CHAPTER 11

Criminal Law, Procedure and Administration

GEORGE F. MCGRATH

§11.1. Crime in Massachusetts. There was a considerable increase in the number of major offenses committed in Massachusetts in 1961 compared to 1960. Table I indicates an increase from 38,645 in 1960 to 48,531 offenses in 1961 and an increase in every major offense category.

TABLE I

Number of Major Offenses Committed 1957-1961 [1]

	Total Offenses	*Murder and Non-negligent Manslaughter*	*Forcible[2] Rape*	*Robbery*
1957	34,920	62		950
1958	37,701	69	217	1,037
1959	36,218	60	231	842
1960	38,645	74	249	1,052
1961	48,531	77	291	1,066

	Aggravated Assault	*Burglary*	*Larceny $50 and over*	*Auto Theft*
1957	753	13,594	8,790	10,771
1958	775	15,498	9,091	11,014
1959	990	14,704	8,670	10,721
1960	1,000	15,918	9,484	10,868
1961	1,181	19,683	12,018	14,215

GEORGE F. MCGRATH is Commissioner of Correction for the Commonwealth of Massachusetts and was formerly Assistant Dean and Assistant Professor of Law at Boston College Law School.

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§11.1. [1] Compiled from 1958 Uniform Crime Reports 64-65, 1959 Uniform Crime Reports 34-35, 1960 Uniform Crime Reports 34-35, and 1961 Uniform Crime Reports 34-35.

[2] There are no figures for forcible rape in 1957 for individual states or geographic divisions, since prior to 1958 the rape count included nonforcible "statutory" offenses.

The number of major offenses committed in 1961 is also greater than the average number of major offenses committed for the years 1957-1960. Total offenses increased from 36,871 (average 1957-1960) to 48,531 for 1961.

Not only is there an absolute increase in the number of major offenses committed, but the crime rate (number of offenses per one hundred thousand of population) increased from 750.6 in 1960 to 927.2 in 1961, as noted in Table II. There is an increase in every major offense category except robbery, which remained constant at 20.4 per one hundred thousand population.

The crime rate for 1961 is also higher than the average crime rate for the years 1957-1960. There is an increase in the crime rate from

TABLE II

Number of Major Offenses per One Hundred Thousand of Population: 1957-1961[3]

	Total Offenses	*Murder and Non-negligent Manslaughter*	*Forcible[4] Rape*	*Robbery*
1957	723.4	1.3		19.7
1958	775.5	1.4	4.5	21.3
1959	708.1	1.2	4.5	16.5
1960	750.6	1.4	4.8	20.4
1961	927.2	1.5	5.6	20.4
Rate Change 1961 over 1957-1960 Average	+25.4%	+13.6%	+21.7%	+4.7%

	Aggravated Assault	*Burglary*	*Larceny $50 and over*	*Auto Theft*
1957	15.6	281.6	182.1	223.1
1958	15.9	318.8	187.0	226.5
1959	19.4	287.5	169.5	209.6
1960	19.4	309.2	184.2	211.1
1961	22.6	376.1	229.6	271.6
Rate Change 1961 over 1957-1960 Average	+28.6%	+25.7%	+27.1%	+24.8%

[3] Compiled from 1958 Uniform Crime Reports 64-65, 1959 Uniform Crime Reports 34-35, 1960 Uniform Crime Reports 34-35, and 1961 Uniform Crime Reports 34-35.

[4] There are no figures for forcible rape in 1957. See note 2 *supra*.

739.4 (average 1957-1960) to 927.2 for 1961 and an increase in the rate in every major offense category.

The number of major offenses committed and the crime rate for Massachusetts, New England and the United States increased in 1961 compared to 1960, as noted in Table III. The data indicate that of the three reporting areas New England consistently has the lowest crime rate, Massachusetts has a higher rate and the United States the highest rate for the years 1957-1961. The crime rate for Massachusetts, New England and the United States in 1961 was 927.2, 811.3 and 1052.8 respectively.

TABLE III

Number and Rate of Major Offenses Committed in Massachusetts, New England and the United States: 1957-1961 [5]

	Massachusetts		*New England*		*United States*	
	Number	*Rate per 100,000*	*Number*	*Rate per 100,000*	*Number*	*Rate per 100,000*
1957 [6]	34,920	723.4	63,858	649.2	1,422,285	835.2
1958	37,701	775.5	70,731	710.1	1,573,210	903.6
1959	36,218	708.1	69,883	670.3	1,630,403	917.5
1960	38,645	750.6	76,273	725.8	1,862,703	1,038.7
1961	48,531	927.2	86,996	811.3	1,926,119	1,052.8

A comparison of changes in the crime rate for Massachusetts, New England and the United States indicates that crime is increasing at a higher rate in Massachusetts than in these other two reporting areas. Based on the number of major offenses, Massachusetts has a 25.4 percent increase while New England and the United States have increases of 17.8 percent and 14 percent respectively, as indicated in Table IV. Except for the crime of robbery, Massachusetts has a higher rate increase in every offense category than New England and the United States. In the robbery offense category, Massachusetts has an increase of 4.7 percent, New England a decrease of 4.6 percent and the United States an increase of 13.4 percent.

A. Legislation

§11.2. New England Interstate Corrections Compact. It is a valid premise that the success of any prison system in the performance of its dual function of custody and rehabilitation is to a considerable

[5] Compiled from 1958 Uniform Crime Reports 64-65, 1959 Uniform Crime Reports 34-35, 1960 Uniform Crime Reports 34-35, and 1961 Uniform Crime Reports 34-35.

[6] There are no figures for forcible rape in 1957 for Massachusetts and New England. See note 2 *supra*.

TABLE IV

Changes in Crime Rate for Massachusetts, New England and the United States: 1961 over 1957-1960 Average

	Total Offenses (Percent)	*Murder and Non-negligent Manslaughter (Percent)*	*Forcible Rape (Percent)*	*Robbery (Percent)*
Massachusetts	+25.4	+13.6	+21.7[7]	+4.7
New England	+17.8	−7.1	+14.5[8]	−4.6
United States	+14.0	−2.1	+5.4	+13.4

	Aggravated Assault (Percent)	*Burglary (Percent)*	*Larceny $50 and over (Percent)*	*Auto Theft (Percent)*
Massachusetts	+28.6	+25.7	+27.1	+24.8
New England	+15.5	+19.5	+17.9	+16.4
United States	+6.6	+16.7	+16.6	+7.9

extent dependent upon the availability of a variety of physical facilities, regimes and programs to best meet the needs (security and treatment) of the offenders committed to its care. The concept of the classification of prisoners, looking toward the ideal of individualized attention, presupposes the existence of a variety of placement opportunities for the individual offender in the correctional program. Thus in Massachusetts, from the point of view of secure custody, our facilities for adult male[1] felons range from extreme close custody in the Department of Correction Segregation Unit[2] located within the walls of M.C.I., Walpole, to the two Forestry Camps[3] for selected inmates at which there are no walls, bars, locks, weapons or even uniformed personnel. In between these extremes are state institutions[4] and the sixteen county jails and houses of correction, which provide varying levels of custodial care. Similarly, the extent and nature of rehabilita-

[7] There are no figures for forcible rape in 1957 for Massachusetts. See note 2 *supra.*

[8] There are no figures for forcible rape in 1957 for New England. See note 2 *supra.*

§11.2. [1] There are three such institutions, located at Norfolk, Walpole and Concord.

[2] Inmates in the general institution population of any of the correctional institutions for males whose presence there is "detrimental to the program of the institution" may be transferred to this unit for an indefinite period by the commissioner. G.L., c. 127, §40.

[3] Id., c. 127, §§83A-83D; c. 125, §1.

[4] In addition to those noted in note 1 *supra,* the M.C.I., Framingham, provides modern correctional programs for female inmates and the institution at Bridgewater controls a variety of inmate types.

tive programs vary from institution to institution.[5] The availability of these resources to the head of an integrated correctional system is made possible, with some limitations, by the power of transfer within the Commonwealth granted to the Commissioner of Correction by statute.[6] Heretofore, it is to be noted, it has not been possible to transfer inmates to institutions in other states or to those under the jurisdiction of the United States Bureau of Prisons. Neither has it been legally permissible to accept transfers from other states. It has been possible to receive federal[7] prisoners, although this permissive statute has not been utilized in modern times until this year, when two federal prisoners were accepted.

In the interest of enlarging upon the number of correctional facilities and thus improving upon services available to any one state, a most significant movement forward in the care and treatment of adult prisoners throughout the entire New England region has been taking place for the past four years. Suggested initially by former Commissioner of Correction Arthur T. Lyman and urged along by the New England Governors' Conference in 1959, a "New England Interstate Corrections Compact" was proposed by a newly formed New England Governors' Conference of State Correctional Administrators some months after its first meeting in April, 1959. The compact was based to a large extent on a Western States Corrections Compact, which had come into being in 1958.

Although Massachusetts had taken the leadership in the conception and formulating of the compact, it was the last of the New England states to adopt it. It became law in Rhode Island in 1960[8] and in Maine,[9] New Hampshire,[10] Vermont[11] and Connecticut[12] in 1961. Massachusetts finally saw the wisdom of its own product in 1962[13] after rejecting the compact in the legislative years 1960 and 1961.[14]

A declaration of purpose and policy is contained in Article I:

> The party states, desiring by common action to fully utilize and improve their institutional facilities and provide adequate pro-

5 The M.C.I. at Bridgewater, for example, is concerned with four kinds of male offenders: the alcoholic, sentenced, committed and voluntary admittees; the "sexually dangerous person"; the defective delinquent; and the criminally insane, involving variation in the degree of security required from one part of the institution to another. M.C.I., Norfolk, on the other hand, was constructed and is operated so as to provide a maximum amount of freedom in a relatively relaxed atmosphere within the highly secure walls.

6 G.L., c. 127, §97.

7 Id., c. 126, §4; c. 125, §11; c. 127, §97.

8 R.I. Gen. Laws Ann. §13-11-2 (Supp. 1960).

9 Me. Rev. Stat. Ann., c. 27-C (Supp. 1961).

10 N.H. Rev. Stat. Ann. §622-A (Supp. 1961).

11 Vt. Acts of 1961, No. 213.

12 Conn. Gen. Stat. Ann. §17-410 (Supp. 1961).

13 Acts of 1962, c. 753.

14 An excellent article on the problems which were faced in attempting to achieve approval of the compact is Janetos, The Making of a Compact, New Englander 15 (Nov. 1962).

grams for the confinement, treatment and rehabilitation of various types of offenders, declare that it is the policy of each of the party states to provide such facilities and programs on a basis of co-operation with one another, thereby serving the best interests of such offenders and of society and effecting economies in capital expenditures and operational costs. The purpose of this compact is to provide for the mutual development and execution of such programs of co-operation for the confinement, treatment and rehabilitation of offenders with the most economical use of human and material resources.

Subsequent provisions authorize the party states to contract with one another for the transfer of prisoners, provide for payment by the sending state to the receiving state, prescribe rights and privileges of officials and inmates and other matters.

Before enacting the compact the Massachusetts Senate formally propounded the following three questions to the Supreme Judicial Court:

1. Does the interstate compact proposed in said bill require the consent of Congress?
2. Has Congress consented, under the provisions of 4 U.S.C. §111, to said compact?
3. If the text of the compact authorized in any state differs materially in substance from the text of the compact authorized in another state, would there be an effective compact in force between such states? [15]

The Supreme Judicial Court answered the second question in the affirmative, thus leading to a negative answer to question one (no *further* Congressional consent required). With regard to question three there were some very minor differences in the compact as enacted between the five states other than Massachusetts. The Massachusetts Senate, however, made four changes from the original bill as submitted.[16] The Court cleared the way for final enactment by the finding with regard to question three: "Nothing . . . appears in the Senate order which suggests that these amendments substantially affect the framework set up by the compact for the negotiation of such further contracts as are not excluded by the amendments." [17]

[15] 1962 Mass. Adv. Sh. 1277, 1279-1280, 184 N.E.2d 353, 355.

[16] (1) County houses of correction were excepted from the statute. There was no objection to this amendment, as transfer to such institutions was not contemplated.

(2) A proviso permitting financial contributions to the enlargement or addition of any institution in another state, subject to legislative approval, was deleted. It should be noted that no such contribution was planned in the foreseeable future and such contribution could not be made without express legislative approval.

(3) Effectiveness of the compact was made contingent on approval by at least four rather than two other states, an amendment which was academic since at the time all five other states had enacted the compact into law.

(4) The approval of all actions of the compact administrator by the Governor and Council, required by the fourth amendment, introduces cumbersome procedures which will limit the effectiveness of the compact.

[17] 1962 Mass. Adv. Sh. 1277, 1285, 184 N.E.2d 353, 358.

It has been pointed out[18] that opponents of this most significant legislation, although a small minority, used questionable methods to defeat the compact, such as adding frivolous amendments[19] and adding unnecessary and burdensome limitations on the action of the compact administrator.

Undoubtedly problems will arise in the administration of the compact,[20] particularly in the early stages of its operation, but its enactment opens a wide new area to New England correctional administrators to perform their duties with more effectiveness, efficiency and economy in the interest of controlling crime.

§11.3. Revision of sentence. During 1961 the Supreme Judicial Court rendered a decision which had received much controversial attention in the press in the case of *District Attorney v. Superior Court.*[1] The Court held that apart from statutory sanction it is permissible for a Superior Court judge to reduce, with the defendant's consent, a partially executed sentence imposed by him following trial on the basis of a "change of heart" on the part of the judge.[2] The time limit prescribed for the exercise of this discretionary power was during the same sitting of the court, which was considered to be a reasonable time.

Without quarreling with the wisdom of permitting sentencing judges to have an afterthought with regard to the sentence imposed, the time limit for its exercise is of crucial importance. If there were no limitation the sentencing court could maintain jurisdiction throughout the entire period of a defendant's imprisonment and, in effect, render repeated decisions, each one based only upon a "change of heart," which would usurp the statutory authority granted those in the executive branch of government. Such decisions could, for example, override a decision by the Parole Board to deny a parole permit[3] to a prisoner, by the court's decreasing a sentence so that release is mandatory or to frustrate the power of the Commissioner of Correction to transfer prisoners[4] by changing the sentence to require that it be served in an institution different from the one originally designated, even though that official had denied such a transfer. It is suggested, therefore, that no time limit or an unreasonable one could constitute a violation of the separation of powers doctrine and would be intolerable.

The time limitation imposed by the Supreme Judicial Court in *District Attorney v. Superior Court* is during the period of the "sitting"

18 Janetos, note 14 *supra.*

19 Janetos, note 14 *supra,* discussing amendments 2 and 3 noted in note 16 *supra.*

20 Perhaps the most perplexing problem here will be the determination, in contract negotiation between member states, of what are to be considered "rights" of the inmates per Article IV(c) and (e), which provides that inmates shall not be deprived of any rights on transfer. See also Fox, Interstate Corrections and Penal Legislation, 42 B.U.L. Rev. 57 (1962).

§11.3. 1 342 Mass. 119, 172 N.E.2d 245 (1961). See 1961 Ann. Surv. Mass. Law §11.3.

2 342 Mass. at 126, 172 N.E.2d at 250.

3 G.L., c. 127, §§128-151*I.*

4 Id. §97.

of the sentencing court. Since this period is discretionary with the Chief Justice of the Superior Court,[5] it could very well be considered to be "unreasonable."

Legislation to remedy this inexact terminative point was passed during the 1962 SURVEY year. Section 2 of Chapter 310 of the Acts of 1962 imposes a sixty-day limitation upon the exercise of this discretionary power by adding a new Section 29C to Chapter 278 of the General Laws.

This period would seem to be a reasonable one and the new statute provides a necessary safeguard against improper intrusion by the judiciary into the realm of the executive branch of government.

§11.4. Review of capital cases. Persons convicted of murder are traditionally accorded extraordinary protection in appellate review. In Massachusetts the Supreme Judicial Court reviews the "whole case" of such defendants, considers "the law and the evidence" and intervenes ". . . if satisfied that the verdict was against the law or the weight of the evidence, or because of newly discovered evidence, or for any other reason that justice may require." [1]

Prior to the passage of Chapter 453 of the Acts of 1962, which amended the above-quoted statute, the form of intervention which the appellate court could take was limited to ordering a new trial. This new statute provides an eminently sensible additional alternative by permitting the court to ". . . direct the entry of a verdict of a lesser degree of guilt, and remand the case to the superior court for the imposition of sentence."

Justice is not served well by a proliferation of proceedings. In this situation when the Court is reviewing the "whole case" it is in a position to determine those proceedings that can be terminated by a directed verdict of a lesser degree of guilt. The rights of defendants are not diminished by this statute, as the Court can still order a new trial in appropriate cases. Neither should the prosecution complain, since the directed verdict of the lesser offense is presumably the only verdict which the reviewing Court would permit to stand on a further review following a new trial. The net result is speedier justice with greater economy of time and costs.

Also to be noted is the fact that this act provides a clear definition of a capital case, meaning a case in which the defendant is tried on an indictment for first degree murder and convicted of murder in either the first or second degree. This should forestall problems which have arisen as to whether a case was "capital," so as to fall within this section.[2]

§11.5. Sex offenders. Section 11.3 of the 1960 ANNUAL SURVEY discussed problems involving the "mandatory parole" of certain sex

[5] G.L., c. 212, §14A.

§11.4. [1] G.L., c. 278, §33E.

[2] See Metcalf v. Commonwealth, 338 Mass. 648, 156 N.E.2d 649 (1959), 1959 Ann. Surv. Mass. Law §10.7; Commonwealth v. Vaughn, 329 Mass. 333, 108 N.E.2d 559 (1952); Commonwealth v. Coggins, 324 Mass. 552, 87 N.E.2d 200 (1949).

offenders. It was there explained that by certain provisions of law[1] prisoners confined for the commission of some ten[2] sexual offenses had their supervision extended beyond that which prisoners who committed other crimes would serve. This comes about by the requirement of this "mandatory parole" law that the designated sexual offender serve his "good conduct" time[3] (time deducted from his maximum sentence for good behavior in prison) under parole supervision rather than be a free man.

In the cases of sex offenders, particularly, and in some other cases as well, administrative difficulties have arisen in deciding from a reading of the complaint or indictment and mittimus in a given case what precise statute was violated by the defendant. It was not uncommon to find no statutory reference in any of these legal instruments, and further clarification by the court, often years after the sentence, and by administrative decisions had to be made.

With the passage of Chapter 48 of the Acts of 1962[4] this urgently needed clarification became law. Now, with respect to felons, correctional institutions will not only receive a copy of the complaint or indictment, the mittimus and the names and addresses of trial witnesses, the judge, district and defense attorney, as in the past, but will henceforth also receive a statement designating the chapter and section of the General Laws under which the defendant was convicted if this information is not contained in the copy of the complaint or indictment that accompanies the prisoner from court.

Considerable attention and concern continued to be given to problems relating to so-called "sexually dangerous persons."[5] No major developments concerning the law on this subject matter occurred this year, but it was encouraging to note that a special commission established in 1961 to "Make an investigation and study of the adequacy and effectiveness of the laws relative to the conviction, commitment, care, treatment and rehabilitation of sexually dangerous persons"[6] was revived and continued with its life extending beyond the 1962 SURVEY year. In view of the need for and desirability of a major overhaul of these laws and the concern of many persons about the problem, it is to be hoped that this commission will actively fulfill its responsibility with a report and legislative reform.

§11.5. [1] G.L., c. 127, §129.

[2] The offenses are unlawful carnal knowledge and abuse of a female under the age of sixteen, G.L., c. 265, §23; indecent assault on a child under fourteen, §13B; rape, §22; forcible rape of child under sixteen, §22A; assault with intent to rape, §24; assault with intent to rape child under sixteen, §24B; incest, G.L., c. 272, §17; unnatural and lascivious acts, §35; unnatural and lascivious acts with a child under sixteen, §35A; or an attempt to commit any of these offenses.

[3] "Every such prisoner whose record of conduct shows that he has faithfully observed all the rules of his place of confinement, and has not been subjected to punishment, shall be entitled to have the term of his imprisonment reduced . . . from the maximum term . . ." G.L., c. 127, §129.

[4] Amending G.L., c. 279, §35.

[5] G.L., c. 123A, §1. See 1959 Ann. Surv. Mass. Law §10.3.

[6] Resolves of 1962, c. 114.

§11.6. County Jails and Houses of Correction Report. During the year 1955 the prison system of the Commonwealth, which is administered by the Department of Correction, underwent extensive reform following legislation[1] resulting from a study undertaken by a committee of experts.[2] Notable among the recommendations made by this "Wessell Committee" and the statutory changes was the recognition of the need for a more integrated system with more authority and responsibility in the department head. Unfortunately, the committee concerned itself with only those correctional institutions that were state operated and almost totally ignored the sixteen county jails and houses of correction which make up a most important part of the Commonwealth's total public institutional efforts.[3]

The primary responsibility for the operation of county jails and houses of correction rests with the sheriff of each county, except in the county of Suffolk, where the House of Correction (at Deer Island) is maintained by the Penal Institution Commissioner of Boston,[4] although the respective county commissioners[5] and the Commissioner of Correction[6] have some involvement. Sheriffs are elected officials in this Commonwealth, and each sheriff maintains his institution or institutions quite independently of any other. The result is a disintegrated collection of institutions, uncoordinated except insofar as the limited influence granted the Commissioner of Correction under his "general supervision" and inspectional visits is implemented and the power of this official to transfer prisoners between and among county institutions and, to a limited extent, between county and state institutions.[7]

Agitation for reform of the county institution system has blown hot and cold since the latter part of the last century, at least. A frequently repeated recommendation of numerous investigative groups and offi-

§11.6. [1] Acts of 1955, c. 770.

[2] Senate Doc. No. 750, Message from His Excellency the Governor, Submitting Recommendations Relative to Reorganizing the Correctional System of the Commonwealth (1955). See 1955 Ann. Surv. Mass. Law §§12.1-12.13.

[3] It is of interest to note that although the average daily prisoner population in the state-controlled institutions during the year 1960 was 2675 as compared with 2272 prisoners in the county institutions, the number of commitments to the state institutions was only 3846 compared to 26,078 commitments to jails and houses of correction. Statistical Reports of the Commissioner of Correction for the year ending December 31, 1960. Pub. Doc. No. 115 (1961).

[4] General Laws, c. 126, §16, provides in part: "The sheriff shall have custody and control of the jails in his county and, except in Suffolk county [where control of the House of Correction is by the Penal Institutions Commissioner] of the houses of correction therein and of all prisoners committed thereto . . . and shall be responsible for them."

[5] County commissioners are given extensive inspective and investigatory powers and responsibilities by G.L., c. 126, §§1-3.

[6] By provisions of G.L., c. 124, §1, the Commissioner of Correction has "general supervision" over these institutions, with additional authority and responsibility for making inspectional visits and limited rule-making power.

[7] G.L., c. 127, §97.

cials has been that the state assume control over these institutions.[8] Reform attempts have met with little success. A notable exception, however, was legislation which removed the paroling authority with regard to inmates serving sentences of one year or more in county prisons from the county commissioners to the state Parole Board in 1960.[9]

In recent years the need for change has again become obvious. County sheriffs and commissioners are constantly seeking legislative approval for large capital outlay requests to modernize or replace institutions, which for the most part are very old. These requests have been, without exception, based upon the need of the one petitioning county in each case, without any thought given to the relationship between the county institution and those of other counties nearby, or state-wide, or to the state institutional system. The requests were to change the buildings, not the system, and generally went unsatisfied. Certain other matters received considerable public attention. The Mayor of the city of Boston has openly requested the state to assume the control and costs of the Suffolk County House of Correction. County officials have sought help in solving problems relating to overpopulation and, in some cases, extreme underpopulation in their institutions. At a time when the public is more aware of the importance of and need for rehabilitative services to accomplish a corrective result with offenders and administered by trained career people free from political considerations, the inadequacies of the status quo, sheriff-operated institutions were becoming more and more intolerable. Finally, on May 14, 1961, David S. Robinson, Master of the Middlesex County Jail and House of Correction in East Cambridge, was murdered during the escape of two prisoners. As the result of this, "Criticism of the county houses of correction rose sharply and

[8] Governor Cox in his annual message on January 6, 1921, commented at length on the county penal institutions, recommending consolidation under state control, among other things, and citing an 1873 "Report of the Committee on Prisons" (H. 264 of 1873). State control has been recommended by reports and/or legislation in the following instances: Report of the Commission to Investigate the Public Charitable and Reformatory Interests and Institutions of the Commonwealth, created by Acts of 1896, c. 60; Report of Massachusetts Prison Association (1898); inaugural message of Governor Wolcott (1899); message from Governor Foss (H. 2155, 1913) ("The county prison has no place in a model prison system and no logical reason for continued existence"); Recommendations of the Board of Prison Commissioners (H. 1064, 1914); annual message of Governor David I. Walsh (1915) ("The first step that must be taken to secure any adequate reform of the long-standing and generally acknowledged defects in our prison system is unquestionably the placing of all county penal institutions under the care of the state"); S. 198 (1919), a bill by the Massachusetts Civic League to transfer the jails and houses of correction to state control; Report of Special Commission (H. 1403, 1919); Report of Special Committee (S. 450, 1920); Report of Joint Special Commission on County Government (S. 280, 1922). Other reports concerning the problem generally are: Report of Committee on Prisons (H. 338, 1880), and the annual messages of Governor Cox in 1922 and 1923.

[9] Acts of 1960, c. 765, extensively amending sections of G.L., cc. 27, 127. Also Acts of 1961, c. 282, amending G.L., c. 127, §129.

the Governor [John A. Volpe] appointed [a] committee to look into that part of our correctional system which is made up of jails and houses of correction . . ." [10]

This committee, commonly called the Gardner Committee after its chairman, Alfred Gardner, Esq., of Boston,[11] made an extensive study of the jails and houses of correction, and submitted a lengthy report to the Governor dated June 21, 1962.[12] The report contains descriptive material on the county institutions generally and individually, and contains many suggestions and recommendations of a major and minor nature, finally enumerating twenty-eight formal recommendations under headings of Long Range Changes, Immediate Permanent Changes, and Interim Recommendations. Most controversial of the recommendations, as the committee expected, was number 1: "The houses of correction should be transferred to the state under a long range plan worked out by a statutory committee." [13] Anticipating objections to this recommendation, the committee enumerated four major objections and effectively answered them:[14] (1) per capita costs for prisons are higher in the state system; (2) it is desirable to locate institutions in the local areas from which the prisoners come; (3) the civil service system and limited union memberships in the state service are undesirable; (4) rehabilitation programs for short-term prisoners are impossible.

Other major recommendations advocated: formation of a statutory committee to bring about the long-range recommendations, particularly changes in the laws to eliminate drunkenness as a crime; to commit alcoholics to the Department of Public Health; to commit all adult female offenders to the state institution at Framingham, thus eliminating all sentenced women from the county institutions; and to establish rehabilitation programs with proper personnel, records and procedures in the institutions now under county control.

In the concluding paragraph of the preface to the report the committee states:

> It is our hope that the recommendations in this report will serve as the basis for a coordinated long range plan for consolidating the functions of houses of correction and the functions of the state institutions into one coordinated correctional system which will take advantage of modern correctional methods in all of its phases; and it is also our hope that, during the time necessary to put a

[10] Report and Recommendations of the Governor's Committee on Jails and Houses of Correction, June 21, 1962.

[11] Other committee members were: James M. Devlin; Rt. Rev. Msgr. Joseph P. Donelan; Arthur G. Falco; Rev. Myron W. Fowell; Professor Sanford Fox; Rabbi Roland B. Gittlesohn; Henry G. Johnson; and former Chief Justice of the Supreme Judicial Court, Hon. Stanley E. Qua. Bruce Crane, a committee member, "did not join with the other members in submitting the report."

[12] The report was not made public until November, 1962.

[13] Governor's Committee Report 69, note 10 *supra*.

[14] Id. at 32-34.

long range plan of consolidation into effect, this report will serve as the basis for immediate changes in the jails and houses of correction which will make the work done by them more effective in the prevention of crime.

Despite the limited success of reformers for over three quarters of a century, the time should be right for some drastic improvements in the operation of this unintegrated, uncoordinated and, in terms of physical facilities, philosophy and methods, antiquated "system" based upon the comprehensive report of this committee, composed of outstanding citizens.

B. Decisions

§11.7. Illegal searches and seizures. The largest single area of judicial decisions concerning criminal law in the 1962 Survey year dealt with the problems raised by the 1961 federal search-and-seizure case of *Mapp v. Ohio*,[1] and its effect on Massachusetts law. This decision overruled Massachusetts law as expressed in the 1923 case of *Commonwealth v. Wilkins*[2] by holding that the admission of illegally obtained evidence by a state court in a state trial violated the due process clause of the Fourteenth Amendment of the United States Constitution.[3] The effect of the *Mapp* decision was considered by the Supreme Judicial Court in *Commonwealth v. Holmes*,[4] in which Holmes, who had been convicted of an assault and battery with a dangerous weapon, claimed that the knife which the police found on his person when they went to arrest him was improperly admitted in evidence because it was obtained as a result of an illegal search and seizure. While holding that the search was a "reasonable" one incident to a lawful arrest, and as such, the evidence so obtained was admissible, the Court also recognized that had the search been illegal, the evidence would not have been admissible.

In deciding problems which were bound to arise under the *Mapp* decision, the Court reached a just result in another case, and reasoned its way out of making a decision in a third. In *Commonwealth v. Spofford*,[5] the Court was faced with an appeal based on *Mapp*, in which the trial had been held prior to that decision, and evidence which was admissible then under the *Wilkins* case would, at the time of appeal, be inadmissible. Briefly, the facts involve two policemen who went to Spofford's apartment without a search warrant, and entered the apartment in his absence. While there, they found pornographic materials in his closet. Later, when Spofford arrived, he was shown what had been found. He acknowledged ownership and sub-

§11.7. [1] 367 U.S. 643, 81A Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961).
[2] 243 Mass. 356, 138 N.E. 16 (1923).
[3] See 1961 Ann. Surv. Mass. Law §10.4.
[4] 1962 Mass. Adv. Sh. 1005, 183 N.E.2d 279, also noted in §10.2 *supra*.
[5] 343 Mass. 703, 180 N.E.2d 673 (1962), also noted in §10.2 *supra*.

sequently, after questioning at the police station but not under arrest, he admitted to having more such material and returned to the apartment and gave this additional material to the police. At the trial, which was held before the *Mapp* ruling, the trial judge admitted both sets of material.

The Court pointed out that the basic problem became whether *Mapp* should be given retroactive effect. In reaching an affirmative answer applying only to the circumstances of this case, the Court pointed out that this retroactive effect was only in a limited sense as "the appeal is before us in regular course for decision on the law as it presently stands." [6] Justification for this position was found in the wording of the *Mapp* decision: "We observe nothing in the *Mapp* majority opinion which indicates an intent that it be confined to prospective operation, assuming such a position could be soundly taken." [7] Indeed, in this particular case, it would appear that all the Court is doing is the same thing which the United States Supreme Court did when it heard the *Mapp* case. Evidence was admitted, an appeal made, and the Court decided that the admission was unconstitutional.

In considering whether the second batch of material was constitutionally admitted, the Supreme Judicial Court rejected the argument of the Commonwealth that it was not illegally obtained, and held that the original illegal search and seizure so "tainted" the second batch that it too was inadmissible.

When faced with the question of absolute retroactivity of the *Mapp* decision, the Court has thus far avoided making a ruling. In the case of *Dirring, Petitioner,*[8] a request for a writ of habeas corpus was denied by the lower court, and Dirring appealed. In his request for the writ, the petitioner relied on *Mapp v. Ohio,* contending that there had been a "violation of his constitutional right to be secure from unreasonable searches and seizures" when evidence allegedly so obtained was admitted in his trial in 1958, some three years before the *Mapp* decision. The Court, in upholding the decision denying the petition, held that no question of illegally seized evidence had been raised in the original trial, and the issue was therefore not before the Court under proper appellate procedure.

The full meaning of the *Mapp* decision, especially with regard to its retroactive effect, must await further litigation.[9] At this point the uncertainty is considerable. The Supreme Judicial Court's latest pronouncement in the *Dirring* case puts it this way: "Retrospective effect of the *Mapp* rule is enshrouded in doubt. We do not puzzle as to something which must be, for us, inscrutable." [10] Perhaps the United States Supreme Court will come to the rescue.

[6] 343 Mass. at 707, 180 N.E.2d at 676.

[7] Ibid.

[8] 1962 Mass. Adv. Sh. 1001, 183 N.E.2d 300, also noted in §10.2 *supra.*

[9] See Note, Collateral Attack on Pre-Mapp Convictions, 16 Rutgers L. Rev. 587 (1962). See also Mapp v. Ohio at Large in the Fifty States, 1962 Duke L.J. 319, 338-343; 1961 Ann. Surv. Mass. Law §10.4.

[10] 1962 Mass. Adv. Sh. 1001, 1002, 183 N.E.2d 300, 301.

§11.8. Bail in capital cases. The question of whether a person charged with a capital offense of first degree murder may be bailed, and if he may, whether such bail is a matter of right or discretion, came before the Supreme Judicial Court in *Commonwealth v. Baker.*[1] In this case, Baker was arrested and charged in the district court with first degree murder, his plea being not guilty. After hearing, the court found probable cause and bound him over to await grand jury action, without bail. Subsequently, Baker moved, in Superior Court, that he be admitted to bail. This motion was denied. While the appeal to the Supreme Judicial Court was based on the refusal of the Superior Court judge to grant several requested rulings, this opinion dealt solely with the question of bail.

The Supreme Judicial Court reasoned that while inferior courts historically and in the present have been restricted in their power to grant bail, there is no common law or statutory restriction on the power of superior courts to do so. Pointing out that case law in Massachusetts on the subject is meager, the Court goes on to consider the common law and such statutory restrictions that may have been placed on the power to grant bail. The ultimate conclusion is reached that under the common law, which was carried over into Massachusetts, superior courts could, in their discretion, admit a prisoner to bail in any case. The only Massachusetts statutory restrictions shown were those in 1860 which prohibited bail in cases involving rape, arson and treason,[2] of which the first two were made bailable in 1881.[3] Thus the Court concludes that one charged with first degree murder may be admitted to bail at the discretion of the court. It is interesting to note that the only crime which is now not bailable is the noncapital one of treason.[4]

§11.8. [1] 343 Mass. 162, 177 N.E.2d 783 (1961).
[2] G.S. 1860, c. 170, §54.
[3] Acts of 1871, c. 61, §1.
[4] G.L., c. 204, §1.