judicial Court's position on the role of expert testimony in obscenity litigation has been two-fold. As to the Commonwealth's burden of proof, the Court has ruled that it need not introduce expert testimony to prove that material is obscene.[4] Rather, the Commonwealth need only introduce the material itself to prove its obscenity under the statutory definition.[5] On the defendant's side, however, the Court has ruled that expert testimony is an important aspect of a defense and should only be excluded from testimony in rare cases.[6]

During the *Survey* year, the Supreme Judicial Court, deciding three cases on the same day, strengthened a defendant's ability to introduce expert testimony as part of a defense to the charge of disseminating obscene material, on both the material's artistic value and the prevailing community standards.[7] First, in *Commonwealth v. United Books, Inc.*,[8]

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§ 11.4. [1] G.L. c. 272, § 29.

[2] *See* G.L. c. 272, § 3 which provides in pertinent part: "matter is obscene if taken as whole it (1) appeals to the prurient interest of the average person applying the contemporary standards of the county where the offense was committed; (2) depicts or describes sexual conduct in a patently offensive way; and (3) lacks serious literary, artistic, political or scientific value."

[3] *See* Commonwealth v. Trainor, 374 Mass. 796, 802, 374 N.E.2d 1216, 1219 (1978).

[4] *Id.* at 799, 374 N.E.2d at 1219.

[5] *Id.*

[6] *Id.*

[7] *See* Commonwealth v. United Books, Inc., 389 Mass. 888, 890, 453 N.E.2d 406, 412 (1983); Commonwealth v. Dane Entertainment Servs., Inc. (No. 1), 389 Mass. 902, 912, 452 N.E.2d 1126, 1133 (1983); Commonwealth v. Dane Entertainment Servs., Inc. (No. 2), 389 Mass. 917, 918, 452 N.E.2d 1135, 1136 (1983).

[8] 389 Mass. 888, 453 N.E.2d 406 (1983).

the Court reversed a jury conviction in an obscenity case on the ground that the trial judge abused his discretion by disallowing the testimony of an expert witness, proffered by the defense, on the film's artistic value.[9] Second, addressing the issue of an expert witness's role in assessing the prevailing community standards, the Court in *Commonwealth v. Dane Entertainment Services, Inc. (No. 2)*[10] reversed a trial judge's decision to exclude the testimony of a defendant's expert witness on relevant community standards.[11] Finally, although it did not focus on the issue of acceptable expert testimony,[12] the Court in *Commonwealth v. Dane Entertainment Services, Inc. (No. 1)*[13] reasserted its willingness to adopt a higher degree of scrutiny towards trial judge's decisions which disallow the introduction of expert witnesses to prove prevailing community standards.[14]

In *Commonwealth v. United Books, Inc.*,[15] the Supreme Judicial Court reversed a jury verdict against a defendant who had been convicted for disseminating obscene material and fined $5,000 for violating chapter 272, section 29 of the General Laws.[16] On appeal, the defendant contended that the complaint should have been dismissed because the conviction was based on a statute that was unconstitutional under both the Massachusetts and United States Constitutions.[17] The defendant also objected to evidentiary rulings and jury instructions issued by the trial judge.[18] The Court's decision to grant the defendant a new trial, however, was based solely on the judge's refusal to allow the defendant's expert to testify on the artistic value of the film.[19]

The record showed that the defendant attempted to call as an expert witness Professor Charles Blinderman to testify on contemporary community standards, and on the issue of the serious artistic, social, political, and scientific value of the allegedly obscene film.[20] On voir dire, Professor Blinderman testified that he was a professor of English at Clark Univer-

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[9] *Id.* at 896-97, 453 N.E.2d at 412-13.

[10] 389 Mass. 917, 452 N.E.2d 1135 (1983).

[11] *Id.* at 918, 452 N.E.2d at 1136.

[12] 389 Mass. 902, 912-13, 452 N.E.2d 1126, 1133 (1983).

[13] 389 Mass. 902, 452 N.E.2d 1126 (1983).

[14] *Id.* at 914 n.4, 452 N.E. 2d at 1134 n.4.

[15] 389 Mass. 888, 453 N.E.2d 406 (1983).

[16] *Id.* at 889-90, 453 N.E.2d at 409. The conviction was based on the coin-operated film "Seak's Fullfillment [sic]" which was available for viewing at the defendant's store.

[17] *Id.* at 890, 453 N.E.2d at 409. The defendant claimed that G.L. c. 272, § 29 was unconstitutional under art. 1, 12 and 16 of the Declaration of Rights of the Massachusetts Constitution and the first amendment to the United States Constitution.

[18] 389 Mass. at 898-901, 453 N.E.2d at 411-14.

[19] *Id.* at 890, 453 N.E.2d at 409.

[20] *Id.* at 894, 453 N.E.2d at 411.

sity in Worcester and had been a professor there for twenty years.[21] He explained that he taught a course in the university's evening division surveying erotic art over the centuries, which dealt in part with the nature of erotic expression in the Commonwealth.[22] Professor Blinderman further testified that he was engaged in an investigation into erotic art in the Worcester area,[23] and that, as a result of his professional experience and research, he believed himself able to testify on the contemporary trends and attitudes in Massachusetts towards the depiction of sexual conduct.[24] The trial judge ruled that Professor Blinderman was not qualified as an expert as to either contemporary community standards or the artistic value of the film.[25] In reversing the trial judge's decision the Court stated that it could find no acceptable reason why Professor Blinderman was not qualified as an expert on the artistic value of the film.[26]

The Court's analysis of the trial judge's decision to disallow the expert testimony of Professor Blinderman focused on two factors: first, the importance of expert testimony in obscenity litigation, and second, the degree of discretion afforded to trial judges in determining whether to accept the qualifications of an expert witness.[27] Addressing the importance of expert testimony in obscenity litigation, the Court noted that in the past both the United States Supreme Court and the Massachusetts Supreme Judicial Court had recognized the relevance and importance of experts in defending a charge that material is obscene.[28] The Court gave particular emphasis to Justice Frankfurter's concurring opinion in *Smith v. California*,[29] in which he had stated that expert testimony was the essence of a defense against obscenity and thus its exclusion may infringe

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[21] *Id.* at 896, 453 N.E.2d at 412.

[22] *Id.*

[23] *Id.*

[24] *Id.* at 896-97, 453 N.E.2d at 413.

[25] *Id.* at 894, 453 N.E.2d at 411. The Supreme Judicial Court noted that while Professor Blinderman was proffered to testify on both community standards and artistic value, the focus of discussion at the trial was on Professor Blinderman's qualifications to testify as to relevant contemporary community standards.

[26] *Id.* at 896, 453 N.E.2d at 412. Before analyzing the judge's refusal of Professor Blinderman as an expert, the Court quickly dismissed the Commonwealth's contention that the defendant was foreclosed from appealing because it failed to make an offer of proof at trial. The Court ruled that such an offer was not necessary. *See* Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority, 335 Mass. 189, 199, 138 N.E.2d 769, 776 (1956), and cases cited therein.

[27] 389 Mass. at 895-96, 453 N.E.2d at 412.

[28] *Id.* at 895, 453 N.E.2d at 412 (citing Kaplan v. California, 413 U.S. 115, 121 (1973) (defense should be free to introduce appropriate expert testimony); Commonwealth v. Trainor, 374 Mass. 796, 802, 374 N.E.2d 1216, 1219 (1978)).

[29] *Id.* (citing Smith v. California, 361 U.S. 147, 164-65 (1959) (Frankfurter, J., concurring)).

on the constitutional safeguards of due process.[30] The Court in *United Books* further noted that the necessity for expert testimony was heightened in Massachusetts where the Commonwealth carried its burden of proof by simply introducing the material itself into evidence.[31] Citing its earlier decision in *Commonwealth v. Trainor*,[32] the Court stated that only in rare cases should expert testimony be excluded on the grounds that it would not be helpful to the trier of fact.[33] The Court concluded the discussion by noting that expert testimony can serve the purpose of judicial efficiency by acting as a substitute for voluminous testimony.[34]

The Court then turned to the issue of the trial judge's degree of latitude in determining whether to accept a witness as an expert.[35] According to the Court, the standard for qualifying a witness as an expert is whether the witness possesses sufficient skill, knowledge, or experience in the field of his testimony that the jury may receive appreciable assistance from it.[36] While acknowledging that a trial judge's decision will be reversed only for abuse of discretion or error as a matter of law, the Court stated that a trial judge's discretion, while broad, is not without limits.[37] Because constitutional concerns of free speech are involved in obscenity litigation, the Court stated, a closer scrutiny of a judge's decision to exclude expert testimony is warranted.[38] Against this background of law, the Court listed Professor Blinderman's qualifications and noted that the trial judge had not questioned them.[39] The Court therefore concluded that under the circumstances of the case at bar, the trial judge erred in refusing to allow Professor Blinderman's testimony as an expert witness on the subject of the artistic value of the film.[40]

Expert testimony in obscenity litigation is used not only to determine

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[30] *Id.* (citing Smith v. California, 361 U.S. 147, 164-65 (1959) (Frankfurter, J., concurring)).

[31] *Id.* (citing Commonwealth v. Trainor, 374 Mass. 796, 802, 374 N.E.2d 1216, 1219 (1978)).

[32] 374 Mass. 796, 374 N.E.2d 1216 (1978).

[33] 389 Mass. at 895, 453 N.E.2d at 412.

[34] *Id.* at 895 n.4, 453 N.E.2d at 412 n.4. *See* Hamling v. United States, 418 U.S. 87, 127 (1974); Smith v. California, 361 U.S. 147, 172 (1959) (Harlan, J., concurring in part and dissenting in part).

[35] 389 Mass. at 895-96, 453 N.E.2d at 412.

[36] *Id.* at 896, 453 N.E.2d at 412 (citing Commonwealth v. Boyd, 367 Mass. 169, 182, 326 N.E.2d 320, 329 (1975)).

[37] *Id.* (citing Edinburg v. Merry, 11 Mass. App. Ct. 775, 777, 420 N.E.2d 1, 2-3 (1981)).

[38] *Id. See* Hewett v. State Bureau of Censors, 243 Md. 574, 582, 221 A.2d 894, 900 (1966).

[39] 389 Mass. at 895, 453 N.E.2d at 412.

[40] *Id.* at 897, 453 N.E.2d at 412. Because of the Court's ruling on Professor Blinderman's status as an expert in the area of the material's artistic value, it was unnecessary for the Court to reach the issue of whether Professor Blinderman was a qualified witness as to community standards. In dicta, however, the Court noted that Professor Blinderman was also qualified to testify as to community standards. 389 Mass. at 897, 453 N.E.2d at 413.

whether allegedly obscene material contains any artistic value, but also to establish the relevant community standards. In *Commonwealth v. Dane Entertainment Services, Inc. (No. 2)*,[41] the Supreme Judicial Court considered the correctness of a trial judge's decision to exclude the testimony of an expert on relevant community standards.[42] In *Dane (No. 2)* the defendant was convicted by a jury of possessing an obscene film, "Oriental Blue," with intent to disseminate it, and fined $5,000.[43] The defendant made several objections to the ruling, but the Court reversed on the grounds that the trial judge erred in disallowing the defendant's expert testimony on community standards.[44] The trial judge had ruled that the expert, again Professor Blinderman, was qualified to testify as to literary and artistic value, but not as to community standards.[45] In reaching its decision the Court referred to the stricter scrutiny standard adopted in *United Books*[46] for evaluating a trial judge's decision to exclude expert testimony in obscenity litigation.[47]

Although the Supreme Judicial Court's decision in *Commonwealth v. Dane Entertainment Services, Inc. (No. 1)*[48] did not turn on the issue, the Court in that case reasserted its willingness, expressed in *United Books*, to apply a high degree of scrutiny to a trial judge's decision to exclude expert testimony on the prevailing community standards.[49] The defendant in *Dane (No. 1)* was convicted of possessing obscene film material with the intent to disseminate it, in violation of chapter 272, section 29.[50] On appeal, the defendant argued that the judge erred in not granting its motion to suppress the film, to dismiss the complaint, and for relief from a pre-trial joinder.[51] In addition, the defendant objected to several of the judge's evidentiary rulings.[52] The Supreme Judicial Court focused on the trial judge's exclusion of the testimony of Donald Wilcox, an investigator whose findings were offered to show community standards concerning the issues of private interest and patently offensive conduct.[53]

The offer of proof made by the defendant at trial stated that Donald Wilcox, during the course of his investigation, viewed several movies

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[41] 389 Mass. 917, 452 N.E.2d 1135 (1983).
[42] *Id.* at 918, 452 N.E.2d at 1136.
[43] *Id.* at 917, 452 N.E.2d at 1136.
[44] *Id.* at 918, 452 N.E.2d at 1136.
[45] *Id.*
[46] 389 Mass. 888, 453 N.E.2d 406 (1983). *See supra* notes 27-40 and accompanying text.
[47] *Dane (No. 2)*, 389 Mass. at 918, 452 N.E.2d at 1136.
[48] 389 Mass. 902, 452 N.E.2d 1126 (1983).
[49] *Id.* at 914 n.4, 452 N.E.2d at 1134 n.4.
[50] *Id.* at 904, 452 N.E.2d at 1128.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 910, 452 N.E.2d at 1131-32.

comparable to the ones in the case and counted the patrons who attended the screening of these films.[54] Mr. Wilcox also visited bookstores which openly displayed "x-rated" and adult video cassettes for sale or rental.[55] The defense contended that the purpose of Mr. Wilcox's testimony was to show that the films involved in the current litigation were comparable to sexually explicit materials which are available to the community and viewed by a significant number of patrons.[56]

The Court began its analysis of the trial judge's decision to disallow Mr. Wilcox's testimony by noting that the evidence was not expert testimony, but rather comparison evidence, which sought to prove that the community accepts the portrayal of the sexual conduct being challenged.[57] According to the Court, comparison evidence must satisfy a two-part foundational test to be admissible.[58] First, the comparison evidence must be similar to the material that is the subject of the litigation; and second, the compared material must enjoy a reasonable degree of community acceptance.[59] The trial judge, the Court stated, retained wide discretion in deciding whether the two-part foundational test has been met, particularly since the admission of evidence may make the trial unmanageably complex and lengthy.[60]

The Court therefore upheld the trial judge's decision in *Dane (No. 1)* to exclude the comparison evidence. In doing so, the Court distinguished between the comparative nature of the evidence offered by Mr. Wilcox and the expert testimony offered by Professor Blinderman in *United Books* and *Dane (No. 2)*.[61] The Court did not belittle the importance of Mr. Wilcox's proffered evidence.[62] Such evidence, according to the Court, is relevant to show either that a film appeals to the prurient interest of the community or is patently offensive. The Court noted, however, that Mr. Wilcox had not seen the allegedly obscene film.[63] Further, the Court noted that a trial judge must be allowed to retain a large degree of discretion because the introduction of comparison evidence may increase the length and complexity of a trial.[64] The Court thus determined that the trial judge's decision to disallow Wilcox's evidence did not merit the

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[54] *Id.* at 910-11, 452 N.E.2d at 1132.
[55] *Id.* at 911, 452 N.E.2d at 1132.
[56] *Id.* at 910, 452 N.E.2d at 1132.
[57] *Id.* at 912, 452 N.E.2d at 1133.
[58] *Id.*
[59] *Id.*
[60] *Id.* at 913, 452 N.E.2d at 1133.
[61] *Id.* at 912, 452 N.E.2d at 1133.
[62] *Id.*
[63] *Id.* at 912 n.3, 452 N.E.2d at 1133 n.3.
[64] *Id.* at 913, 452 N.E.2d at 1133.

closer scrutiny given to a trial judge's decision to exclude evidence of an expert.[65]

These three decisions do not alter the Court's prior posture on the need for expert testimony in obscenity litigation.[66] The Court has merely clarified its willingness to protect a defendant's ability to call an expert in defense of an obscenity charge. The Court accomplished this goal by repeatedly stating that it will impose a higher degree of scrutiny on a trial judge's decision to deny a defendant's attempt to introduce expert testimony.[67] The decision to diminish the discretion of the trial judge seems to be based in part on notions of due process and to a lesser extent on concerns of judicial efficiency.[68] The Court seems to fear that the denial of an expert witness will grant the Commonwealth an unfair advantage because its burden of proof is met by merely introducing the evidence itself.[69]

While the Court was clear in its willingness to favor expert testimony, it was less clear in articulating a standard by which an expert's qualifications will be judged. The Court merely stated that an expert's qualifications to testify on community standards should be based on relevant training, experience, research, study, and investigation. The Court has thus left the issue of what qualifications will constitute an expert in obscenity litigation to the trial judge.

§ 11.5. Testimonial Privileges — Parent-Child Communications.* Testimonial privileges are the exception to the rule that the public has the right to every person's testimony.[1] Such privileges exempt potential witnesses from testifying in investigatory or judicial proceedings.[2] Generally, the number of testimonial privileges has remained fairly restricted, primarily because of the public's strong interest in obtaining all relevant evidence in judicial proceedings.[3] Among the testimonial privileges that have been granted by the Massachusetts Supreme Judicial Court and the Massachusetts Legislature are those relating to husband-wife, priest-penitent, psychotherapist-patient, and attorney-client communications.[4]

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[65] *Id.* at 914 & n.4, 452 N.E.2d at 1134 & n.4.

[66] *See* Commonwealth v. Trainor, 374 Mass. 796, 802, 374 N.E.2d 1216, 1219 (1978).

[67] *See Dane (No. 1)*, 389 Mass. at 914 n.4, 452 N.E.2d at 1134 n.4.

[68] *See United Books*, 389 Mass. at 895, 453 N.E.2d at 412.

[69] *Id.*

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§ 11.5. [1] Three Juveniles v. Commonwealth, 390 Mass. 357, 359, 455 N.E.2d 1203, 1205 (1983), *cert. denied sub nom.* Keefe v. Massachusetts, 104 S. Ct. 1421 (1984). *See* United States v. Bryan, 339 U.S. 323, 331 (1950).

[2] Three Juveniles v. Commonwealth, 390 Mass. 357, 359, 455 N.E.2d 1203, 1205 (1983).

[3] *See id.* at 359-60, 455 N.E.2d at 1205. *See also* Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting).

[4] *See id.* at 360-61, 455 N.E.2d at 1206. *See also* Foster v. Hall, 29 Mass. (12 Pick.) 89, 97

In *Three Juveniles v. Commonwealth*,[5] the Supreme Judicial Court considered whether to recognize a testimonial privilege for parent-child communications.[6] Specifically, the Court considered the question whether an unemancipated minor could be compelled to appear and testify before a grand jury investigating the possible role of the child's father in the murder of a nonfamily member, despite objections from both the child and the parents to the child's testifying.[7] The Court held that the child had no privilege to refuse either to appear or to testify.[8]

The plaintiffs in *Three Juveniles* were twelve, fourteen, and fifteen year old children who lived with their parents.[9] They were subpoenaed to testify before a grand jury on April 4, 1983 about their observations of their parent's activities on the evening of the murder and about any conversations they had heard between their father and the murder victim.[10] The children did not want to appear or to testify, nor did their parents want them to.[11] Consequently, on the scheduled date of their testimony, the plaintiffs moved to quash the subpoenas.[12] They based their motion on the grounds of a family or parent-child privilege.[13] A superior court judge denied the motion, but stayed the children's ordered appearance before the grand jury until April 14.[14] On April 13, the plaintiffs filed a petition for Suffolk County with the Supreme Judicial Court seeking a reversal of the denial of their motion to quash the subpoenas.[15] A single justice of the Court allowed the parents to intervene, and also accepted an affidavit from the Commonwealth supporting its position that the children's expected testimony would be relevant to its investigation.[16] The justice continued the stay of the children's appearance and, without decision, reserved the case for full Court determination.[17]

(1832) (attorney-client privilege); G.L. c. 233, § 20 (marital testimonial privileges); G.L. c. 233, § 20A (clergyperson-member of congregation communications privilege); G.L. c. 233, § 23B (psychotherapist-patient communications privilege).

[5] 390 Mass. 357, 455 N.E.2d 1203 (1983), *cert. denied sub nom.* Keefe v. Massachusetts, 104 S. Ct. 1421 (1984). Justice Wilkins wrote the majority opinion, which Justices Liacos, Abrams, and Nolan joined.

[6] *Id.* at 357, 455 N.E.2d at 1204.

[7] *Id.*

[8] *Id.* The Court declined to consider the closely related question whether a child could refuse to testify as to confidential parent-child communications. *Id.*

[9] *Id.*

[10] *Id.* at 358, 455 N.E.2d at 1204.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

On May 5, 1983, the full bench of the Supreme Judicial Court heard the plaintiffs' arguments.[18] The Court reached conclusions on three separate questions. First, the Court affirmed the denial of the plaintiffs' motion to quash the subpoena.[19] Second, the Court held that the plaintiff children did not have the right, on either constitutional or other grounds, to refuse to appear and to testify at the grand jury hearing.[20] Third, the Court found that the plaintiffs' parents had no right, on either constitutional or other grounds, to prevent their children from appearing or testifying.[21]

The Court began its analysis of the plaintiffs' case with a general discussion of the policy behind testimonial privileges.[22] The Court first stressed that extending such a privilege contravenes the general rule that the public has a right to have every person's testimony.[23] In light of the existence of such a strong public interest, the Court stated that testimonial privileges should be "strictly construed," and such testimony excluded only when the public benefit arising from its exclusion overshadows the public's interest in obtaining the evidence subject to the privilege.[24] The Court concluded that, in order to determine whether the current boundary of testimonial privilege should be extended, it must weigh the need for the anticipated evidence against the interests which would be promoted through the exclusion of such evidence.[25]

Although noting that in recent years courts have tended to leave the creation of new evidentiary privileges to legislatures, the Court nevertheless found that it could judicially recognize the privilege of a child not to testify against his or her parent.[26] The Court went on, however, to distinguish this proposed parent-child privilege from existing judicially and legislatively created testimonial privileges.[27] According to the Court, the

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[18] *Id.*

[19] *Id.* at 358-59, 455 N.E.2d at 1204-05.

[20] *Id.* at 359, 455 N.E.2d at 1205.

[21] *Id.*

[22] *Id.* at 359-60, 455 N.E.2d at 1205. For a complete discussion of the policy bases for granting a parent-child testimonial privilege, see Coburn, *Child-Parent Communications: Spare the Privilege and Spoil the Child*, 74 DICK. L. REV. 599 (1969); Stanton, *Child-Parent Privilege for Confidential Communications: An Examination and Proposal*, 16 FAM. L.Q. 1 (1982); *but see* Note, *Questioning the Recognition of a Parent-Child Testimonial Privilege*, 45 ALB. L. REV. 142 (1980).

[23] 390 Mass. at 359, 455 N.E.2d at 1205. *See* United States v. Bryan, 339 U.S. 323, 331 (1950).

[24] *Id.* at 359-60, 455 N.E.2d at 1205. *See* Elkins v. United States, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting); Commonwealth v. Corsetti, 387 Mass. 1, 5, 438 N.E.2d 805, 808 (1982).

[25] *Id.* at 360, 455 N.E.2d at 1205. *See* Trammel v. United States, 445 U.S. 40, 51 (1980); *In re* Pappas, 358 Mass. 604, 609, 266 N.E.2d 297, 301 (1971).

[26] 390 Mass. at 360, 455 N.E.2d at 1205-06.

[27] *Id.* at 360-61, 455 N.E.2d at 1206. The Court listed judicially recognized testimonial

majority of statutory and common-law privileges encompass only confidential communications between parties, and are not blanket disqualifications from testifying such as that advocated by the plaintiffs.[28] The Court also noted that, while the Massachusetts Legislature has granted a testimonial privilege to certain confidential spousal communications,[29] and has permitted one spouse to refuse to testify against the other spouse in most criminal proceedings,[30] the Legislature has not granted a parent-child testimonial privilege or disqualification.[31] The Court expressly declined to consider, as an issue not before the Court, the question whether there should be a limited testimonial privilege as to confidential parent-child communications.[32] While noting that there is support in the case law of some jurisdictions for such a privilege, the Court stated that even jurisdictions recognizing the privilege have extended it only to include confidential communications made by the child to the parent, and not to those made by the parent to the child.[33] According to the Court, the majority of courts that have considered the issue of parent-child privilege have not recognized a blanket testimonial privilege for a child not to testify against his or her parents.[34] The Court found only one opinion that recognized such a privilege, and noted that the opinion had cited no authority or persuasive policy reason for its position.[35]

Finally, the Court considered whether either the constitutional right to privacy or society's interest in preserving family unity required the recog-

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privileges as those of attorney-client and government informer. *Id.* Legislatively created privileges noted were those encompassing some communications made to clergypersons, psychotherapists, and social workers. *Id.*; *see supra* note 4.

[28] 390 Mass. at 361, 455 N.E.2d at 1206.

[29] *Id. See* G.L. c. 233, § 20.

[30] 390 Mass. at 361, 455 N.E.2d at 1206. This testimonial privilege is available except in criminal proceedings relating to child support or nonsupport. *See* G.L. c. 233, § 20, cl. 2.

[31] 390 Mass. at 361, 455 N.E.2d at 1206.

[32] *Id.* at 361-62, 362 n.5, 455 N.E.2d at 1206 & n.5.

[33] *Id.* For cases upholding a parental privilege not to testify as to confidential communications made to them by their children, see *In re* A & M, 61 A.D.2d 426, 433-34, 403 N.Y.S.2d 375, 380-81 (1978); Matter of Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464, 465 (1978) (mem.); People v. Fitzgerald, 101 Misc. 2d 712, 422 N.Y.S.2d 309, 312-13 (N.Y. County Ct. 1979). For cases refusing to recognize such a privilege, see *In re* Grand Jury Subpoena Served Upon Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970); *In re* Terry W., 59 Cal. App. 3d 745, 748-49, 130 Cal. Rptr. 913, 914-15 (1976); Cissna v. State, 170 Ind. App. 437, 439-40, 352 N.E.2d 793, 795 (1976).

[34] 390 Mass. at 362, 455 N.E.2d at 1207.

[35] *Id.* at 363, 455 N.E.2d at 1207. *See In re* Grand Jury Proceedings Witness: Agosto, 553 F. Supp. 1298 (D. Nev. 1983). For cases which did not recognize a blanket testimonial privilege as to general parent-child communications, see United States v. Jones, 683 F.2d 817, 818-19 (4th Cir. 1982); *In re* Grand Jury Proceedings, 647 F.2d 511, 512-13 (5th Cir. 1981) (per curiam); United States v. Penn, 647 F.2d 876, 885 (9th Cir. 1980); State v. Gilroy, 313 N.W.2d 513, 516 (Iowa 1981).

nition of a parent-child, nonconfidential communications testimonial privilege.[36] Balancing society's interest in obtaining the plaintiffs' testimony against the plaintiffs' interest in avoiding testifying against their father in a grand jury proceeding, the Court stated that it would not expand the number of existing testimonial privileges to include the right of children not to testify against their parents about nonconfidential matters.[37]

In a strong dissenting opinion, Justice O'Connor argued that the Court should have recognized a testimonial privilege in the case.[38] The dissent maintained that society's interest in obtaining the children's testimony was outweighed by the violence done to the child in obtaining such testimony, the concommitant damage to family unity, and the consequent injury to society which might result from compelling the children's testimony.[39] In concluding that the Court should create a parent-child testimonial privilege in this case, the dissent focused on the children's desire not to testify against their parents, the nature of normal parent-child relationships as weighing against such testimony, and the state's interest in fostering family integrity, as evidenced by its recognition of a spousal testimonial privilege in criminal cases.[40]

In the dissent's view, the precedent cited by the majority inadequately justified the Court's refusal to recognize a testimonial privilege in this case.[41] The dissent distinguished on two grounds the cases on which the *Three Juveniles* majority relied in reaching its decision.[42] First, the dissent asserted that in many of the cases relied on by the majority, courts had refused to recognize a parent-child testimonial privilege because of a reluctance to encroach on territory perceived as belonging to legislatures.[43] The dissent observed, however, that no bar to judicially created new testimonial privileges exists in Massachusetts.[44] Second, the dissent found no reasoning in these cases that would compel the Supreme Judicial Court to deny recognition of a parent-child testimonial privilege.[45] Ac-

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[36] 390 Mass. at 364, 455 N.E.2d at 1207-08.

[37] *Id.*

[38] *Id.* at 365, 455 N.E.2d at 1208 (O'Connor, J., dissenting). Justice O'Connor wrote the dissenting opinion which Chief Justice Hennessey and Justice Lynch joined.

[39] *Id.*

[40] *Id.* at 366-67, 455 N.E.2d at 1209 (O'Connor, J., dissenting).

[41] *Id.* at 368, 455 N.E.2d at 1209 (O'Connor, J., dissenting).

[42] *Id.*

[43] *Id. See, e.g., In re* Terry W., 59 Cal. App. 3d 745, 130 Cal. Rptr. 913 (1976); Hunter v. State, 172 Ind. App. 397, 360 N.E.2d 588, *cert. denied*, 434 U.S. 906 (1977); Cissna v. State, 170 Ind. App. 437, 352 N.E.2d 793 (1976); State v. Gilroy, 313 N.W.2d 513 (Iowa 1981).

[44] 390 Mass. at 368, 455 N.E.2d at 1209 (O'Connor, J., dissenting).

[45] *Id.* at 368-69, 455 N.E.2d at 1210 (O'Connor, J., dissenting). *See, e.g.*, United States v. Jones, 683 F.2d 817 (4th Cir. 1982); *In re* Grand Jury Proceedings, 647 F.2d 511 (5th Cir. 1981); United States v. Penn, 647 F.2d 876 (9th Cir. 1980) (per curiam); *In re* Grand Jury Subpoena Served Upon Kinoy, 326 F. Supp. 400, 406 (S.D.N.Y. 1970).

cording to the dissent, these cases were distinguishable on their facts as either not involving testimony against a parent under investigation for a criminal act[46] or as involving testimony about a parent who was not under investigation and which was sought from an emancipated adult not living with the parent.[47]

The dissent emphasized that a correct analysis of the questions raised in this case would primarily entail comparing the competing values raised.[48] According to the dissent, the majority failed to cite any case in which a court had held on such analysis that the state's interests outweighed the other interests involved.[49] In support of its position, the dissent cited the case of *In re Grand Jury Proceedings Witness: Agosto*,[50] where such an analysis of competing interests had been made, and where the court had held that a child had the right to refuse to testify against his or her parent in a criminal proceeding on constitutional grounds.[51] Reasoning that the *Agosto* analysis supported the recognition of a parent-child testimonial privilege in the case at bar, the dissent in *Three Juveniles* concluded that unemancipated minors, living at home, should not be forced either to appear or to testify before a grand jury investigating their father's possible role in a murder.[52]

The *Three Juveniles* Court joins the clear majority of courts in refusing to create a parent-child testimonial privilege. In part, the Court's decision reflected an unwillingness to invade territory which might more properly belong to the legislature.[53] Such deference aside, the Court was in fact free to recognize a testimonial privilege in this case.[54] The majority refused to do so on the ground that there is almost no support in other jurisdictions for creating a general parent-child testimonial privilege.[55] As the dissenting opinion emphasized, however, almost all of the cases relied on by the majority are distinguishable either factually, or on the ground

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[46] 390 Mass. at 368-69, 455 N.E.2d at 1210 (O'Connor, J., dissenting). *See* United States v. Penn, 647 F.2d 876 (9th Cir. 1980); *In re* Grand Jury Subpoena Served Upon Kinoy, 326 F. Supp. 400 (S.D.N.Y. 1970).

[47] *See* United States v. Jones, 683 F.2d 817 (4th Cir. 1982). The dissent distinguished *In re* Grand Jury Proceedings, 647 F.2d 511 (5th Cir. 1981), on the ground that it was unknown whether the child from whom the testimony was sought was a minor, emancipated, or living with her parents. 390 Mass. at 369, 455 N.E.2d at 1210 (O'Connor, J., dissenting).

[48] 390 Mass. at 369, 455 N.E.2d at 1210 (O'Connor, J., dissenting).

[49] *Id.*

[50] *See In re* Grand Jury Proceedings Witness: Agosto, 553 F. Supp. 1298 (D. Nev. 1983).

[51] 390 Mass. at 369, 455 N.E.2d at 1210 (O'Connor, J., dissenting). The *Agosto* court recognized a parent-child testimonial privilege on the ground that the child had a constitutionally based right to privacy. 553 F. Supp. at 1325.

[52] 390 Mass. at 370, 455 N.E.2d at 1210 (O'Connor, J., dissenting).

[53] *See id.* at 360 & n.3, 455 N.E.2d at 1205 & n.3.

[54] *See id.*

[55] *See id.* at 362-63, 455 N.E.2d at 1207.

that the courts in those cases were required to leave the creation of new evidentiary privileges to the states' legislatures.[56]

In its analysis of the issues presented by this case, the majority dismissed too summarily the possible effects that testifying against their father might have on the plaintiffs. By focusing as it did on the lack of support in other jurisdictions for creating such a testimonial privilege, and by declining to invade what was perceived as the legislature's province by judicially creating a new evidentiary privilege, the Court unduly narrowed the proper scope of its inquiry in this case. The Court would have done well to follow more closely the reasoning set forth by the minority and thereby to inquire carefully into the effects its ruling might have on the children involved. Because one extremely important policy of the Commonwealth is to strengthen and encourage family life,[57] the Court had a duty to explore fully the adverse effects on both the child and the family which might follow from compelling children to testify against their parent in grand jury proceedings investigating that parent's possible role in a murder. By failing to adequately focus on possible effects of its decision on the children involved in this case, the Court granted the plaintiffs an impermissibly abbreviated consideration of their claims.

There will be little confusion in this area of law after *Three Juveniles*, because the Court quite clearly ruled that there is no parent-child testimonial privilege in the Commonwealth of Massachusetts. The Court did leave open, however, the question whether it might recognize a privilege encompassing confidential parent-child communications at some point in the future.[58] Although the Court declined to rule on this issue because the case at bar did not involve confidential communications, it noted that there is support in the case law for creating such a privilege.[59] The Court's opinion indicates that in future cases concerning this particular question, it might exercise its power to create new testimonial privileges and recognize a child's right to refuse to testify about confidential communications by a child to a parent.

§ 11.6. Paternity Suits — Offers to Pay for Abortion — Display of Child to Jury.* During the *Survey* year, in *Commonwealth v. Kennedy*,[1] the

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[56] *See id.* at 368-69, 455 N.E.2d at 1209 (O'Connor, J., dissenting).

[57] *See, e.g.*, G.L. c. 119, § 1.

[58] *See* 390 Mass. at 362, 364, 455 N.E.2d at 1204, 1207. The Court stated that "[c]onfidential communications aside, we see no basis for concluding that a constitutional right of privacy requires that the children and their parents be given a testimonial privilege." *Id.* at 364, 455 N.E.2d at 1207.

[59] *Id.* at 361, 362 n.4, 455 N.E.2d at 1206 & n.4. See *supra* note 33 for cases recognizing a testimonial privilege regarding confidential parent-child communications.

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§ 11.6. [1] 389 Mass. 308, 450 N.E.2d 167 (1983).

Supreme Judicial Court changed Massachusetts law on evidence with regard to paternity suits in two principal respects. First, the *Kennedy* Court addressed the question whether an offer to pay for an abortion should be admitted against a defendant in a paternity action as evidence supporting the paternity claim, or whether such an offer should be excluded as an offer of compromise. In *Kennedy*, a case of first impression, the Supreme Judicial Court joined the majority of jurisdictions in permitting testimony on the putative father's offer to pay for an abortion.[2] In allowing such testimony, the *Kennedy* Court rejected the defendant's argument that the testimony merely constituted evidence of an offer to compromise, and concluded that an offer to pay for an abortion provides some evidence of paternity.[3]

Second, the *Kennedy* Court considered whether the plaintiff in a paternity action may display the child's appearance to the jury as evidence of paternity. In *Kennedy*, the Court followed Massachusetts case law precedent in permitting the child in question to be shown to the jury.[4] The Court held that in future paternity cases, however, a child's appearance may be shown to the jury only with accompanying expert testimony on the probability that certain of the child's physical characteristics were inherited from the putative father.[5] In reaching this conclusion, the *Kennedy* Court reasoned that without accompanying expert testimony, it is often extremely difficult for jurors to identify which of the child's features may have been inherited from a defendant, and to avoid having their sympathies impermissibly engaged when viewing the child.[6]

In *Kennedy*, the child's mother had sought in district court a paternity adjudication against the defendant[7] and a judgment that he had failed to contribute reasonably to his child's support.[8] The jury found the defendant guilty of nonsupport, and the trial judge ordered child support payments of $125 per week along with payment of the child's medical and dental expenses.[9] The defendant appealed both his nonsupport conviction and the child support order to the Supreme Judicial Court, claiming that the trial judge wrongly admitted certain evidence.[10] The defendant based

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[2] *Id.* at 313, 450 N.E.2d at 171. See *infra* note 19 for cases in which evidence of a putative father's offer to pay for an abortion was allowed at trial.

[3] 389 Mass. at 309-13, 450 N.E.2d at 169-71.

[4] *Id.* at 313, 450 N.E.2d at 171.

[5] *Id.* at 314, 450 N.E.2d at 172.

[6] *Id.* at 313-14, 450 N.E.2d at 172.

[7] *Id.* G.L. c. 273, § 12 controls proceedings of this type, which are civil in nature. Commonwealth v. Lobo, 385 Mass. 436, 447, 432 N.E.2d 496, 502 (1982).

[8] 389 Mass. at 308-09, 450 N.E.2d at 172. *See* G.L. c. 273, § 15. Under this statute nonsupport proceedings are criminal in nature. Commonwealth v. Chase, 385 Mass. 461, 463-64, 432 N.E.2d 510, 512 (1982).

[9] 389 Mass. at 309, 450 N.E.2d at 169.

[10] *Id.* at 309-13, 450 N.E.2d at 169-71.

his appeal on the grounds that the trial judge erred in permitting the complainant to testify that the defendant had offered to pay for an abortion and in allowing the jury to view the seventeen month old child.[11] The defendant also argued that the support order was unfairly excessive.[12]

On appeal, the Supreme Judicial Court first considered whether certain of the defendant's statements were erroneously admitted as evidence of paternity.[13] At trial, the mother was allowed to testify, over defendant's objection that after telling the defendant she was pregnant, they discussed the possibility of her obtaining an abortion.[14] The mother testified that, during this conversation, the defendant had suggested she obtain an abortion and had offered to pay for the operation, an offer which was later repeated.[15] The trial court also admitted in evidence the defendant's statement that he would make payments to the welfare department if necessary.[16] The defendant denied that he had made the offer to pay for an abortion, and, in the alternative, argued that evidence of an offer to pay for an abortion constituted evidence of an offer to compromise, and as such, should not have been admitted at trial.[17]

The Court, in its analysis of the defendant's arguments, noted that an offer to pay for an abortion is at least somewhat probative on the question of whether the offeror thought he was the father of the unborn child.[18] The Court further noted that a majority of jurisdictions have allowed evidence

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[11] *Id.* at 309-15, 450 N.E.2d at 169-72. The defendant also argued that the trial judge erred in limiting evidence on the mother's prior inconsistent statements to the issue of her credibility. *Id.*

[12] *Id.* at 309, 315, 450 N.E.2d at 169, 172.

[13] *Id.* at 309-13, 450 N.E.2d at 169-71.

[14] *Id.* At trial, both the mother and the defendant admitted to having intercourse several times between June and late September, 1979. *Id.* at 309, 450 N.E.2d at 169. The child in question was born on June 1, 1980. *Id.* The mother had testified that the defendant was the only man with whom she had had sexual intercourse during that time. *Id.* At trial, the defendant had testified that the complainant had told him she was sterile. *Id.* The defendant also testified that he had used a condom each time he and the mother had had intercourse, although he knew that condoms are not a failsafe method of contraception. *Id.*

[15] *Id.* at 310, 450 N.E.2d at 169-70.

[16] *Id.* at 313, 450 N.E.2d at 171.

[17] *Id.* at 310, 450 N.E.2d at 169-70. In considering this claim, the Court reviewed those rules of evidence which apply when a trial court determines whether to admit evidence that may tend to show paternity. *Id.* The Court first noted that a statement is considered relevant if it tends to make the desired factual inference either more or less probable than it would have been without that evidence. *Id.* *See* Poirier v. Plymouth, 374 Mass. 206, 210, 372 N.E.2d 212, 218 (1978); Proposed MASS. R. EVID. 401. The Court also observed that if an objection is made to the admission of evidence, the trial judge makes a determination whether a reasonable jury could find that the evidence constituted an admission. 389 Mass. at 310, 450 N.E.2d at 169-70. *See* Proposed MASS. R. EVID. 104(a).

[18] 389 Mass. at 310, 450 N.E.2d at 169-70. *See* Phillips v. Hoyle, 70 Mass. (4 Gray) 568, 571 (1855) (admission of testimony upheld where defendant had inquired of witness whether woman could be found to nurse child in question if defendant could settle the matter).

that a putative father had offered to finance or arrange for an abortion in paternity suits.[19] The Court concluded that, apart from the issue of the probative value of the offer to pay for an abortion, in *Kennedy* there existed a jury question regarding whether the defendant's statements were made out of friendship, as the defendant claimed, or whether they constituted a partial admission of paternity.[20]

In considering the defendant's argument that his offer to finance an abortion was simply an offer to compromise, the Court noted that such a proposal is "in a sense" an offer to settle possible child support claims.[21] The Court noted that a typical offer of compromise attempts to settle a claim arising from an event which has already occurred.[22] In distinguishing the defendant's offer, the Court observed that in *Kennedy* the event giving rise to possible future nonsupport claims had not occurred when the offer was made, since the child had not yet been born.[23] The Court acknowledged, however, that had the defendant's offer been accepted and acted upon, the controversy would have been settled at that point.[24] According to the Court, the difference between the defendant's offer and a typical compromise offer required further examination of the rationale for either admitting or excluding evidence of an offer.[25]

The Court, therefore, next considered the question whether evidence of the defendant's offer to pay for an abortion should be excluded on public policy grounds.[26] Initially, the Court noted that offers of compromise are

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[19] 389 Mass. at 310-11, 450 N.E.2d at 170. *See, e.g.*, Swindle v. State, 21 Ala. App. 462, 463, 109 So. 369, 370 (1926); Gatzemeyer v. Peterson, 68 Neb. 832, 835 (1903); State *ex rel.* Fitch v. Powers, 75 S.D. 209, 212, 62 N.W.2d 764, 765-66 (1964). Additionally, the *Kennedy* Court noted that some courts have admitted evidence of the putative father's interest in the woman obtaining an abortion, even though there was never an offer made to pay for the operation. *See, e.g.*, T.A.L.S. v. R.D.B., 539 S.W.2d 737, 739 (Mo. App. 1976); People v. Mendel, 10 A.D.2d 767, 767, 197 N.Y.S.2d 484, 484-85 (1960).

Although the Court noted that all of the cases cited above were decided before Roe v. Wade, 410 U.S. 113 (1973), the Court concluded that the reasoning in those cases did not turn on the fact that abortion was illegal when they were decided. 389 Mass. at 311, 450 N.E.2d at 170.

[20] 389 Mass. at 310, 450 N.E.2d at 170. In drawing this conclusion, the Court explicitly stated that public policy might dictate whether such an offer should be excluded. *Id.*

[21] *Id.* at 311, 450 N.E.2d at 170.

[22] *Id. See* Proposed MASS. R. EVID. 409.

[23] 389 Mass. at 311, 450 N.E.2d at 170. The Court also noted that causing the complainant to become pregnant did not in itself give rise to a cause of action. *Id.*

[24] *Id.* The Court noted that even if the complainant had accepted the defendant's offer to pay for an abortion, she would have had to take the further step of obtaining the abortion in order for any future nonsupport claims to be settled. *Id.* The Court reasoned that this further distinguished the defendant's offer from a typical offer of compromise, because acceptance of a compromise offer usually extinguishes the claim without further action being necessary. *Id.*

[25] *Id.*

[26] *Id.* at 312, 450 N.E.2d at 170.

often extended simply out of a desire to settle a conflict, and thus may not constitute admissions of wrongdoing.[27] The Court further noted that the law favors settling disputes out of court if possible.[28] The Court found, however, that the Commonwealth's interest in encouraging out of court settlement of typical disputes was significantly different from its interest in offers to pay for an abortion.[29] According to the Court, excluding evidence of an offer to finance an abortion would make fact-finding more difficult in disputes about paternity, where the only other evidence of paternity is the conflicting testimony of the complainant and the defendant.[30] In addition, the Court considered the Commonwealth's interest in protecting potential life as a ground for excluding the defendant's offer to pay for an abortion.[31] The Court found that an offer to finance an abortion, unaccompanied by an offer to pay childbirth costs and child support, tends to influence a pregnant woman in making a decision whether to have an abortion or to carry the child to term.[32] While acknowledging that, in the absence of a compelling state interest, the law should take a neutral position on abortion, the Court stated that the Commonwealth should do whatever is constitutionally possible to "advance the State's interest in the protection of potential life."[33] Consequently, the Court concluded that there was no overriding public policy which required that evidence of an offer to finance an abortion be excluded.[34]

After establishing that an offer to pay for an abortion is admissible in evidence, the Court next considered the defendant's objection to the admission at trial of testimony concerning his statement that, if necessary,

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[27] *Id. See* K. HUGHES, EVIDENCE LAW AND PRACTICE, 19 MASS. PRACTICE SERIES § 532, at 749 (1961); C. MCCORMICK, A HANDBOOK ON THE LAW OF EVIDENCE § 274, at 663 (2d ed. 1972); 4 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1061, at 36 (Chadbourn rev. ed. 1972). The Court stated that it assumed, without deciding, that the parties could in fact have settled the matter. For cases supporting this assumption, see Harrison v. District of Columbia, 95 A.2d 332, 334 (D.C. 1953); Fowler v. State, 111 Ga. App. 856, 858, 143 S.E.2d 553, 554 (1965); Commonwealth v. Terry, 275 Pa. Super. 184, 186-87, 418 A.2d 673, 674-75 (1980). The Court left open the question whether an agreement compromising a child support claim could in fact serve to limit the father's legal duty to support his child. 389 Mass. at 312 n.3, 450 N.E.2d at 170 n.3.

[28] 389 Mass. at 312, 450 N.E.2d at 170. *See* K. HUGHES, *supra* note 27, § 532, at 749; C. MCCORMICK, *supra* note 27, § 274, at 663; J. WIGMORE, *supra* note 27, § 1061, at 36.

[29] 389 Mass. at 312, 450 N.E.2d at 171.

[30] *Id.* at 312, 450 N.E.2d at 170-71.

[31] *Id.* at 312-13, 450 N.E.2d at 171.

[32] *Id.*

[33] *Id. See* Moe v. Secretary of Admin. & Fin., 382 Mass. 629, 663, 417 N.E.2d 387, 406 (1981) (Hennessey, C.J., dissenting). *Cf.* Taft v. Taft, 388 Mass. 331, 334, 446 N.E.2d 395, 397 (1983) (woman could not be compelled to undergo simple surgery required to maintain her pregnancy).

[34] 389 Mass. at 313, 450 N.E.2d at 171.

he would make payments to welfare for the child's support.[35] The Court held that the trial court had correctly admitted this evidence.[36] In reaching this decision, the Court reasoned that the statement was neither an offer of compromise nor impermissibly prejudicial to the defendant.[37]

Turning to the next issue, the Court addressed the defendant's objection to displaying the seventeen month old child to the jury in order for it to compare the child's appearance to that of the defendant.[38] The trial judge, the Court noted, has the discretion in Massachusetts to decide whether to show a child to a jury for such a purpose.[39] The youth of the child, the Court observed, merely relates to how much weight the jury should give to this evidence.[40] Applying the Massachusetts rule, the Court held that the trial judge in *Kennedy* had not abused his discretion by permitting the child to be shown to the jury.[41]

The Court noted, however, that the Massachusetts rule allowing a child of any age to be shown to a jury as evidence of paternity represents a position taken by a distinct minority of states.[42] A very young child, the Court stated, may not yet have developed "settled features," making a realistic assessment of the child's resemblance to the putative father unlikely.[43] Further, the Court observed that exhibiting a child to a jury might unfairly appeal to the jurors' sympathies and thus impermissibly prejudice the defendant.[44] The Court therefore concluded that in future cases a child's appearance should be displayed to a jury as evidence of paternity only with accompanying expert testimony on the probability that certain of the child's physical characteristics are inherited from the putative father.[45]

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[35] *Id.*

[36] *Id.*

[37] *Id.* Additionally, the Court noted that the defendant had been free to request a jury instruction that abortion was not at issue in the case, which he failed to do. *Id.* The Court added that the trial judge was not obligated to give the jury such an instruction on his own initiative. *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id. See* Scott v. Donovan, 153 Mass. 378, 379 (1891).

[41] 389 Mass. at 313, 450 N.E.2d at 170. The Court noted that the trial judge had warned the jury not to favor the child emotionally in reaching their verdict. *Id.* at 314 n.4, 450 N.E.2d at 172 n.4.

[42] *Id.* at 313, 450 N.E.2d at 171 (citing Dorsey v. English, 283 Md. 522, 524-25, 390 A.2d 1133, 1135-36 (1978)).

[43] *Id.*

[44] *Id.* at 314, 450 N.E.2d at 172.

[45] *Id. See* People, Int. of R.D.S., 183 Colo. 89, 94, 514 P.2d 772, 775-76 (1973); Almeida V. Correa, 51 Hawaii 594, 596-604, 465 P.2d 564, 567-71 (1970). The *Kennedy* Court limited the scope of its decision on the issue of permitting a child to be shown to a jury by noting that there may be other occasions when it would be appropriate for a child to appear before a jury. For example, the Court observed that a child would still be able to testify before a jury

Finally, the Court affirmed the trial court's order of $125 per week child support as well as payment of the child's medical and dental expenses.[46] Although the Court stated that the record was insufficient to permit it to evaluate the reasonableness of the award, the Court nonetheless concluded that the support order was not excessive on its face.[47] The Court based this conclusion on the ground that public policy requires that both parents of an illegitimate child should share in the support and maintenance of their child.[48] The burden of supporting the child, the Court stated, should be divided between the parents according to their individual circumstances, with the same standard of obligation to support applied to each parent.[49] Although the Court found no evidence in the record of the relative financial positions of the parties, it noted that the defendant was a physician and the mother a worker in a hospital admissions department.[50] The Court stated that it assumed that the mother had custody of the child and that she either had to care for the child herself or pay someone else for child care while she worked.[51] Consequently, the Court found that on the record before it the order for support was not excessive.[52]

In conclusion, the *Kennedy* Court's decision significantly changes Massachusetts law in two principal respects. After an extensive discussion of rules of evidence and public policy, the *Kennedy* Court affirmed the trial court's evidentiary ruling permitting testimony on the defendant's offer to

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in a paternity action to her relationship with the alleged father. 398 Mass. at 314, 450 N.E.2d at 172. *See, e.g.*, Elizabeth v. James, 104 Misc. 2d 1052, 1054, 429 N.Y.S.2d 1006, 1008 (N.Y. Fam. Ct. 1980).

The Court found that only one of the remainder of the defendant's objections to the trial judge's evidentiary rulings needed extended discussion, and concluded that the rest came within the trial judge's discretion. 389 Mass. at 314, 450 N.E.2d at 172. The Court did not list those objections which it held properly within the trial judge's discretion. *Id.* In regard to the final objection, the Court affirmed the trial court's ruling which limited testimony on the complainant's prior inconsistent statements to the issue of her credibility. *Id.* The Court stated that, in actions for nonsupport — proceedings which are criminal in nature, *see* Commonwealth v. Chase, 385 Mass. 461, 463-64, 432 N.E.2d 510, 512 (1982); G.L. c. 273, § 15 — the complainant is not a party to the proceeding and thus the substantive content of a complainant's prior extra-judicial statements is not admissible except on the issue of credibility. 389 Mass. at 314, 450 N.E.2d at 172. *See* Commonwealth v. Sanders, 80 Mass. (14 Gray) 394 (1860); People v. Carson, 87 Mich. App. 163, 169, 274 N.W.2d 3, 6 (1978); 4 J. WIGMORE, *supra* note 27, § 1076, at 154. Paternity actions under G.L. c. 273, § 12 are civil in nature. *See* Commonwealth v. Lobo, 385 Mass. 436, 447, 432 N.E.2d 496, 502 (1982).

[46] 389 Mass. at 315, 450 N.E.2d at 172.

[47] *Id.*

[48] *Id.*

[49] *Id. See* Commonwealth v. Lobo, 385 Mass. 436, 446, 432 N.E.2d 496, 502 (1982); Commonwealth v. Mackenzie, 368 Mass. 613, 618, 334 N.E.2d 613, 615 (1975).

[50] 389 Mass. at 315, 450 N.E.2d at 172.

[51] *Id.*

[52] *Id.*

pay for an abortion.[53] In reaching this conclusion, the Court reasoned that such an offer provides probative evidence of paternity, and rejected the defendant's argument that the testimony simply constituted evidence of an offer to compromise.[54] In allowing evidence to be introduced that a defendant in a paternity suit has offered to pay for an abortion, the *Kennedy* Court joined the majority of jurisdictions that have considered the question.[55]

The *Kennedy* Court's prospective holding restricting the display of a child's appearance to a jury as evidence of paternity also significantly changes Massachusetts law. For the purposes of the case at bar, the Court followed relevant Massachusetts case law precedent, which in a paternity proceeding, allows a child's appearance to be shown to jurors, who are then free to draw their own conclusions about the child's parentage.[56] The *Kennedy* Court thus upheld the trial court's ruling which permitted the defendant's seventeen month old illegitimate child to be shown to the jury for the purpose of comparing the child's appearance with that of the defendant.[57] The *Kennedy* Court concluded, however, that it is difficult for jurors both to identify intelligently certain of the child's features which might have been inherited from the putative father and to avoid having their sympathies impermissibly engaged through viewing the child.[58] Consequently, the Court held that in future cases a child may be shown to the jury only with accompanying expert testimony on the probability that certain of the child's physical characteristics were inherited from the putative father.[59]

§ 11.7. Privilege — Prejudicial Effect of Refusal to Testify in Jury's Presence.* Witnesses at a trial frequently exercise their rights under the law of privilege to refuse to testify about certain matters.[1] Where a witness who has had personal contact with the defendant elects to exercise this privilege in a criminal proceeding, the danger exists that a jury

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[53] *Id.* at 313, 450 N.E.2d at 171.

[54] *Id.* at 312-13, 450 N.E.2d at 171.

[55] *See supra* note 19 and accompanying text.

[56] 389 Mass. at 313, 450 N.E.2d at 171. *See* Scott v. Donovan, 153 Mass. 378, 379 (1891).

[57] 389 Mass. at 315, 450 N.E.2d at 171.

[58] *Id.* at 313-14, 450 N.E.2d at 172.

[59] *Id.* See *supra* note 45 for cases which also take this position.

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§ 11.7. [1] For a description of the law of privilege in Massachusetts, see P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE, 173-216 (5th ed. 1981). Among the privileges available are husband-wife, attorney-client, physician-patient, priest-penitent, and the privilege against self-incrimination. *See, e.g.*, Drinkwater-Lunn, *Evidence*, 1979 ANN. SURV. OF MASS. LAW § 4.12, at 138 (husband-wife and attorney-client privileges); Wallach, *Evidence*, 1975 ANN. SURV. OF MASS. LAW § 14.6, at 375 (attorney-client privilege); Fenton, *Evidence*, 1974 ANN. SURV. OF MASS. LAW § 9.3, at 167 (clergyperson-penitent privilege).

will infer from the refusal to testify that the defendant is actually guilty, and that the witness's silence is merely an effort to cover up the defendant's guilt.[2] To avoid this possible prejudice, Massachusetts cases typically suggest that a prosecutor must refrain from calling a witness to testify when he is aware of a witness's intention to assert a privilege and not testify.[3]

During the *Survey* year, in *Commonwealth v. Kane*,[4] the Massachusetts Supreme Judicial Court clarified the extent to which the Court would impose this limitation on prosecutors. The *Kane* Court held that a prosecutor in a murder trial could ask a Roman Catholic priest the contents of a conversation between himself and the defendant, despite the priest's assertion on voir dire that he would refuse to answer.[5] In reaching this decision, the Court applied the same two-part test that it had applied in the past.[6] The Court first examined whether the prosecutor's behavior constituted prosecutorial misconduct, and then whether improper inferences from that behavior added critical weight to the prosecutor's case.[7]

In *Kane*, the defendant was convicted of murdering a two year old boy.[8] At the time of the incident, the defendant lived in an apartment with the victim, the victim's three year old brother and the boy's mother.[9] A substantial amount of evidence suggested that the defendant, who regularly beat the victim, had inflicted the injuries which eventually led to the boy's death.[10]

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[2] *See* Namet v. United States, 373 U.S. 179, 191 (1963) (Black, J., dissenting).

[3] *See* Commonwealth v. Fazio, 375 Mass. 451, 460, 378 N.E.2d 648, 654 (1978); Commonwealth v. Martin, 372 Mass. 412, 421 n.17, 362 N.E.2d 507, 512 n.17 (1977). If the witness is in a position to testify to other relevant matters which are not privileged, the prosecutor may call that witness. The prosecutor should not, however, ask questions regarding the privileged information. *See infra* notes 42-44 and accompanying text.

[4] 388 Mass. 128, 445 N.E.2d 598 (1983).

[5] *Id.* at 135, 445 N.E.2d at 602.

[6] *See* Commonwealth v. Cook, 380 Mass. 314, 323, 403 N.E.2d 363, 369 (1980); Commonwealth v. Martin, 372 Mass. 412, 414, 362 N.E.2d 507, 508 (1977).

[7] 388 Mass. at 138, 445 N.E.2d at 604. The factors which constitute the two-pronged test were first articulated by the United States Supreme Court in Namet v. United States, 373 U.S. 179, 186-87 (1963).

[8] 388 Mass. at 129, 445 N.E.2d at 599. The defendant was convicted of murder in the second degree. *Id.* At the end of all the evidence, the judge allowed the defendant's motion precluding the jury from finding the defendant guilty of murder in the first degree. *Id.* at 129 n.1, 445 N.E.2d at 599 n.1.

[9] *Id.* at 129, 445 N.E.2d at 599.

[10] *Id.* at 130-33, 445 N.E.2d at 599-601. The evidence suggested that during the evening in which the injuries were inflicted, the mother checked on her son prior to departing for the store. *Id.* at 131, 445 N.E.2d at 600. At that time, the defendant, who was lying on his bed, was alone in the house with the two boys. *Id.* When the mother returned twenty to thirty minutes later, the defendant was still lying on the bed and the child was seriously injured. *Id.* While the defendant maintained that the child had fallen, expert testimony suggested that the

At trial the prosecution called a Roman Catholic priest to testify.[11] The defendant requested a voir dire of the witness.[12] During voir dire, the priest stated that due to his role as a priest, he would not testify as to a private conversation he had had with the defendant shortly after the victim was taken to the hospital.[13] The priest persisted in his refusal to testify even after the defendant, the holder of the privilege, consented to the disclosure.[14] The judge concluded voir dire by ruling that the priest should take the stand to testify to other relevant matters, and informed the priest that by not testifying he would be in contempt of court.[15] The judge refused to grant the defendant's motion that the prosecutor not be allowed to question the priest about the private conversation.[16] During the subsequent testimony before the jury, the prosecutor inquired as to the conversation.[17] After the judge overruled the defendant's objection, the priest declined to answer on the basis of his obligation under Roman Catholic Canon law.[18] The judge informed the jury that the defendant had waived his privilege.[19] In addition he instructed the jury not to draw any inferences from the priest's refusal to testify.[20] Counsel for the defendant then

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injuries resulted from a severe blunt force, such as a fist, foot, wall or door. *Id.* at 133, 445 N.E.2d at 601.

[11] *Id.* at 135, 445 N.E.2d at 602.

[12] *Id.*

[13] *Id.*

[14] *Id.* As the holder of the privilege, the defendant had the right to prohibit the priest from testifying as to the contents of their conversation. *See infra* note 15. Once the defendant waived that right, however, the conversation was no longer "privileged," and the priest was obligated under law to testify.

[15] *Id.* Under G.L. c. 233, § 20A, the penitent holds the privilege. The statute states:

> A priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner shall not, without the consent of the person making the confession, be allowed to disclose a confession made to him in his professional character, in the course of a discipline enjoined by the rules or practice of the religious body to which he belongs; nor shall a priest, rabbi or ordained or licensed minister of any church or an accredited Christian Science practitioner testify as to any communication made to him by any person in seeking religious or spiritual advice given thereon in the course of his professional duties or in his professional character, without the consent of such person.

G.L. c. 233, § 20A. According to the Court, the validity of the witness's refusal to testify was immaterial to the issue of whether the silence prejudiced the defendant. 388 Mass. at 138 n.4, 445 N.E.2d at 603 n.4. *See, e.g.*, Commonwealth v. Fazio, 375 Mass. 452, 459 n.2, 378 N.E.2d 648, 653 n.2 (1978).

[16] 388 Mass. at 136, 445 N.E.2d at 602.

[17] *Id.*

[18] *Id.* The judge found the priest in contempt of court and levied a nominal fine against him. *Id.* at 137, 445 N.E.2d at 603.

[19] *Id.* at 136, 445 N.E.2d at 602.

[20] *Id.* The judge instructed the jury as follows:

> I would say then, ladies and gentlemen, that he has testified as to what he has testified

conducted cross-examination of the priest and direct examination of both the defendant and his former attorney[21] in an attempt to establish that the conversation did not incriminate the defendant.[22]

The defendant was convicted and appealed the judge's ruling which allowed the questioning of the priest.[23] According to the defendant, by forcing the priest to refuse to testify in the presence of the jury, the judge's ruling had raised prejudicial inferences as to the content of the conversation.[24]

In deciding that the judge's decision did not constitute prejudicial error, the Supreme Judicial Court applied a two-pronged test.[25] The Court first analyzed whether the prosecutor had attempted deliberately to raise improper inferences in questioning the witness, such that the attorney's behavior constituted "prosecutorial misconduct."[26] Second, the Court considered the entirety of the evidence and analyzed whether those inferences added "critical weight" to the prosecution's case.[27]

As to the first prong of the test, the Court concluded that the prosecutor had not acted improperly.[28] It was unnecessary, according to the Court, for the prosecutor to refrain from questioning the priest and thus to accept the defendant's account of the conversation.[29] Given the judge's warning

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to up to this point concerning what he observed, what he said, and what the defendant said is before you for evidence. He has declined to testify to a private conversation he had with the defendant, Peter Kane, in the motor vehicle between the Sturdy Memorial Hospital and Plainville. And therefore I would further direct you that the refusal of the Father to testify that you may draw no inference as to what that conversation was. You may draw no inference, favorably or unfavorably against the defendant, Peter Kane, because of the Father's refusal to testify. He has indicated that he has refused on religious grounds. Those are not legal grounds and I have directed him to testify and he has stated that he will not testify. Therefore I would ask you to not draw any inference as to what that conversation was or was not. It is not before you. It is not to be certainly inferred against the defendant because the Father has determined that he will not testify as to that conversation. You have heard his reasons and therefore the record may stand at that point.

Id. at 136-37 n.3, 445 N.E.2d at 602-03 n.3 (quoting the trial transcript).

[21] After the defendant waived his attorney-client privilege, his former attorney recounted the defendant's version of the conversation. According to the former attorney, the defendant had merely expressed his disbelief to the priest as to the number of problems that "they" had recently had. *Id.*

[22] *Id.* at 136-37, 445 N.E.2d at 602-03.

[23] *Id.* at 129, 445 N.E.2d at 599.

[24] *Id.* at 138, 445 N.E.2d at 603. The defendant also claimed that the ruling prevented effective cross-examination of the witness on this issue. *Id.*

[25] *Id.* at 138, 445 N.E.2d at 603-04.

[26] *Id.* at 138, 445 N.E.2d at 604. "Prosecutorial misconduct" would have occurred, according to the Court, if the prosecutor "unfairly exploited the matter." *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

to the priest on voir dire, the Court stated, the prosecutor could reasonably have assumed that the priest would change his mind at trial and testify as to the conversation.[30] The Court acknowledged, however, that the question of prosecutorial misconduct was a close one.[31] In addition, the Court also emphasized that the prosecutor had not attempted to build his case out of inferences arising from the priest's silence. The Court noted that the prosecutor had asked the priest only one question about the conversation and that he had not attempted to establish "facts" through the posing of leading questions.[32] The Court further emphasized that the prosecutor had not referred to the conversation in his closing argument.[33]

Turning to the second prong of the test, the Court determined that any improper inferences drawn from the priest's refusal to answer had not added "critical weight" to the prosecution's case.[34] The Court relied on several factors in reaching this decision. First, the priest had testified that his decision to keep the conversation confidential was unrelated to the specifics of his exchange with the defendant, but was instead premised on his general duties to maintain confidences as a priest.[35] Second, the judge had issued immediate instructions to the jury, directing them not to draw any inferences from the priest's silence.[36] Third, both the defendant and his former attorney had testified as to the innocuous content of the discussion.[37] Finally, and most importantly, the prosecution had otherwise established a strong case against the defendant.[38] The priest's silence, therefore, constituted only a very small part of the trial and was, in the Court's view, relatively unimportant.[39]

The Court thus held that the judge had not abused his discretion by allowing the prosecutor to question the priest about the conversation,

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[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* Other courts have found that detailed and persistent questioning of witnesses claiming a privilege has prejudiced their right to a fair trial. *See* Sanders v. United States, 373 F.2d 735, 735-36 (9th Cir. 1967) (prosecutor asked fifty-five questions despite the witness's refusal to answer); Shockley v. State, 335 So. 2d 659, 662 (Ala. Crim. App.) (persistent questions seen as attempt to induce jury to draw improper inferences), *aff'd*, 335 So. 2d 663 (Ala. 1976); Washburn v. State, 164 Tex. Crim. 448, 451, 299 S.W.2d 706, 708-09 (1956) (through leading and fact-laden questions, prosecutor presented his theory of the crime).

[34] 388 Mass. at 139, 445 N.E.2d at 604.

[35] *Id.*

[36] *Id. See supra* note 20.

[37] 388 Mass. at 139, 445 N.E.2d at 604.

[38] *Id.*

[39] *Id.* For cases holding that the witness's refusal to testify did add "critical weight" to the prosecution's case, see United States v. Ritz, 548 F.2d 510, 521, 523 (5th Cir. 1977) (rest of prosecution's case relatively weak); Robinson v. Smith, 451 F. Supp. 1278, 1293-95 (W.D.N.Y. 1978) (inferences drawn added critical weight).

despite the priest's assertion on voir dire of his intent to remain silent.[40] In its reasoning, the Court clarified its position as to when a prosecutor should refrain from questioning such a witness.[41] The Court referred to its earlier statements in *Commonwealth v. Martin*.[42] In *Martin*, the Court had suggested that a prosecutor should not ask a witness a question in front of the jury if that witness had clearly stated in advance that he would not respond.[43] The *Martin* Court, however, had added that a prosecutor was not required to assume that a witness would refuse to answer questions in the presence of the jury.[44] Based on this limitation in *Martin*, and based on its view that the judge in the *Kane* trial was in a better position to observe the witness and gauge his potential for changing his mind about testifying, the *Kane* Court affirmed the trial judge's decision.[45] The Court qualified its holding, however, by reiterating that the judge had not abused his discretion. The Court emphasized that this standard of review did not permit it to speculate on whether as a trial court it would have reached the same conclusion.[46] Yet the Court suggested that the prosecutor and the judge might not have adequately considered the Court's position in *Martin* regarding a witness who had firmly stated on voir dire that he will refuse to answer a question.[47] Calling the matter "an unnecessary appellate issue," the Court stated that without the other "saving circumstances" enunciated in its opinion, it might have reversed the decision.[48]

The *Kane* Court's treatment of the priest's refusal to testify is consistent with the approach taken in prior decisions.[49] The Court set forth a two-pronged test designed to measure the degree of prosecutorial misconduct and the extent to which improper inferences added critical weight to the prosecution's case. The Court had considered these factors in earlier cases.[50] In applying this test in *Kane*, the Court did clarify its view as to when a prosecutor can question a witness despite that witness's announced intention to exercise a privilege.

In *Kane*, the priest made it relatively clear on voir dire that he would not reveal the substance of the conversation.[51] According to the Court,

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[40] 388 Mass. at 139, 445 N.E.2d at 604.

[41] *Id.*

[42] 372 Mass. 412, 362 N.E.2d 507 (1977).

[43] *Id.* at 421 n.17, 362 N.E.2d at 512 n.17.

[44] *Id.* at 420, 362 N.E.2d at 512.

[45] 388 Mass. at 139, 445 N.E.2d at 604.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.* at 138, 445 N.E.2d at 603-04. For cases utilizing this approach, see *supra* note 6.

[50] *See* Commonwealth v. Cook, 380 Mass. 314, 323, 403 N.E.2d 363, 369 (1980); Commonwealth v. Fazio, 375 Mass. 451, 458-62, 378 N.E.2d 648, 651-53 (1978); Commonwealth v. Martin, 372 Mass. 412, 414, 362 N.E.2d 507, 508 (1977).

[51] 388 Mass. at 135, 445 N.E.2d at 602.

however, the prosecutor's insistence on questioning him about that conversation did not constitute reversible error because of a number of saving factors.[52] From the Court's discussion of the two-pronged test, it appears that these factors included findings that the prosecutor could have reasonably believed that the priest would change his mind, that he questioned the witness only once, that he did not ask leading questions, and that he refrained from referring to the issue in his closing argument.[53] Additionally, the judge had promptly instructed the jury not to draw inferences from the priest's silence, both the defendant and his former attorney had testified to the innocuous nature of the conversation, and a substantial amount of other evidence implicated the defendant.[54] All these factors served, in the Court's view, to limit the amount of prejudice to the defendant resulting from the prosecution's questioning of the priest. Given the Court's statement that these factors were necessary to save the conviction, *Kane* may be viewed as offering more definitive guidelines concerning this issue than were provided in *Commonwealth v. Martin* and other earlier cases.[55] The Court's general displeasure with the trial judge and the prosecutor may indicate that the particular facts in *Kane* represent the most that a prosecutor with advance knowledge of a witness's intention not to testify can do in questioning that witness without risking a reversal of the conviction.

Despite the Court's thorough survey of the factors bearing on the issue of whether the questioning of the priest constituted reversible error, the *Kane* decision both leaves questions open and raises new questions. For example, in *Commonwealth v. Martin*[56] the Court stated in a footnote that it was not deciding whether prosecutorial misconduct alone constituted reversible error, or whether that misconduct must also have added critical weight to the prosecution's case.[57] Because the *Kane* Court neither found prosecutorial misconduct nor concluded that inferences from the priest's silence added critical weight, the Court once again failed to indicate the relative weight to be given each prong of the test. As a result, the question remains unresolved.[58]

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[52] *Id.* at 140, 445 N.E.2d at 604.

[53] *Id.* at 138, 445 N.E.2d at 604.

[54] *Id.* at 139, 445 N.E.2d at 604.

[55] *See supra* note 50.

[56] 372 Mass. 412, 362 N.E.2d 507 (1977).

[57] *Id.* at 421 n.17, 362 N.E.2d at 512 n.17.

[58] In Namet v. United States, 373 U.S. 179 (1963), the Supreme Court affirmed a conviction even though the prosecutor forced the witness to claim a privilege in the presence of the jury. *Id.* at 190. In that decision, the Court noted that several of the lower courts had found that error under either prong of the test constituted grounds for reversal. *Id.* at 186. The Court, however, declined to rule on the correctness of those decisions. *Id.* at 187. *Cf.* Frazier v. Cupp, 394 U.S. 731, 737 (1969).

Moreover, the Court never discussed the possible implications of the witness's status as a priest. All the precedents cited in *Kane*, and the vast majority of cases considering this issue, have involved a witness claiming the fifth amendment right to be free from self-incrimination. The danger in fifth amendment cases is that a jury will infer from the witness's silence that the defendant was associated with the witness in the same illegal activity and, consequently, that the defendant is most likely guilty.[59] When, however, the witness is not exercising his fifth amendment rights and, moreover, is an ordained priest, a jury is unlikely to draw these same inferences. The risk of prejudice still remains because a jury might question whether a discussion with a priest shortly after an alleged crime was actually some form of a confession. Differences exist, however, between a co-conspirator claiming that he cannot respond to questions about past events without implicating himself, and a priest insisting that due to his religious obligations he will not answer questions concerning private discussions. The question therefore arises whether the status of the witness and the source of his privilege affected the reasoning of the Court.[60] Due to the Court's decision not to discuss these potential distinguishing factors in *Kane*, the possibility exists that a future case involving a prosecutor's questioning of a witness whom he knows will assert his fifth amendment rights will distinguish *Kane* as a case involving not only a different privilege, but also a more trustworthy witness.[61]

In sum, the *Kane* decision is sound both in terms of its application of the two-pronged test and in the Court's determination that prejudicial error did not occur. By voicing its displeasure with the prosecutor and the judge, the Court added further guidance to the question of when a prosecutor may ask a witness questions despite his knowledge of the witness's intention to exert a privilege not to testify. The Court, however,

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[59] *See Martin*, 372 Mass. at 413-14, 362 N.E.2d at 508.

[60] The argument that differences exist between the priest's refusal to testify here and a witness's exercise of his fifth amendment rights is strengthened through an analysis of the precedent relied on by the *Kane* Court. In *Martin*, the Court noted that the potential prejudice consisted of "invidious inferences associating the witness with the defendant in an illegal enterprise." 372 Mass. at 413, 362 N.E.2d at 508. In a later case, *Commonwealth v. Fazio*, the Court distinguished *Martin* due to the status of the witness as a victim rather than a co-conspirator. 375 Mass. 451, 460 n.3, 378 N.E.2d 648, 654 n.3 (1978). The *Fazio* Court stated that, "the claim of the witness . . . of the privilege against self-incrimination would be most unlikely to create an 'invidious inference' of association with the defendant in an illegal enterprise as might have been an issue in *Martin*." *Id.* It is surprising that the Court would distinguish *Fazio*, another fifth amendment privilege case, but not even mention the distinction in *Kane*.

[61] The general trustworthiness of a priest is significant because in *Kane*, the priest testified in front of the jury that his refusal to reveal the conversation was not "depend[ent] on the nature of the disclosures to him, whether incriminating or not." 388 Mass. at 139, 445 N.E.2d at 604.

has left questions unanswered, particularly through its decision not to discuss potentially distinguishing factors between *Kane* and relevant precedents.

§ 11.8. Attorney-Client Privilege — Availability of Selective Waiver for Non-Party Witnesses.* Massachusetts has long recognized the viability of the attorney-client privilege.[1] The privilege is the oldest judicially established means of protecting confidential communications.[2] The privilege seeks to encourage open discussions between attorneys and clients[3] by minimizing a client's apprehension about revealing sensitive matters.[4] Historically, the privilege's scope was narrow and only applied to disclosures that took place during judicial and administrative proceedings.[5] The privilege's present scope is far broader, extending to the protection of certain documents and statements made out of court.[6]

Generally, a disclosure of a protected communication waives the attorney-client privilege.[7] The basis for the waiver of the privilege is twofold. First, the privilege exists to protect confidentiality.[8] Once confidentiality has been destroyed, the rationale for the privilege no longer exists.[9] Second, a party's attempt to disclose one aspect of a confidential conversation while withholding the remainder of the discussion may serve to mislead an opposing party.[10]

The common law recognizes circumstances where a client's waiver of the attorney-client privilege will be limited to the discrete subject matter of the disclosed communication.[11] In Massachusetts, however, the Su-

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§ 11.8. [1] *See* Foster v. Hall, 29 Mass. (12 Pick.) 89 (1831).

[2] 8 J. WIGMORE, EVIDENCE IN TRIALS OF COMMON LAW § 2290, at 542 (John T. McNaughton rev. 1961 & Supp. 1982).

[3] *Id.*, § 2306, at 590.

[4] *Id.*, § 2290, at 543.

[5] Rosenfeld, *The Transformation of the Attorney-Client Privilege: In Search of an Ideological Reconciliation of Individualism, the Adversary System and the Corporate Client's SEC Disclosure Obligations*, 33 HASTINGS L.J. 495 495-96 (1982).

[6] J. WIGMORE, *supra* note 2, §§ 2306-2310, at 590.

[7] C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE, § 93 (2d ed. 1972). *See also In re* Horwitz, 482 F.2d 72, 81 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973).

[8] *In re* Penn Central Commercial Paper Litigation, 61 F.R.D. 453, 464 (S.D.N.Y. 1973); *see* J. WIGMORE, *supra* note 2, § 2311, at 599.

[9] *See* Underwater Storage Inc. v. United States Rubber Co., 314 F. Supp. 546, 548-49 (D.C. 1970) (once confidentiality is breached, basis for continued existence of privilege is destroyed).

[10] J. WIGMORE, *supra* note 2, § 2327, at 636. *See* Handgolds Inc. v. Johnson & Johnson, 413 F. Supp. 926, 929 (N.D. Cal. 1976) (central consideration in assessing valid waiver is fairness).

[11] *Id. See* Weil v. Investment Indicators, Research and Management, Inc., 647 F.2d 18 (9th Cir. 1981); Goldman, Sachs & Co. v. Blondis, 412 F. Supp. 286 (N.D. Ill. 1976).

preme Judicial Court has never directly addressed the issue of whether the scope of a witness's waiver of the attorney-client privilege can be confined to a discrete subject. The Supreme Judicial Court's decisions have been limited to the more basic issue of whether the attorney-client privilege is automatically waived when a witness chooses to testify.[12]

During the *Survey* year, a witness's ability to selectively waive the attorney-client privilege was considered by the Appeals Court. In the case of *Neitlich v. Peterson*[13] the court held that a non-party witness may selectively invoke the attorney-client privilege, and therefore only relinquish the privilege as to the discrete subject matter of the disclosed communication.[14] *Neitlich v. Peterson* involved an allegation of libel.[15] The plaintiff, Mr. Neitlich, was an attorney who alleged that he had been libelled by the defendant Wayne N. Peterson.[16] Mr. Peterson's actions included sending a letter to the Massachusetts Bar Association accusing Mr. Neitlich of violating the Canons of Ethics which regulates members of the Massachusetts bar.[17] Specifically, he alleged violations of Canon 4: "A lawyer should preserve the confidences and secrets of a client;" and Canon 5: "A lawyer should exercise independent professional judgment on behalf of a client."[18] Mr. Peterson's letter to the Massachusetts Bar Association was prompted by the plaintiff's decision to represent Mr. Peterson's wife in divorce proceedings, despite having previously represented both Mr. Peterson personally and a corporation he controlled on business matters.[19]

Affirming a jury verdict in the superior court, the Appeals Court held that the defendant's decision to send a letter to the Massachusetts Bar Association did not constitute libel.[20] The Appeals Court's analysis focused on the narrow issue of whether the trial judge's decision to allow Mrs. Peterson to selectively invoke the attorney-client privilege was correct.[21] Mr. Peterson called Mrs. Peterson to the witness stand and on direct examination asked her about conversations she had with Mr. Neitlich, the plaintiff, concerning tax returns for 1971, 1972 and 1973.[22] Before answering the question, Mrs. Peterson asked the trial judge whether

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[12] *Compare* Woburn v. Henshaw, 101 Mass. 193, 200 (1869); Montgomery v. Pickering, 116 Mass. 227, 231 (1874).

[13] 15 Mass. App. Ct. 622, 447 N.E.2d 671 (1983).

[14] *Id.* at 627, 447 N.E.2d at 674.

[15] *Id.*

[16] *Id.* at 623, 447 N.E.2d at 672.

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.* at 624, 447 N.E.2d at 672.

[21] *Id.* at 625-28, 447 N.E.2d at 673-74.

[22] *Id.* at 625, 447 N.E.2d at 673.

answering the question would waive the attorney-client privilege as to all conversations with Mr. Neitlich or merely the subject matter of the instant question.[23] The trial judge responded by explaining to Mrs. Peterson that her answer to the question would only waive the attorney-client privilege as to the particular subject matter of the question.[24]

The plaintiff appealed the trial judge's decision to allow Mrs. Peterson to selectively waive the attorney-client privilege.[25] The Appeals Court, affirming the decision, initially noted that prior decisions by the Supreme Judicial Court were divided on the more basic issue of whether a witness waives the attorney-client privilege entirely by simply taking the witness stand.[26] The court noted that case law on that issue includes two parallel yet inconsistent lines of decisions.[27] The first line of cases, with its roots in *Woburn v. Henshaw*,[28] holds that once a witness takes the stand, he waives the attorney-client privilege and is open to complete cross-examination on any communication that has taken place between himself and his attorney.[29] The second line of cases, beginning with *Montgomery v. Pickering*,[30] holds that the attorney-client privilege is not completely waived by a witness who chooses to testify.[31] The court concluded that the second line of cases was the "preferred path."[32]

In choosing to adopt the view of the second line of cases, the Appeals Court noted that Mrs. Peterson was not a party to the case being litigated.[33] According to the court, this factor distinguished the *Neitlich* case from the line of Supreme Judicial Court cases which rejected a party witness's ability to take the witness stand and still retain the attorney-client privilege.[34] It would be impermissible, the court noted, for a witness to waive the privilege for the purpose of introducing favorable testimony and then assert the privilege to halt cross-examination.[35] The court then found that Mrs. Peterson was prepared to be a cooperative witness on both direct and cross-examination, and that her selected waiver of the

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[23] *Id.*

[24] *Id.*

[25] *Id.* at 626, 447 N.E.2d at 673.

[26] *Id. See supra* note 12 and cases cited therein.

[27] 15 Mass. App. Ct. at 626, 447 N.E. 2d at 673. *See* Spalding, *The Uncertain State of the Law as to Waiver of Professional Privilege as to Confidential Communications*, 20 MASS. L.Q. No. 3, at 16, 19 (1935).

[28] 101 Mass. 193, 200 (1869).

[29] *Id.* at 200.

[30] 116 Mass. 227 (1874).

[31] *Id.* at 231.

[32] 15 Mass. App. Ct. at 627, 447 N.E.2d at 674.

[33] *Id.* It simplifies the decision in the instant case that Dorothy was not a party to the action.

[34] *Id.*

[35] *Id.*

attorney-client privilege was not intended to further her own interests or that of either side in the litigation.[36]

The Appeals Court concluded its analysis by focusing on the scope and exact subject matter of Mrs. Peterson's waiver of the attorney-client privilege. According to the court, her waiver of the privilege was limited to conversations she had with the defendant, Mr. Neitlich, concerning the present libel suit and her prior divorce proceeding.[37] The court, however, concluded that she retained the privilege as to conversations regarding her own and her husband's financial affairs, and the details of their married life.[38] The court surmised that the subject areas in which Mrs. Peterson chose to waive the attorney-client privilege were distinct from the subject areas in which she attempted to assert the privilege.[39] Consequently, the court allowed Mrs. Peterson to maintain the confidentiality of the attorney-client privilege over certain subject areas.[40]

Although the *Neitlich* decision involved a non-party witness, the reasoning of the Appeals Court suggests that the holding can be extended to witnesses who are parties to the litigation as well. The court focused on two factors in determining whether to uphold a witness's limited waiver of the attorney-client privilege.[41] These factors were first, the witness's purpose for requesting a limited waiver of the privilege, and second, whether the waiver of the privilege can be limited to a discrete subject matter.[42] The identity of the witness should therefore not determine whether a limited waiver of the attorney-client privilege is upheld.

The Appeals Court's decision in *Neitlich*, upholding a witness's ability to limit his waiver of the attorney-client privilege, is consistent with the views of commentators on Massachusetts law[43] and with judicial decisions in other jurisdictions.[44] Massachusetts Proposed Rule of Evidence 510 adopts a position similar to the one adhered to by the Appeals Court. The rule states that the attorney-client privilege is only waived if a witness voluntarily discloses a significant aspect of a particular privileged subject area.[45]

The proposed Massachusetts rule, therefore, implies that if a witness merely discloses a discrete portion of a confidential communication, the

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[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 214-15 (5th ed. 1980).
[44] *In re* Grand Jury Subpeona Duces Tecum, 391 F. Supp. 1029, 1033-34 (S.D.N.Y. 1975); Littlefield v. Superior Court, 136 Cal. App. 3d 477, 483-85, 186 Cal. Rptr. 368, 371-72 (1982).
[45] *See supra* note 40.

attorney-client privilege will be retained as to any undisclosed communications. Although the Supreme Judicial Court has not directly upheld a witness's ability to limit his waiver of the attorney-client privilege, the current weight of authority suggests that if the court is faced with the issue, it will uphold the appellate court's ruling in *Neitlich v. Peterson*.[46] The effect of the decision would be to sanction the limited waiver of the attorney-client privileges under circumstances where a witness discloses only a discrete portion of a protected communication and does not attempt to unfairly advance one side of the litigation.

[46] *See supra* notes 40-41.