PART II

Public Law

CHAPTER 10

Constitutional Law

JOHN D. O'REILLY, JR.

A. COURT DECISIONS

§10.1. Supreme Judicial Court: Rejection of advisory opinions in subsequent Court decisions. For many years the Supreme Judicial Court has stated that in the decision of cases it did not consider itself bound by statements made by the Justices of the Court in the performance of their constitutional duty to render advisory opinions. If an issue dealt with in an advisory opinion should come before the Court in a litigated case, the announced doctrine was that the Court would consider the issue afresh, without being influenced by the advisory opinion through the doctrine of stare decisis.[1]

Over the years, however, the Court has invariably reached, in such cases, the same conclusions previously arrived at by the Justices in their advisory opinions.[2] During the 1969 SURVEY year the Court finally decided a case upholding the validity of a statute enacted by the legislature notwithstanding an advisory opinion that such a law would be in excess of the constitutional powers of the legislature.[3]

In 1966 there was pending in the House of Representatives a bill to create a state agency which would be authorized to finance the construction of housing projects designed to provide shelter for a "mix" of families of low income (who would, perforce, pay less than an economic rent) and families of moderate income (who would pay eco-

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§10.1. [1] Commonwealth v. Welosky, 276 Mass. 398, 177 N.E. 656 (1931).

[2] See 1964 Ann. Surv. Mass. Law §10.4, at 109.

[3] Massachusetts Housing Finance Agency v. New England Merchants National Bank, 1969 Mass. Adv. Sh. 987, 249 N.E.2d 599.

nomic rents, the revenues from which might be large enough to offset the deficiencies in revenues collected from low income tenants, and thus provide a total or partial subsidy of the latter).

The Justices ruled, in an advisory opinion,[4] that use of public funds to carry out such operations would not be a use for a public purpose. Justice Kirk, in a separate opinion, indicated that he felt otherwise on the principle involved, but he declined to render an advisory opinion because he read the questions submitted by the House as not accurately keyed to the provisions of the bill.

The legislature nonetheless enacted a statute creating the Massachusetts Housing Finance Agency and authorizing it to borrow money, on tax exempt notes, to lend to private developers to enable them to construct and operate housing for low income and moderate income families as described above.[5] The agency entered into contracts with various banks for purchase and sale of its notes, the agreements being conditioned upon, among other things, the constitutional permissibility of an undertaking by the Commonwealth in Section 9B(c) of the act to maintain, by appropriation, the agency's ability to meet debt service payments on its notes (which ability conceivably might become impaired if deficits in rental revenue left a developer-operator of a project unable to repay his loans from the agency). A suit was arranged between the agency and the banks for a declaratory judgment to obtain resolution of the question of whether this condition of the contracts had been met.[6] The Court ruled that it had.

Justice Cutter, writing for the Court, pointed out that the bill, as enacted, differed in many respects from the bill which had been sent over for the advisory opinion, so that the latter was not expressly repudiated. The changes, however, amounted to no more than a filing down of some, though by no means all, of the rough spots in what had originally been an inartistically drawn bill. On the substantive point, the decision must be seen as completely at variance with what was said in the earlier advisory opinion.

The public purpose issue, as the case points out, is more complex than the simplistic question whether public funds may be used to provide subsidized housing for others than those whose incomes are too low to enable them to pay a rental of full market value. There is, for example, the further question whether the legislature may properly conclude that legitimate public health and welfare objectives may be achieved by encouraging occupancy of housing facilities by families in different economic strata with the hope of thus deferring or minimizing the danger of deterioration of such facilities into substandard housing.

The episode may suggest the advisability of giving some fresh consideration to the practice of requiring the Justices to render advisory opinions upon request from the governor, the executive council or a

[4] Opinion of the Justices, 351 Mass. 716, 219 N.E.2d 18 (1966).
[5] Acts of 1966, c. 708.
[6] G.L., c. 231A.

house of the legislature. What may have been a workable, and even useful institution in 1780 is not necessarily suitable to the conditions found two centuries later. Legislation in a laissez-faire age was rather rare and aimed at simple problems. Court calendars were light and readily disposed of, and chief justices apparently did not mind the additional chore of drafting the seldom-requested advisory opinions for the approval and signatures of their brethren.[7] Today, however, the volume of appeals is close to overwhelming. In increasing numbers appeals are disposed of summarily without full opinion. The rapid development of constitutional doctrine, particularly on criminal matters, has brought the Court's once leisurely nisi prius docket to flood stage. Proposed legislation is directed more and more to involved social and economic problems. And the burden of the Justices is not lessened by the apparent legislative tendency to avoid coming to grips with controversial bills by referring them for advisory opinions.

As noted recently in these pages, the Justices have devised a partial solution to some of the problems involved by initiating a practice of inviting briefs from persons interested in some of the questions propounded to them.[8] This, however, is no more than a palliative. Presentations by persons with casual or academic interests lack the flavor of the adversary process, which provides the best motivation for thorough presentation of all relevant considerations and is calculated to put the Court into the best possible position to deal with issues presented.

The episode may also suggest that there are reasonably adequate alternatives to the advisory opinion procedure. Where there is serious question of the constitutionality of a law after its enactment, it is not necessary that irreparable harm be suffered by someone before the issue is determined. The Court has been very liberal in construing the Declaratory Judgment Act, and it is relatively easy, as in the situation under consideration here, to frame a contract so as to generate a declaratory judgment proceeding for speedy clarification of the problem. This device has been used for the resolution of doubts in several socio-economic areas in recent years.[9] It can be adapted to other areas.[10]

[7] Llewellyn, The Common Law Tradition: Deciding Appeals (1960). This recounts a conversation with Chief Justice Wilkins of the Massachusetts Supreme Judicial Court, in which the Chief Justice spoke of a custom of composition of advisory opinions by chief justices. It is not clear whether the Chief Justice was referring to the then (1960 or earlier) current practice in the Court, or if he was describing the practice of his predecessors. In any event, it is clearly manifest that, given the increasingly numerous and complex requests for advisory opinions, a chief justice cannot be expected to shoulder the whole burden of processing them, in addition to carrying out his judicial and administrative duties. Of necessity, the drafting of these opinions is a task which must now be distributed among the members of the Court.

[8] 1968 Ann. Surv. Mass. Law §7.3, at 197.

[9] Massachusetts Bay Transportation Authority v. Boston Safe Deposit & Trust Co., 348 Mass. 538, 205 N.E.2d 346 (1965); Pioneer Credit Corp. v. Commissioner of Banks, 349 Mass. 214, 207 N.E.2d 51 (1965); Dodge v. Prudential Ins. Co., 343 Mass. 375, 179 N.E.2d 234 (1961).

[10] See Zwickler v. Koota, 389 U.S. 241 (1967) (approving use of declaratory

The full extent of the availability of alternatives to the advisory opinion deserves exploration.

§10.2. Obscenity law: Vagueness of constitutional standards. The constitutional status and applicability of the obscenity law[1] have not been substantially clarified since the subject was discussed in these pages two years ago. Cases which came up during the 1969 SURVEY year have perhaps raised more questions than they have answered.

In two of the cases,[2] involving convictions for sales of various magazines, the Supreme Judicial Court affirmed the convictions with a rescript opinion in each case reciting simply: "There was no error in the trial and convictions of the defendant[s] on two of [the] complaints under G.L., c. 272, §28A."

The reports leave unclear precisely what issues the Court passed upon. The printed records in the cases, which do not include the magazines (under the local practice these are trial exhibits, subject to examination upon appeal), leave unclear just what the obscenity consisted of, e.g., whether it was "hard core pornography" under the standards of the *Roth*[3] and *Fanny Hill*[4] cases, or borderline publications losing constitutional protection by reason of a "pandering" merchandising technique such as was controlling in *Ginzburg v. United States*.[5] The briefs on appeal made some point as to the element of scienter, but the Court had already interpreted the statute to be read as though it contained the word "knowingly," as qualifying the conduct denounced therein.[6] In one of the cases, application for certiorari was made to the Supreme Court of the United States, but the petition was denied.[7]

The uncertainty as to the applicable standards was not diminished by the Supreme Court's disposition of another magazine case. The New York Court of Appeals, also without an explanatory opinion, affirmed a conviction for a sale in violation of the obscenity law of that state.[8] On November 17, 1969, the Supreme Court granted certio-

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judgment procedure to determine constitutional validity of criminal statute whereby contestant would be relieved of risk of undergoing criminal trial). This is something of a variant of the more familiar use or the injunctive process to restrain enforcement of an allegedly unconstitutional law. See Ex parte Young, 209 U.S. 123 (1908).

§10.2. 1 G.L., c. 272, §28A.

2 Commonwealth v. Calabrese, 1969 Mass. Adv. Sh. 450, 245 N.E.2d 413; Commonwealth v. Johnson, 1969 Mass. Adv. Sh. 824, 247 N.E.2d 698, cert. denied, 396 U.S. 990 (1969).

3 Roth v. United States, 354 U.S. 476 (1957).

4 A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413 (1966), cited as Fanny Hill, noted in 1966 Ann. Surv. Mass. Law §11.2.

5 383 U.S. 463 (1966), noted in 1966 Ann. Surv. Mass. Law §11.2.

6 Demetropoulos v. Commonwealth, 342 Mass. 658, 175 N.E.2d 259 (1961).

7 Johnson v. Massachusetts, 396 U.S. 990 (1969). Justices Black and Douglas voted to grant certiorari and reverse summarily.

8 People v. Carlos, 24 N.Y.2d 865, 248 N.E.2d 924 (1969).

rari[9] but revoked the grant on the same day.[10] Three weeks later it again granted the writ and summarily reversed,[11] citing *Redrup v. New York*.[12] As noted in these pages at the time, *Redrup*, and the summary decisions coming after it, do little by way of offering guidelines for determining which publications are constitutionally protected.

It may be questioned whether the obscurity of the Supreme Court's reasons for its disposition of obscenity cases is best met by comparably cryptic statements of a state court's reasons for decisions in such cases. Earlier in the 1969 SURVEY year, in another constitutional area, the Supreme Judicial Court, while deploring the failure of the Supreme Court of the United States to announce precise standards for allowance or disallowance of claims of privilege against self-incrimination,[13] proceeded to articulate its reasons for concluding that a particular claim of privilege was not well taken.[14]

In another case, the Court dealt less summarily with a conviction for presenting a film entitled Fanny Hill Meets Dr. Erotico.[15] The brief rescript recited the familiar triple standard: "The film is obscene. Its dominant theme as a whole appeals solely to a prurient interest in sex; it is patently offensive, an affront to contemporary community standards regarding sexual matters; and it is *utterly* without redeeming social value." The italicizing of "utterly" was probably designed to forestall reopening of the Pandora's box which erupted when the Fanny Hill book case was in litigation. There, neither the trial judge nor the majority of the Supreme Judicial Court found any redeeming social value in the book. In substance, the majority opinion said merely that even if the book had social value, it was not significant enough to offset the objectionable features.[16] When the Supreme Court reversed, three Justices (perhaps four) assumed that

9 Carlos v. New York, 396 U.S. 926 (1969).

10 Ibid.

11 Carlos v. New York, 396 U.S. 119 (1969). Perhaps the greatest significance of this case lies in the fact that Chief Justice Burger dissented (with Justice Harlan) and aligned himself with the latter on the point advanced in Roth, note 3 supra 354 U.S. at 496 (separate opinion), and Fanny Hill, note 4 *supra*, 383 U.S. at 455, that Fourteenth Amendment due process tolerates a greater degree of state regulation of publication than the First Amendment would allow the United States. These two justices would have denied certiorari but, since the majority decided to grant the writ, they would have affirmed summarily the decision below.

12 386 U.S. 767 (1967), noted in 1967 Ann. Surv. Mass. Law §8.5, at 106.

13 The Court referred to what is considered elusive standards set forth for determining whether the Fifth Amendment privilege against self-incrimination was appropriately claimed in Hoffman v. United States, 341 U.S. 479 (1951). The same standards are applicable in state proceedings under Malloy v. Hogan, 378 U.S. 1 (1964).

14 1969 Mass. Adv. Sh. 331, 245 N.E.2d 246.

15 Commonwealth v. State Amusement Corp., 1969 Mass. Adv. Sh. 1003, 248 N.E.2d 497.

16 Attorney General v. A Book Named "John Cleland's Memoirs of a Woman of Pleasure," 349 Mass. 69, 206 N.E.2d 403 (1965).

there was at least some literary or social merit in the book, and concluded that this made it constitutionally protected.

Whether the issue of a book's or a film's endowment or nonendowment with literary merit or "redeeming social value" presents a question of fact or of law, or a mixed question of both, has not been resolved. Nor is there anything like a clear answer to the stickier question whether the issue is to be resolved on the basis of testimony given by "experts," or by a judicial "intuition of experience"[17] in reaction to the publication or picture.

Some answers may be forthcoming in the decision of a case which is pending on appeal at the present writing. In a prosecution for exhibition of an erotic film entitled I Am Curious (Yellow), the chief justice of the superior court prefaced his findings of guilty with a lengthy opinion.[18] The film is heavily larded with scenes of nudity and explicit graphic displays of various forms of sexual intercourse. Several defense witnesses testified as to social values of the film and rebuttal witnesses for the Commonwealth testified to the contrary. As to these, the chief justice said:

> Presented with divergent analyses of "I Am Curious (Yellow)," predicated on contradictory expert testimony, I am not bound to accept the testimony of any witness or group of witnesses. Otherwise, the expression of the professed views of a small number of partisan witnesses could oust the trial judge from his traditional function.
>
> I do not find the testimony of the defense witnesses persuasive, and, insofar as the law permits, I reject it.[19]

The opinion went on to question the "utterly without redeeming social value" factor of legal obscenity. The argument ran to the effect that the requirement of this factor for a finding of obscenity is not really Supreme Court doctrine, since it was primarily announced in an opinion subscribed to by but three members of the full court.[20]

17 Chicago, Burlington & Quincy R.R. v. Babcock, 204 U.S. 585, 598 (1907). The epigram was made by Justice Holmes to describe the process by which assessors may properly arrive at certain of their conclusions.

18 Commonwealth v. Karalexis, Nos. 43068 Cr.–43071 Cr. (Suffolk County Ct. 1969).

19 Ibid.

20 Fanny Hill, 383 U.S. 413 (1966). There was no opinion of the Court. Justice Brennan delivered the lead opinion, joined by Chief Justice Warren and Justice Fortas. Justices Black and Stewart concurred in the result on the grounds set forth in their respective dissenting opinions in the companion cases, Ginzburg v. United States, 383 U.S. 463 (1966), and Mishkin v. New York, 383 U.S. 518 (1966). Justice Douglas also concurred in an opinion which assumed that the book had a "social value." Justices Clark, Harlan and White dissented in separate opinions. The superior court's doctrinal conclusion from its fragmentation of the Supreme Court's decision inspired Judge Aldrich, in dealing with the same film, to the earthy comment, "If we may be pardoned the analogy, if deuces are wild, an inside straight flush and a deuce takes the pot." Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969).

However, as the opinion also noted, the doctrine has been accepted as binding by the Supreme Judicial Court.[21] The Chief Justice found that the film is utterly without redeeming social value.

What might be called the "facade doctrine" with respect to redeeming social value was also adverted to in the opinion. This doctrine was epitomized by Judge Friendly in a special concurrence with a decision holding this film not obscene under the customs laws: "[A] truly pornographic film would not be rescued by inclusion of a few verses from the Psalms."[22] While the Court of Appeals for the Second Circuit concluded that this proposition was not relevant, the Maryland Court of Appeals recently reached the opposite result.[23] The Massachusetts opinion offers an extension of this concept in the following language:

> [T]o restore some degree of rationality to the element of "social value" as set forth in *Roth,* the deliberate use of the term "redeeming" should be given due weight. *Roth's* repudiation of the doctrine of *Regina v. Hicklin,* L.R. 3 Q.B. 360 (1868) that the obscenity of a work cannot be judged according to isolated excerpts implies that neither should an otherwise pornographic work be redeemed by a similar consideration of isolated passages of minimal social value.[24]

This thought is advanced, it must be remembered, on the premise that complete absence of social value is not a requisite of denying constitutional protection to a publication.

Another view of the constitutional status of I Am Curious (Yellow) was advanced by a divided United States District Court of three judges which issued an injunction against further prosecutions of the exhibitors of the film.[25] The majority felt that the substantive issue was governed by *Stanley v. Georgia,*[26] which held that possession of obscene pictures held for the personal delectation of the possessor was constitutionally protected. The film, so the argument runs, is known (by reason of exclusion of minors from the theatre) to be offensive; those who go to view it are willing to be exposed to it; collectively they have the same right to this sort of delectation as does an individual *Stanley.* The opinion of the court asserts, without documentation, that a necessary corollary of *Stanley* is that a producer or distributor of por-

21 Attorney General v. A Book Named "Naked Lunch," 351 Mass. 298, 218 N.E.2d 517 (1966).

22 United States v. A Motion Picture Film Entitled "I am Curious — Yellow," 404 F.2d 196, 201 (2d Cir. 1968). See also Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial circular is not transformed into constitutionally protected publication by having patriotic platitude appended to it).

23 Wagonheim v. Maryland State Board of Censors, — Md. —, 258 A.2d 240 (1969), cert granted sub. nom. Grove Press, Inc. v. Maryland State Board of Censors, — U.S. — (1970).

24 Commonwealth v. Karalexis, Nos. 43068 Cr.–43071 Cr. (Suffolk County Ct. 1969).

25 Karalexis v. Byrne, 306 F. Supp. 1363 (D. Mass. 1969), cert. granted, —— U.S. —— (1970).

26 394 U.S. 557 (1969).

nographic materials has (under First Amendment principles?) rights coextensive with those of the reader or viewer (which may be determined as much by constitutional or principles of privacy as by principles of the freedoms of speech and press). On the other hand, the court does not make clear why the advertising of the film, having the effect which the court attributes to it, does not fall within the "pandering" restriction of *Ginzburg v. United States*.[27]

On December 15, 1969, these questions were, at least temporarily, rendered academic. The Supreme Court stayed the district court's injunction, pending the taking of an appeal by the prosecutor, and, if such appeal is taken, pending its ultimate disposition.[28] Whether the stay was motivated by doubts of the propriety of federal court intervention in state criminal proceedings,[29] doubts as to the standing of the plaintiffs to raise the issues considered by the district court, doubts as to the correctness of the extension of the *Stanley* doctrine, doubts as to the jurisdiction of the district court to decide the case on an issue narrower than that of the constitutionality of the statute (as distinct from the constitutionality of its specific application),[30] or some other doubt, cannot be known at least until (and unless) the Supreme Court passes upon the merits of the appeal.

§10.3 Sexually dangerous persons statute. The story of Leroy Peterson and of his litigation over the sexually dangerous persons law[1] was told in these pages last year.[2] The final chapter of the story, however, had to be compressed into a footnote inserted while the volume was in the press.[3]

While Peterson was serving a prison term for assault with a dangerous weapon, proceedings were instituted looking to his commitment as a sexually dangerous person. After trial in the superior court he was ordered committed. Judgment was affirmed on appeal,[4] and certiorari was denied by the Supreme Court of the United States.[5] Collateral attacks upon the judgment were brought first in the United States District Court, which dismissed for failure to exhaust state remedies,[6] then in the Supreme Judicial Court, which dismissed on the

27 383 U.S. 463 (1966).

28 Byrne v. Karalexis, 396 U.S. 976 (1969).

29 The act, 28 U.S.C. §2283, forbidding federal courts to issue injunctions to stay proceedings in state courts, might be applicable, as the federal action was commenced after a state indictment had been returned. That indictment, however, was quashed, and the state conviction was had under a subsequent indictment. Commonwealth v. Karalexis, Nos. 43668 Cr.–43071 Cr. (Suffolk County Ct. 1969). See Dombrowski v. Pfister, 380 U.S. 479 (1965); Zwickler v. Koota, 389 U.S. 241 (1967).

30 See Douglas v. Jeannette, 319 U.S. 157 (1943).

§10.3. 1 G.L., c. 123A.

2 1968 Ann. Surv. Mass. Law §7.2, at 190.

3 Id. at 197, n.29.

4 Commonwealth v. Peterson, 348 Mass. 702, 205 N.E.2d 719 (1965), noted in 1965 Ann. Surv. Mass. Law §12.9.

5 Peterson v. Massachusetts, 384 U.S. 909 (1966).

6 Peterson v. Gaughan, Superintendent, Misc. Civ. No. 66-38-C (D. Mass., memorandum of June 19, 1967).

merits.[7] The federal case was reactivated, and the district court reached the same conclusion as had the state court.[8]

Perhaps the principal issue in the case grew out of the fact that a substantial amount of the evidence against Peterson at his trial was hearsay. Counsel made a timely objection, but the court admitted the material de bene esse, and no motion to strike was subsequently made. The Supreme Judicial Court and the district court, invoking the familiar rule that inadmissible evidence admitted without appropriate objection being perfected may have probative effect, decided that there was no fatal error.

These decisions were criticized here[9] on the ground that the courts had failed to address themselves to the question whether Peterson had a constitutional, not merely an evidentiary, right to be confronted by the witnesses against him, although the commitment proceedings were "civil," rather than "criminal," and if so, whether the right had been effectively waived.

Upon appeal to the Court of Appeals for the First Circuit it was held[10] that the Supreme Court's decision in *Specht v. Patterson*,[11] while the case is distinguishable on its facts, establishes that a commitment proceeding against one charged with sexual deviation must be attended with the elements of due process of law traditionally required in conventional criminal proceedings. One of these elements is the right of confrontation. The court of appeals proceeded, however, to rule that on the facts disclosed by the record — the conditional admission of the hearsay, the known availability of a motion to strike, and particularly the fact that the trial judge told counsel that he would be allowed to file any motion he thought appropriate — it must be concluded that Peterson's counsel had intelligently waived his right of confrontation.

This conclusion is supported only by citation of one case in which the Supreme Court laid down the generalization that, "A waiver [of fundamental constitutional rights] is ordinarily an intentional relinquishment or abandonment of a known right or privilege."[12] No reference is made to subsequent cases in which this principle was substantially refined. Thus, it has been indicated that mere nonexercise of a known right does not necessarily constitute a waiver,[13] and that failure to claim a known right does not amount to a waiver unless it is found that the failure is a deliberate and purposeful trial strategy.[14] Furthermore, there is an as yet uncharted area within which rights

7 Peterson, petitioner, 354 Mass. 110, 236 N.E.2d 82 (1968).

8 Peterson v. Gaughan, 285 F. Supp. 377 (D. Mass. 1968).

9 1968 Ann. Surv. Mass. Law §72, at 196.

10 Peterson v. Gaughan, 404 F.2d 1375 (1st Cir. 1968). In addition to ruling on the confrontation issue, the decision also reviewed and sustained the determinations that the statute was not void for vagueness and that it did not deny equal protection of the laws.

11 386 U.S. 605 (1967).

12 Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

13 Fay v. Noia, 372 U.S. 391, 438-440 (1963).

14 Henry v. Mississippi, 379 U.S. 443, 449-452 (1965).

may be waived only by the individual concerned and cannot be waived by counsel.[15]

As far as the Peterson litigation is concerned, this issue was rendered academic, as Peterson was released from custody shortly after the Court's decision, and no further proceeedings were undertaken in the case.

§10.4. Habeas corpus: Right to be heard unaffected by time. The case of *Chin Kee v. Massachusetts*,[1] decided during the 1969 SURVEY year, hinged upon an issue not likely to be presented again. It nevertheless deserved mention in an account of constitutional developments because it stands as striking proof that in fact, not merely in theory, the passage of time does not wipe out the right of a convicted person to be heard on the merits of a claim that his conviction grew out of an invasion of constitutionally protected right.

In 1932 Chin Kee was convicted in the superior court of murder in the first degree. The following year the judgment against him was affirmed.[2] The death sentence, originally imposed, was commuted to life imprisonment. Thirty-five years later he was allowed to raise for the first time, the contention that his trial had been wanting in due process of law.

It appeared that at the time of Chin Kee's arraignment under the murder indictment he was not represented by counsel. He pleaded not guilty, and subsequently an attorney was designated to represent him at the trial. At the time, the law of Massachusetts was to the effect that a general plea to an indictment constituted a waiver of any right to plead matters in abatement of the indictment.[3] After it was determined, many years later, that the right to the assistance of counsel in state criminal proceedings is a right of constitutional dimension,[4] Chin Kee conceived that the state's failure to provide him with such assistance at his arraignment was a deprivation of his constitutionally protected rights.

On a petition for writ of error, the Supreme Judicial Court denied relief.[5] It pointed out that there was no showing that there had been

[15] Brookhart v. Janis, 384 U.S. 1, 7 (1966).

§10.4. [1] 407 F.2d 10 (1st Cir. 1969).

[2] Commonwealth v. Chin Kee, 283 Mass. 248, 186 N.E.2d 53 (1933). No point was made in this appeal with reference to the timing of the assignment of counsel for the defendant. In fact, the relevant statute appears to contemplate that counsel is to be assigned after the accused pleads to the indictment, G.L., c. 277, §47.

[3] Commonwealth v. Blake, 94 Mass. 188 (1866); but see Commonwealth v. Harris, 231 Mass. 584, 121 N.E. 409 (1919). The rule became largely a matter of historical interest in 1964, when the superior court adopted its Rule 101A, expressly overruling the doctrine that a plea waives matter in abatement. Since 1965, pleas in abatement in criminal cases have been abolished, and matter in abatement is presented by motion to dismiss, with supporting affidavits, where appropriate, G.L., c. 277, §47A.

[4] Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52 (1961); White v. Maryland 373 U.S. 59 (1963).

[5] Chin Kee v. Commonwealth, 354 Mass. 156, 235 N.E.2d 787 (1968).

any matter in abatement, and it inferred from the diligence and competence of trial counsel as reflected in the record and from his failure to offer to show such matter that there had been in fact no basis for a plea in abatement. The conclusion was that if, in fact, hindsight would show the failure to assign counsel at the time of arraignment to have been error, it was "harmless."

Chin Kee then addressed a petition to the United States District Court. Counsel was appointed, and a petition for federal habeas corpus was heard and denied on the basis of the opinion of the Supreme Judicial Court.[6] Upon appeal, the United States Court of Appeals for the First Circuit affirmed.[7] Its approach differed somewhat from that of the state court. Both courts start with the premise, mandated by the Supreme Court,[8] that an accused is entitled to the assistance of counsel at every "critical stage" of a criminal proceeding. The court of appeals focused upon the question whether an arraignment was such a stage in Massachusetts in 1932. Pointing out that the right to plead in abatement was not, in any circumstances, an unqualified right, and that, even under the law as it stood at that time, a judge had discretionary power to entertain a plea in abatement after a general plea had been entered, the court concluded that the arraignment of Chin Kee had been a "marginally" critical stage of the prosecution against him. This refinement was relevant to the question of how much must be shown to convince the reviewing court "beyond a reasonable doubt"[9] that the deprivation of constitutional right was harmless. The court concluded that the Commonwealth had shown enough by establishing that industrious trial counsel had not invoked the court's discretion to consider any matter in abatement and by pointing out that there was no present suggestion that there was in fact matter which could have been pleaded in abatement.

On June 23, 1969, the last chapter in the long litigation was written when the Supreme Court denied a petition for certiorari which sought clarification of the reasonable doubt standard by which courts in post-conviction proceedings are to distinguish harmless deprivations of constitutional rights from those which are more noxious.[10]

§10.5. Miscellaneous decisions. Another "loyalty oath" problem arose during the 1969 SURVEY year. A statute[1] requires public employees to take the following oath: "I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the Commonwealth of Massachusetts

[6] Chin Kee v. Massachusetts, Civ. No. 68-41-M (D. Mass., Aug 1, 1968).

[7] Chin Kee v. Massachusetts, 407 F.2d 10 (1st Cir. 1969).

[8] Hamilton v. Alabama, 368 U.S. 52 (1961).

[9] Chapman v. California, 386 U.S. 18 (1967) announced that, where a deprivation of constitutional right has been established, the state has the burden of establishing beyond a reasonable doubt that the error was harmless.

[10] Chin Kee v. Massachusetts, 395 U.S. 982 (1969).

§10.5. [1] G.L., c. 263, §14.

and that I will oppose the overthrow of the government of the United States of America or of this Commonwealth by force, violence or by any illegal or unconstitutional method."

A federal district court of three judges held that the "uphold and defend" clause of the oath was not objectionable, but that the "oppose the overthrow" clause contained a too vague description of the obligation required to be taken by employees.[2] It was not clear to the court whether the employee would undertake simply not to participate in violent or illegal subversion, or to take positive action against subversive activity by others.

In sustaining the "uphold and defend" part of the oath, the court relied upon a decision of another federal district court[3] sustaining a statute requiring teachers (among others) to subscribe to an oath to "support" the constitution. The latter decision was affirmed per curiam by the Supreme Court of the United States.[4]

In the *Knight* case there was involved an oath identical in form to the oath required of teachers by a Massachusetts statute.[5] It pledged not only support of the constitutions, but also went on to recite, "I will faithfully discharge the duties of the position of (insert name of position) according to the best of my ability." The Supreme Judicial Court held that the quoted language, at least as required of teachers in private schools, is unconstitutionally vague.[6] The Court went on to say that the "faithfully discharge" clause of the oath was not separable from the "support" clause. The federal court which decided the *Knight* case explicitly refused to follow the reasoning of the Massachusetts court.

The Commonwealth has taken an appeal, contending that the "oppose the overthrow" clause of the oath is not objectionably vague.[7] One can only speculate, at this point, whether the case will be considered as raising the question not reached in *Pedolsky:* Is a required pledge to support or defend the constitutions subject to the "overbreadth" objections which have been fatal to "negative oaths," in which the employee was required to disclaim present or past membership in subversive organizations?[8]

Another federal district court decision should be noted here, although it involves a matter of national rather than state law. In *United States v. Sisson,*[9] the court placed the right of a conscientious

[2] Richardson v. Cole, 300 F. Supp. 1321 (D. Mass. 1969), *judgment vacated and case remanded,* 38 U.S.L.W. 3362 (U.S. Mar. 17, 1970).

[3] Knight v. Board of Regents, 269 F. Supp. 339 (S.D.N.Y. 1967).

[4] Knight v. Board of Regents, 390 U.S. 36 (1967).

[5] G.L., c. 71, §30A.

[6] Pedolsky v. Massachusetts Institute of Technology, 352 Mass. 127, 224 N.E.2d 414 (1967), noted in 1967 Ann. Surv. Mass. Law §17.2.

[7] Cole v. Richardson, No. 679 (October Term, 1969).

[8] See, e.g., Baggett v. Bullitt, 377 U.S. 360 (1964). The Supreme Court remanded the case to determine whether it has become moot. 38 U.S.L.W. 3362 (U.S. Mar. 17, 1970).

[9] 297 F. Supp. 902, (D. Mass. 1969).

objector to exemption from compulsory military service on a constitutional, rather than a statutory basis. In *United States v. Seeger*[10] the Supreme Court had construed the then applicable statute exempting conscientious objectors as covering those whose objections were grounded on purely ethical principles as well as those whose objections grew out of religious conviction. Congress amended the statute so as to confine the exemption to one, "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[11] Sisson was found to be, by reason of ethical conviction, not religious training and belief, opposed to participation in the Vietnam conflict. After a jury found him guilty of refusal to submit to induction into the armed services pursuant to the Selective Service Act, the court granted a motion to arrest judgment, ruling that the limitation of the exemption in the amended statute violated both the "free execrise of religion" clause and the "establishment of religion" clause of the First Amendment.

The government has taken a direct appeal to the Supreme Court, seeking to argue that exemption from combat service may be limited to (a) those whose conscientious objections stem from religious roots, and (b) those whose conscientious objection is to all war, not merely selected wars. Conceivably, these issues will not be reached, and the case could go off on a jurisdictional point. The court postponed the jurisdictional question until argument on the merits,[12] evidently having some doubt whether the granting of a motion to arrest judgment was tantamount to entering judgment in favor of the defendant non obstante veredicto, a ruling from which the statutes do not provide appeal to the Supreme Court.[13]

In another criminal case the Supreme Judicial Court held that the constitutionally protected right to the assistance of counsel at the time of sentencing[14] does not include a right to have the contents of a presentencing probation officer's report made available for inspection by counsel for the defendant.[15] This, as the opinion of the Court documents, is an issue upon which the authorities are divided. Perhaps the numerical weight of authority tends to the view that the disclosure of any or all of the contents of the report lies in the discretion of the presiding judge.[16] In jurisdictions where disclosure of the contents of the report is required, this generally is the result of a judgment that

[10] 380 U.S. 163 (1965).

[11] Pub. L. No. 90-40, §1(7), 50 U.S.C. App. §456(j) (1967).

[12] United States v. Sisson, 396 U.S. 812 (1969).

[13] 18 U.S.C. §3731 sets forth the criteria for direct appeals to the Supreme Court in criminal cases. If the Supreme Court should rule that a direct appeal does not lie, but that an appeal would lie to a court of appeals, the case could be remanded to the Court of Appeals for the First Circuit.

[14] Mempa v. Rhay, 389 U.S. 128 (1967).

[15] Commonwealth v. Martin, 1969 Mass. Adv. Sh. 215, 244 N.E.2d 303.

[16] Rule 32(c)(2) of the Federal Rules of Criminal Procedure states, in substance, the standard generally followed.

such procedure makes for sound administration of criminal justice, rather than of a feeling of constitutional compulsion.[17]

The sticky problem of a public employee's duty to answer questions put to him by his superior in connection with the performance of his duties was considered in *Silverio v. Municipal Court of the City of Boston*.[18] The petitioner was a policeman who was called to his captain's office and questioned with respect to his appearance as a witness before the grand jury. A number of persons, including three policemen, were indicted by the grand jury in connection with motor vehicle thefts. Silverio declined to state whether he had been questioned by the grand jury about the thefts or whether he had refused to answer grand jury questions on the ground of privilege against self-incrimination. For the refusals he was discharged. Had the discharge been based upon a claim of constitutional privilege,[19] or had it been based upon answers given in reaction to a threat to discharge unless the employee waived his privilege again self-incrimination,[20] it would have been unlawful. As the Court pointed out, however, the refusal to answer the questions put was not within the privilege, and, since the questions were relevant to the officer's duties of law enforcement (some of them were as to his acquaintance with certain persons who may have been involved in the thefts) refusal to answer was a proper ground of discharge. The Supreme Court of the United States denied certiorari.[21]

The final case to be noted is *Commonwealth v. Haseotes*.[22] This case grew out of the statute[23] which requires retailers selling prepackaged meat, poultry or edible fish to provide their outlets with computing scales and to reweigh any such prepackaged food at the request of a prospective customer. This was found to be a reasonable requirement calculated to protect consumers against fraud, accident, carelessness or mistake which might lead to their being overcharged by being given less food than the label indicates. As to application of the statute to prepackaged food from out-of-state sources, the Court concluded that the cost of the scales to weigh such foods did not impose an appreciable burden in interstate commerce in such foods. After examining the various federal laws dealing with the processing, packing, marking and labeling of the kinds of food products involved, together with the implementing agency rules and regulations, the Court concluded that

17 See the majority and dissenting opinions in State v. Kunz, 55 N.J. 128, 259 A.2d 895, 38 U.S.L.W. 2402 (1969). The majority of the New Jersey Supreme Court takes a position substantially similar to the proposal in the American Law Institute Model Penal Code §7.07(5) (Proposed Official Draft 1962). Essentially, the reports are to be shown to counsel after being screened by the trial judge and edited as may be necessary to protect sources of confidential information.

18 1969 Mass. Adv. Sh. 691, 247 N.E.2d 379.

19 Gardner v. Broderick, 392 U.S. 273 (1968).

20 Uniformed Sanitation Men v. Commissioner of Sanitation, 392 U.S. 280 (1968).

21 Silverio v. Municipal Court of the City of Boston, 396 U.S. 878 (1969).

22 Commonwealth v. Haseotes, 1969 Mass. Adv. Sh. 1033, 249 N.E.2d 639.

23 G.L., c. 98, §56B.

there had not been federal preemption of the area of such magnitude as to preclude state legislation requiring provision of computer scales to verify the label recitals of weight and price.

B. Student Comment

§10.6. Free speech: Invasion of privacy: Commonwealth v. Wiseman.[1] The respondent, Frederick Wiseman, is a noted producer of educational and documentary films. In 1965, he sought permission from the commissioner of correction and the superintendent, Massachusetts Correctional Institution, Bridgewater, to make a documentary film at Bridgewater. The commissioner and the superintendent denied his initial request, but in January of 1966 they relented, provided that such permission was within their authority (as determined by the attorney general of the Commonwealth) and provided further that certain specific requirements designed to protect the interests of the inmates were met.[2]

In March of 1966, the attorney general (Edward Brooke) advised the superintendent, that if he deemed it advisable, then he could permit Wiseman to make his film at Bridgewater.

Permission was then granted and Wiseman began filming at the institution in April of 1967. After completion, in June of 1967, the film, which had been entitled Titicut Follies, was shown to the superintendent and the attorney general (Elliot Richardson). In September of that year, the attorney general notified Mr. Wiseman and his legal advisers "that in his opinion the film constituted an invasion of the privacy of the inmates shown in the film; that mentally incompetent patients were shown . . . and that the releases, if any, obtained by Wiseman, were not valid."[3] The commissioner first saw the film in September, and on September 21, 1967, he notified the respondent that the film could not be shown in its "present form."[4]

Notwithstanding these objections by the attorney general of the Commonwealth, the commissioner of correction, and the superintendent of the institution, Wiseman proceeded to contract with Grove Press, Inc. for the public distribution of the film as made.

The superintendent and the commissioner of correction as parens patriae, brought suit on behalf of inmates pictured in the film on the

§10.6. [1] 1969 Mass. Adv. Sh. 1055, 249 N.E.2d 610, petition for cert. filed 38 U.S.L.W. 3102, No. 621 (U.S. Sept. 18, 1969).

[2] The superior court found that Wiseman was permitted to make the film on the following conditions: "(a) that 'the rights of the inmates and patients [would be] fully protected,' (b) that there would be used only 'photographs of inmates and patients . . . legally competent to sign releases,' (c) that a written release would be obtained 'from each patient whose photograph is used in the film,' and (d) that the film would not be released 'without first having been . . . approved by the Commissioner [of Correction] and Superintendent [of Bridgewater].'" Id. at 1056, 249 N.E.2d at 612.

[3] 1969 Mass. Adv. Sh. at 1057, 249 N.E.2d at 613.

[4] Ibid.

theories of breach of contract and invasion of privacy. The trial court found that respondent had violated the terms of the agreement on which petitioners had allowed him to make the film, and that the film was an invasion of the inmates' privacy. Petitioners were granted an injunction banning all showings of Titicut Follies. Respondent appealed to the Supreme Judicial Court claiming primarily that the freedom of speech guaranteed by the First Amendment precludes the granting of such an injunction. The Court HELD: The film was an invasion of the inmates' privacy; that in making it Wiseman had breached the contract; that its subject was not a matter of public concern protected by the First Amendment; but that the good of showing it to "professional audiences"[5] would outweigh any possible harm.

The Court based its decree denying the general public access to Titicut Follies in small part on the breach of contract which the trial court found as fact, and in large part on the invasion of privacy which it found from its own viewing of the film. That part of the decree allowing professional audiences to see the film is based on a public interest in having these people aware of conditions at Bridgewater and similar institutions. This public interest is said to outweigh any private harm done to the inmates.

The *Wiseman* case reviewed the following issues: the standing of the Commonwealth to maintain the action, the propriety of equitable relief from invasion of privacy, and most important, the conflicting claims of the public to be informed and of the individual to preserve his privacy.

It seems clear that the Commonwealth itself would have no standing to maintain this action. It is true that the Commonwealth made the contract which it alleged was breached; but it did so on behalf of the inmates of Bridgewater. The contract was designed to serve a personal rather than a material interest, to protect the rights of the inmates and in particular not to realize a financial gain.[6] Therefore the equitable remedy of an injunction, rather than the legal remedy of damages, was sought by the Commonwealth.

The interest for which protection was sought — privacy — was in the inmates of Bridgewater and not in the Commonwealth. Wiseman contended that the true interest of the Commonwealth was in protecting its own reputation as custodian, and as such was adverse to the interests of the inmates; that the Commonwealth was interested in suppressing a report of conditions at Bridgewater at the expense of those suffering under those conditions.[7] Whatever truth his contention may have had, it is not significant. The Commonwealth may well have had a selfish motive in bringing the action, but its motive must be kept

[5] Specifically, "legislators, judges, lawyers, sociologists, social workers, doctors, psychiatrists, students in these or related fields, and organizations dealing with the social problems of custodial care and mental infirmity." Id. at 1065, 249 N.E.2d at 618.

[6] See note 2 *supra*.

[7] Brief for Respondents at 44-46.

distinct from its action. It acted for the inmates. The inmates have a personal right of privacy,[8] which, as a personal right, may properly be protected by a court of equity.[9] There was a serious question as to whether that privacy had been invaded.

The right to maintain an action for invasion of privacy lies in the victim only.[10] The victims here are inmates of a state institution. The legislature provided a comprehensive system for the care of incompetents[11] in the exercise of its power as parens patriae.[12] The duty to care for and control such persons was delegated by the legislature to the commissioner of correction and the superintendent at Bridgewater.[13] With that duty passed the corresponding duty to protect the interests of the inmates at Bridgewater;[14] and, where there is a duty to protect, a fortiori there must be a corresponding power. The inmates, who have so little freedom to act, have no power to protect themselves in a situation such as this. That responsibility lies with those who restrict their actions. Custody gives rise to responsibility; the power a person would have had to act in his own best interests passes, upon his commitment to Bridgewater, into the hands of his custodians, so that they may fulfill this responsibility. Insofar as it acts on behalf of the inmates at Bridgewater, the Commonwealth would have standing to seek injunctive relief in a collective suit.

Equitable relief from wrongs to the person is an outgrowth of equitable relief from wrongs to property. It originated with the landmark case of *Gee v. Pritchard*.[15] In that case the plaintiff, a widow, had taken the defendant into her home and raised him as her son, at the request of her husband. Her husband died leaving defendant a large share of his property; but defendant was dissatisfied with his inheritance. He proposed to publish personal and confidential letters which he had received from his stepmother. To prevent this, she obtained an injunction. In denying a motion to dissolve the injunction, the chancellor explicitly denied that he was doing so "because the letters are written in confidence, or because the publication of them may wound the feelings of the Plaintiff. . . ."[16] He based his decision on a property interest of plaintiff in the letters, which defendant's publication of them would violate. Clearly the real wrong is to plaintiff's feelings and not to her property. It was a case of saying one thing and

[8] See Griswold v. Connecticut, 381 U.S. 479 (1965).

[9] Kenyon v. City of Chicopee, 320 Mass. 528, 70 N.E.2d 241 (1946). See also Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. 640 (1916).

[10] Compare Brauer v. Globe Newspaper Co., 351 Mass. 53, 217 N.E.2d 736 (1966), and Kelley v. Post Publishing Co., 327 Mass. 275, 98 N.E.2d 286 (1951), with Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930).

[11] G.L., c. 123.

[12] Ex parte Dubois, 331 Mass. 575, 578, 120 N.E.2d 920, 922 (1954).

[13] G.L., c. 123, §§4, 28.

[14] Ex parte Sturm, 152 Md. 114, 119, 136 A. 312, 314 (1927).

[15] 36 Eng. Rep. 670 (Ch. 1818).

[16] Id. at 678.

doing another. That is, the chancellor denied the power of equity to prevent a personal wrong, and then prevented it, calling upon precedent in the form of property rights to justify a departure from precedent. "Something is found which gives the camel's nose legitimate standing in the chancellor's tent, and the whole beast follows. . . ."[17]

After *Gee v. Pritchard,* there was a growing tendency in courts of equity to relieve personal wrongs. In 1946, a group of Jehovah's Witnesses sought an injunction restraining officials of Chicopee, Massachusetts, from arresting them for passing out pamphlets. The statute under which they were being arrested was clearly unconstitutional. The Supreme Judicial Court of Massachusetts declared itself "impressed" by plaintiffs' suggestion that "if equity would safeguard their right to sell bananas it ought to be at least equally solicitous of their personal liberties guaranteed by the Constitution."[18] The Court went on to say: "We believe the true rule to be that equity will protect personal rights by injunction upon the same conditions upon which it will protect property rights by injunction."[19] These conditions are if a substantial right of plaintiff will be materially impaired, if the legal remedy is inadequate, and if an injunction would be enforceable.[20]

These conditions were met in *Wiseman.* The right in question is the right to privacy, which emanates from the Bill of Rights.[21] This right is substantial, especially to people in the unfortunate situation of the inmates of Bridgewater. The mere fact of their confinement, if disclosed, might harm them; and in this case considerably more than that fact is disclosed. The abysmal conditions of their confinement are revealed in the film. Many are shown naked, in degrading and humiliating situations. A number of the men are clearly identifiable. A more material invasion of privacy could hardly be imagined.

Damages awarded to the inmates by a court of law would not repair the injury to one who was identified by people seeing the film. Every individual has a right "to be secured in his dignity and honor as part of his personality. . . ."[22] The situations in which these inmates are pictured rob them of dignity and honor, and no amount of money will give it back.

Of those who can be identified, perhaps not all would be so affected. They may have changed in appearance during their confinement and would be unrecognizable to former friends and neighbors. It is possible that they had no friends or have none now. They may have no

[17] Pound, Equitable Relief Against Defamation and Injuries to Personality, 29 Harv. L. Rev. at 672.

[18] Kenyon v. City of Chicopee, 320 Mass. at 533-534, 70 N.E.2d at 244.

[19] Id. at 534, 70 N.E.2d at 244.

[20] Ibid.

[21] 381 U.S. at 483-484. See also Pound, Interests of Personality (pts. 1-2), 28 Harv. L. Rev. 343, 445, 362-365, 447-453 (1915).

[22] Id. at 447.

family that would suffer if this film were shown. Still, the risks of showing the film readily should not be taken without sound justification.

To the inmates pictured who cannot be recognized, there may have been injury, but it is submitted that it is not irreparable. What injury there is lies mainly in the actual filming,[23] which is not in issue. Even though there may be some injury to these people from the exhibition of the film — in that it might upset them if they saw or knew of the contents, which is unlikely during their confinement — they would not be injured in the eyes of society. This limited invasion of privacy is counterbalanced, in any event, by the interest of making the public aware of the situation.

The enforceability of an injunction barring the exhibition of Titicut Follies depends on the scope of the decree. The decree banning all showings of Titicut Follies was easily enforceable. The Court forbade Wiseman to show the film to anyone, at any time, and to ensure that he did not, ordered him to turn over the negative and prints to the Commonwealth. This would not have been unusually difficult to enforce.

The limited injunction granted by the Supreme Judicial Court, on the other hand, is more difficult to enforce. It limits showings to professional audiences.[24] It is not improbable that questions will arise as to how far the term professional extends; for instance, as to exactly what occupations are related to the fields specifically mentioned. Much time could be spent deciding these questions, with numerous fringe groups claiming the right to see it, and the Commonwealth contesting this right. The alternative would be for the Court, at the time of the first such decision, to spell out in minutest detail the qualities peculiar to a professional. This too would take time and would not necessarily eliminate any future problem of interpretation.

In either case, the effect of the limited injunction could be irrational. It is possible to imagine a group of concerned, responsible adults, who, since they do not fall under any of the accepted headings, are denied access to the film. At the same time it may be readily available to their high school–age sons and daughters whose qualification is one hour a week spent in a course such as psychology or sociology.[25]

In addition to matters of practicality, it should be noted that both these injunctions were in personam. They would affect Wiseman wherever he went, whether to another state or to another country. Therefore the decree of the Supreme Judicial Court of Massachusetts severely limits the exhibition of the movie everywhere in the world. It is submitted that the interest protected does not justify this wide a scope of

[23] Brief for Civil Liberties Union of Massachusetts as Amicus Curiae at 9.

[24] See note 2 *supra*.

[25] Milton High School, Milton, Massachusetts, offers such a course to students in the 12th grade. Telephone interview with secretary of the Guidance Department of Milton High School, Oct. 27, 1969.

suppression, for the farther from Massachusetts one goes, the less is the likelihood of injury to the subjects of the film in the eyes of society.

The practical effect and the scope of the injunction granted raise the question of its propriety. The major consideration in answering this question is a constitutional one, i.e., whether the interest for which protection is sought is outweighed by the interest in freedom of speech guaranteed by the First Amendment.

In cases where there may have been a violation of the First Amendment, the courts normally decide that issue by applying the "balancing test."[26] This test consists of weighing a governmental interest in subduing expression against a private interest in allowing it. In this case, however, the interests on both sides are private. While the Commonwealth is a party to the action, it is acting on behalf of private individuals. Actually, the Commonwealth's own interest would be better served if Titicut Follies were shown. It would arouse interest in the problems at such institutions, perhaps leading to widespread support of improvements. This was what state officials hoped for when the movie's filming was permitted. Now they are in the position of contesting the right of one individual, Wiseman, to disclose what they feel would invade the privacy of other individuals, for whom they are responsible.

A case in which similar rights were in conflict was *Time, Inc. v. Hill.*[27] The Hills were held captive in their home by escaped convicts, who released them unharmed. After this incident the family moved and discouraged all publicity. Their experience, somewhat fictionalized, was incorporated into a book. That book was subsequently made into a play, which was reviewed in Life magazine.

The review linked the Hills to the play, creating the impression that it was an accurate re-enactment of their experience. In the play the family suffered insult and violence which never actually occurred. Under a New York privacy statute,[28] Hill sued for damages for invasion of privacy. The Supreme Court held that, in the absence of a showing that the article was knowingly or recklessly false, it was protected by the First Amendment.

In *Wiseman* as in *Hill,* the individual's right to speak conflicts with the individual's right to privacy. The inmates at Bridgewater, like the Hill family, were thrust involuntarily into the arena of public interest. Once there, there is a limit to the protection they may receive. The result in *Hill* indicates that the Court decided this limit by using a balancing test similar to the one employed in cases where the government has an interest in suppressing speech. Harm to the individual, rather than harm to the government, is weighed against the value of allowing the speech.

[26] See 1968 Ann. Surv. Mass. Law §7.5, at 222-225.
[27] 385 U.S. 374 (1967).
[28] N.Y. Civ. Rights Law §§50-51 (McKinney 1948).

In both *Hill* and *Wiseman* the harm is apparent. The Court in *Hill* noted that in privacy cases the primary damage is mental distress. That is, injury to reputation bears on that damage.[29] The Hills seem to have suffered considerable mental distress as a result of publication of the article in Life, even though it does not appear that their reputation suffered greatly. It is uncertain, as mentioned above, to what degree the showing of Titicut Follies would damage the reputations of or cause mental distress to inmates pictured in it.

Both the conflicting rights are constitutionally guaranteed.[30] The right to freedom of speeech is explicit, while the right to privacy is implicit and its recognition is fairly recent. The Court in *Hill* mentioned the "primary value"[31] which our society places on freedom of speech. Privacy is a very basic right also, one that is in increasing need of protection, as technological advances make invasions of it progressively easier. Each case must be decided according to its particular circumstance.[32]

The Court in *Hill* evidently reasoned that, although there may have been an invasion of privacy, the matter was one of public interest, the harm done was not too great, and so Life had a right to publish. It is recognized that in *Wiseman* there is an invasion of privacy much more basic than in *Hill*. But it is undisputed that the subject of the film — conditions at a public institution for the mentally ill — is of considerable public interest. If the invasion is more basic, the subject matter, it is submitted, is much more compelling.

The pictures alleged to be invasions of privacy are directly related to the matter of concern. It was the conditions of living, care and treatment that needed to be improved; the film showed why. To point out the need for something, it is relevant to show the lack of it.

It has been said that there is an excessive preoccupation with nudity and sensationalism in the film, in excess of what might have been necessary for its effectiveness. Perhaps this is so. But it is not the court's function to decide whether or not there is. The Court in *Wiseman* denied doing this,[33] but it appears to have done so nonetheless.

In finding that the book Tropic of Cancer was not obscene, the Supreme Judicial Court said:

> . . . It is not the function of judges to serve as arbiters of taste or to say that an author must regard vulgarity as unnecessary . . . to establish particular ideas. Within broad limits each writer, attempting to be a literary artist, is entitled to determine such

29 Time, Inc. v. Hill, 385 U.S. at 384-385 n.9.

30 Regarding freedom of speech, see the First Amendment of the U.S. Constitution. Regarding the right to privacy, see the discussion of the First, Third, Fourth, Fifth and Ninth Amendments in Griswold v. Connecticut, 381 U.S. 479, 483-485 (1965).

31 Time, Inc. v. Hill, 385 U.S. at 388.

32 Stryker v. Republic Pictures Corp., 108 Cal. App. 2d 191, 238 P.2d 670 (1951).

33 1969 Mass. Adv. Sh. at 1064 n.10, at 249 N.E.2d at 618.

> matters for himself, even if the result is as dull, dreary, and offensive as the writer of this opinion finds almost all of Tropic.[34]

A movie is as much an art form as a book, and the film-maker should have the same license as an author. It should be left to the film-maker to decide what scenes are necessary to create an effective film. This film as a whole may stand or fall, according to whether or not it is deemed an unwarranted invasion of privacy; that is the issue before the court. The court may cite specific scenes which it feels are invasions in giving this decision, but it should not say whether those scenes are unnecessary.

The Supreme Judicial Court conceded that the interest of some segments of the public in knowing of conditions at Bridgewater outweighs any possible harm to the inmates. On this basis the Court allows limited audiences to see the film. But this elitism is hardly a proper solution to the problem. If the film is shown to some segments of the public it should be shown to all segments. Everyone has the same right to know, regardless of the value of the knowledge to any particular individual. It is dangerous for the judicial system to decide what knowledge will be useful to whom, and to condition access to that knowledge on its decision. Such a practice raises a serious question of denial of equal protection of the law.[35]

In conceding that the First Amendment guaranteed freedom of speech protects the showing of Titicut Follies to some of the public, the Court has in effect conceded that protection to its showing to the general public. A logical step for the United States Supreme Court — if it grants certiorari in this case[36] — would be to expand its holding in *Time, Inc. v. Hill* by bringing truthful disclosures in areas of public concern under the protection of the First Amendment, even if such disclosures constitute a fundamental invasion of privacy, where the value of the disclosure seems to outweigh its harm.

PATRICIA M. DINNEEN

§10.7. Right to a speedy trial: Presumption of waiver: Commonwealth v. Marsh;[1] Needel v. Scafati.[2] The history of the development of constitutional rights has consistently moved in the direction of granting greater protection to the accused, with the notable exception

[34] Attorney General v. The Book Named "Tropic of Cancer," 345 Mass. 11, 20, 184 N.E.2d 328, 334 (1962).

[35] Cox v. Louisiana, 379 U.S. 536, 557-558 (1965).

[36] Commonwealth v. Wiseman, 1969 Mass. Adv. Sh. 1055, 249 N.E.2d 610, petition for cert. filed 38 U.S.L.W. 3102, No. 621 (U.S. Sept. 19, 1969) As of this date, no disposition has been made of the petition for certiorari.

§10.7. [1] 1968 Mass. Adv. Sh. 1229, 242 N.E.2d 545.

[2] 289 F. Supp. 1006 (D. Mass. 1968).

of the Sixth Amendment's guarantee to a speedy trial.[3] For some inexplicable reason, this right has always been tempered by the assumption that it is automatically waived unless promptly claimed. Two cases decided in the 1969 SURVEY year afford examples of the presumption of waiver on the one hand, and the right to a speedy trial on the other.

Commonwealth v. Marsh presents an extreme example of assumed waiver — the "demand" doctrine. In Marsh, the defendant was indicted on October 1, 1965. On July 6, 1966, he moved for a speedy trial which was denied; on September 8, 1966, he moved for dismissal on the grounds that he was denied a speedy trial; on November 14, 1966, he moved for dismissal on the same grounds; and on March 17, 1967, he again moved for a speedy trial, ". . . as provided by the Constitution[s] of the United States and the Commonwealth of Massachusetts."[4] Again, on October 25, 1967, the day of the trial, the defendant's attorney moved for dismissal on the grounds that the defendant had been denied a speedy trial. Apparently this was the first time the motion had come to the attention of the court, and accordingly, it was denied by the trial judge. In affirming the denial of this motion, the Supreme Judicial Court implicitly stated that the initial demand for a speedy trial and the subsequent follow-up motions were not sufficiently strong to overcome the presumption of waiver. The Court HELD: In order to negative the presumption of waiver, the defendant must make a demand that shows a desire for a prompt trial and he must make reasonable efforts to obtain one. In this case, the motions were not presented to the judge, and it was reasonable to view them as only preliminary steps in presenting the matter to the court.[5] In furtherance of this position the Court stated:

> In our cases holding that the constitutional right has been denied, the issue of the effect of the mere filing of a motion has not arisen; in all the cases the defendants concerned were reasonably diligent in asserting their right to a speedy trial.[6]

In order to counter the defendant's somewhat reasonable contention that he was diligent in asserting his rights and that the lack of a hearing was the district attorney's fault since he should have brought the motions before the court, the Supreme Judicial Court pointed to G.L., c. 278, §1, which allows the defendant to add cases to the trial list upon motion to the court.[7] Regardless of the fact that this action is available to the defendant, it is somewhat unusual in that it ignores

[3] U.S. Const. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

[4] 1968 Mass. Adv. Sh. at 1230, 242 N.E.2d at 547.

[5] Id. at 1232, 242 N.E.2d at 548.

[6] Id. at 1230-1231, 242 N.E.2d at 547.

[7] G.L., c. 278 §1, provides: "At each session of the superior court for criminal business, the district attorney, before trials begin, shall make and deposit with

the basic fact that it is the duty of the district attorney, not the defendant, to prosecute the case. Furthermore, it not only places the burden upon the defendant to make a demand for a speedy trial, but he must also see to it that something is done about his demand if he is to escape the presumption of waiver.

The contrasting view — that a speedy trial is a fundamental constitutional right not presumed to be waived — is presented in *Needel v. Scafati*.[8] In *Needel*, the defendant was indicted in Hampden County on January 4, 1960, while already in custody in Essex County on an unrelated charge for which he was later sentenced on February 10, 1960. He was not officially informed of the Hampden County charges nor given copies of the indictments, and only learned of their existence informally. While serving the Essex County sentence, the Hampden County authorities issued a bench warrant at Walpole Correctional Institution and then waited four and one half years until his release before arraigning the defendant. During this time the defendant attempted to learn the nature of the charges and to get copies of the indictments against him. On February 27, 1963, he finally managed to get the last of this information after some rather frustrating correspondence with the Hampden County Clerk.[9] This was the extent of the defendant's activity until November 1963 when, in accordance with G.L., c. 277, §72A, he was informed of his right to a prompt

the clerk, for the inspection of parties, a list of all cases to be tried at that session, and the cases shall be tried in the order of such trial list, unless otherwise ordered by the court for cause shown. Cases may be added to such list by direction of the court, upon motion of the district attorney or of the defendant."

[8] This case was recently overruled by the Circuit Court of Appeals, in Needel v. Scafati, 412 F.2d 761 (1st Cir. 1969), cert. denied, 38 U.S.L.W. 3130 (U.S. Oct. 14, 1969) primarily on the grounds that the defendant had not exhausted his state remedies since the district court, in holding that there was no waiver, used evidence which the defendant, for some unfathomable reason, had not presented to the Supreme Judicial Court. Consequently, the circuit court did not feel that it could find the Supreme Judicial Court wrong as to the matter of waiver, on the basis of the evidence that the Supreme Judicial Court had before it.

The circuit court does say, however, in support of the district court's finding: "We are reluctant to prolong petitioner's pursuit and to nullify the careful efforts of the district court. But if the state and federal judicial systems are to work in complementary harmony, the state courts must be given a fair chance to assess constitutional issues. While federal courts should not abstain from decision simply because of the appearance of additional bits of evidence, inevitable in a new hearing, we find here that the underlying thrust of the issues posed and the evidence adduced presented petitioner's case in a significantly different posture from that considered by the Massachusetts Supreme Judicial Court. Under these circumstances, we decide that the judgment below should be reversed and remanded with instructions to dismiss the petition." 412 F.2d at 766.

[9] On March 12, 1960, defendant wrote the clerk requesting the docket numbers and the nature of the charges in the outstanding indictments. The clerk replied only that one indictment was outstanding. On Mar. 16, 1961, defendant again inquired also asking the date of the next criminal session. The clerk replied with information as to the indictments only and the date of the next criminal session. On Oct. 16, 1961, defendant requested copies of the indictments and the clerk sent only one. On Feb. 20, 1963, defendant again wrote the clerk, requesting a copy of the other indictment which he finally received on Feb. 27, 1963.

trial.[10] He was not notified in writing, however, nor was he advised of the precedures to follow in order to assert this right.

The case worked its way through the lower state courts, and on the basis of the defendant's above described activities, the Supreme Judicial Court affirmed the finding that he had waived his rights to a speedy trial by never formally requesting one.[11] When he turned to the federal system in seeking a writ of habeas corpus, however, the Federal District Court for Massachusetts in granting the writ, felt that the defendant did not know of his right to a speedy trial until long after his indictment and that even then he was unaware of the correct procedure to follow in order to obtain one.

> . . . Until November 1963 (46 months after indictment) petitioner did not know that he had the right to a speedy trial. Since he did not know of the existence of the right he could not intelligently or understandingly or intentionally relinquish or abandon it. . . . His failure to request or demand trial after he was made aware of his right to a speedy trial, is not a sufficient basis for an inference that he had waived it.[12]

The district court in *Needel,* in effect, bases its decision on the concept that a speedy trial is a constitutional right which should not be arbitrarily denied under an assumption of waiver. "There is a presumption against the waiver of constitutional rights. For a waiver to be effective it must be clearly established that there was an intentional relinquishment or abandonment of a known right."[13]

The *Marsh* case, on the other hand, is decided on exactly the opposite criteria, as is shown by the opinion's endorsement of the language in *Commonwealth v. Hanley.*[14]

> . . . We think that the full intent of the constitutional protection will be afforded by a rule that in the absence of a showing of circumstances which negative the implication, the failure to demand prompt trial implies a waiver of the right thereto.[15]

[10] G.L., c. 277, §72A, provides in part: "The commissioner of correction . . . shall, upon learning that an untried indictment . . . is pending in any court in the commonwealth against any prisoner serving a term of imprisonment in any correctional institution, . . . notify such prisoner in writing thereof, stating its contents, including the court in which it is pending, and that such prisoner has the right to apply, as hereinafter provided, to such court for prompt trial or other disposition thereof.

"Such application shall be in writing and given or sent . . . to the commissioner of correction . . . who shall promptly forward it to such court. . . .

"Any such prisoner shall, within six months after such application is received by the court, be brought into court for trial or other disposition of any such indictment . . . unless the court shall otherwise order."

[11] Commonwealth v. Needel, 349 Mass. 580, 211 N.E.2d 335 (1965).

[12] 289 F. Supp. at 1013.

[13] Ibid.

[14] 337 Mass. 384, 149 N.E.2d 608 (1958).

[15] 1968 Mass. Adv. Sh. at 1230, 242 N.E.2d at 547.

In view of the obvious conflict between these doctrines, it seems advisable to trace their development, starting with the right to a speedy trial. This concept, along with most of our common law, was brought over from England where it had been embodied in the Magna Charta.[16] The concept was thought to be so important that it was incorporated into the Constitution as the Sixth Amendment. Subsequently its sanctity declined until it seemed to have reached a point wherein it was regarded as merely an empty phrase carrying little or no actual value. Even in recent history, where the trend has been to extend more and more of the sanctions of procedural due process to one accused of a crime,[17] the right to a speedy trial has received a minimum of attention until most recently.

One of the earliest Supreme Court cases dealing with the right to a speedy trial was *Beavers v. Haubert*,[18] in which it was found that the right is not absolute, but that it is "consistent with delays and depends upon circumstances."[19] In *Pollard v. United States*,[20] the circumstances supporting petitioner's right to a speedy trial were said to be "purposeful and oppressive delays"[21] by the state, and though this phrase tends to define the limits to which the state can go, it also serves to give the state great leeway within those limits. In 1966 Justice White reaffirmed these views, although the opinion also contains a good explanation of the reasons behind the speedy trial concept.

> This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself. However, in large measure because of the many procedural safeguards provided an accused, the ordinary procedures for criminal prosecution are designed to move at a deliberate pace. A requirement of unreasonable speed would have a deleterious effect both upon the rights of the accused and upon the ability of society to protect itself.[22]

The unfortunate part of this "deliberate pace" concept is that in this case there was more than a two-year delay before the trial.[23]

In the process of carving out the exceptions to the right to a speedy trial, the courts have isolated four relevant factors, any one of which

16 Magna Charta, 9 Hen. 3, c. 29 [c. 40 of King John's Charter of 1215] (1225).

17 Miranda v. Arizona, 384 U.S. 437 (1966); Escobedo v. Illinois, 378 U.S. 478 (1964); Massiah v. United States, 377 U.S. 201 (1964); Gideon v. Wainright, 372 U.S. 335 (1963); Rochin v. California, 342 U.S. 165 (1952).

18 198 U.S. 77 (1905).

19 Id. at 87.

20 352 U.S. 354 (1957).

21 Id. at 361.

22 United States v. Ewell, 383 U.S. 116, 120 (1966).

23 The defendants had been convicted, and after serving for two years their sentence was vacated because of a defect in the indictment, whereupon they were immediately rearrested and reindicted for the same offense.

is usually sufficient to defeat the claim. "Four factors are generally held to be relevant in considering a claim of denial of a speedy trial: the length of delay, the reason for the delay, the prejudice to the defendant, and waiver by the defendant."[24]

Considering first the length of the delay, the courts have generally held that

> [M]ere lapse of time is not enough to establish denial of a speedy trial. There [*Fleming v. United States*][25] we observed that a delay of eleven months was "very short" and hence not unreasonable. It is essential that defendant also show prejudice or that the delay was improperly motivated.[26]

A few courts, on the other hand, consider the length of delay alone, if sufficiently long, to be enough to support a claim of the denial of a speedy trial. "Although what amounts to an undue delay is 'not fixed by the statute in days or months,' depending as it does 'upon the circumstances of each particular case' . . . it may not seriously be urged that the six-year lag in the present case was consistent with the mandate for a speedy trial."[27] And also, "Two years have now elapsed. This plainly is more than a reasonable time."[28]

Touching briefly on the reasons for the delay, traditionally the courts have held that almost any excuse by the state will justify the delay. These have included: delays so that an undercover agent would not have to reveal his identity,[29] delays enabling further investigation,[30] and delays in order to locate the prosecution's missing witness.[31]

Mere expense, however, has been held not to be a valid reason to delay a trial. In *Commonwealth v. McGrath*,[32] the district attorney declined to pay defendant's round trip travel expenses from the federal prison in Atlanta, Georgia, to the trial in Suffolk County, whereupon the court held,

> . . . that the right to a speedy trial contemplates that the Commonwealth will take reasonable action to prevent undue delay in bringing a defendant to trial, even though some expenses may be involved in bringing him into the Commonwealth and returning him to Federal custody. The Commonwealth must, within

24 Commonwealth v. Thomas, 353 Mass. 429, 431, 233 N.E.2d 25, 27 (1967).

25 378 F.2d 502 (1st Cir. 1967). — Ed.

26 Carroll v. United States, 392 F.2d 185, 186 (1st Cir. 1968); accord, United States v. Beard, 381 F.2d 325 (6th Cir. 1967).

27 People v. Prosser, 309 N.Y. 353, 357, 130 N.E.2d 891, 894 (1955).

28 Bishop v. Commonwealth, 352 Mass. 258, 260, 225 N.E.2d 345, 346 (1967).

29 Fleming v. United States, 378 F.2d 502 (1st Cir. 1967); United States v. Simmons, 338 F.2d 804 (2d Cir. 1964), cert. denied, 380 U.S. 983 (1965).

30 United States v. Lester, 328 F.2d 971 (2d Cir. 1964); United States v. Brown, 188 F. Supp. 624 (S.D.N.Y. 1960).

31 United States v. Kaufman, 311 F.2d 695 (2d Cir. 1963).

32 348 Mass. 748, 205 N.E.2d 710 (1965).

> a reasonable time, either secure the defendant's presence for trial or dismiss the indictments.[33]

In *Smith v. Hooey*,[34] the Supreme Court reiterates this concept, thus extending it to the federal courts.

The determination of whether or not the defendant has been prejudiced by the delay is closely entwined with the length and the reason for the delay, although some courts do attempt to separate it and treat it independently. As such, the question that arises is whether the delay alone, assuming it to be reasonably long, entitles the defendant to a dismissal or whether he must show that he has been prejudiced by the delay. The traditional view, that he must show prejudice, is succinctly put in *Fleming v. United States*: "Whether there is any merit in this claim . . . depends upon whether this defendant was prejudiced by this delay or whether it was occasioned by oppressive or culpable governmental conduct."[35] A few courts, on the other hand, feel that prejudice need not be shown.

> The Government argues that appellant has not made a convincing demonstration that the delay prejudiced him in the presentation of his case and, although we agree, we think that a showing of prejudice is not required when a criminal defendant is asserting a constitutional right under the Sixth Amendment.[36]

By far the most controversial factor though, is in the area of waiver, permeated as it is by the demand doctrine. This doctrine, although possibly developed somewhat earlier, is well articulated in *Shepherd v. United States*:

> [T]he right of the accused to a discharge for failure of the prosecution to give him a speedy trial is a personal one to him and may be waived. He must assert the right if he wishes its protection and if he does not make a demand for trial or resist a continuance of the case, or if he goes to trial without objection that the time limit has passed, or fails to make some kind of effort to secure a speedy trial, he will not ordinarily be in position to demand dismissal because of delay in prosecution. . . .[37]

This "demand" doctrine has been supported and followed in the federal courts, and in each decision, the original right to a speedy trial seems to have slightly altered and lessened in one way or another.

[33] Id. at 752, 205 N.E.2d at 714.

[34] 393 U.S. 374 (1969).

[35] 378 F.2d 502, 504 (1st Cir. 1967); accord, "A defendant certainly has not suffered the denial of a speedy trial unless he has been prejudiced by the delay in his trial." United States v. Richardson, 291 F. Supp. 441, 445 (S.D.N.Y. 1968); United States v. Curry, 278 F. Supp. 508 (N.D. Ill. 1967); United States v. Gladding, 265 F. Supp. 850 (S.D.N.Y. 1966).

[36] United States v. Lustman, 258 F.2d 475, 477-478 (2d Cir. 1968).

[37] 163 F.2d 974, 976 (8th Cir. 1947).

For example, *James v. United States*[38] reiterates and expands upon the idea that the defendant loses the right if he himself has caused the delay. In this case, the finding of waiver was probably justified since the defendant twice asked for new counsel and for continuation of the trial.

In an opinion by Judge Burger, the same court later asserted: "Generally a speedy trial claim is waived unless the right is asserted promptly,"[39] thereby firmly establishing the need for a seasonable claim of delay.[40]

In *Von Feldt v. United States*,[41] the court ruled, "Pertinent to the question of the diligence required of the defendant, the courts have ruled with consistency that where, as here, the defendants are at liberty on bond and are represented by counsel, a demand for a speedy trial should be made by the defendants and that failure to make such a demand will constitute a waiver."[42] Earlier, in *United States v. Sanchez*,[43] the defendant was held required to make a prompt assertion for a speedy trial or of prejudice claimed as a result of delay, despite the fact that he was without the assistance of counsel during the pre-arrest delay.

Basically then, it seems fairly well established that until very recently the federal courts believed the demand doctrine to be good law and binding precedent. This was dramatically shown in *United States v. Lustman*,[44] where the court, after commenting favorably upon reasoning contra the demand doctrine, said: "The federal decisions, however, clearly establish that the right to a speedy trial is the defendant's personal right and is deemed waived if not promptly asserted."[45]

This necessity of the demand for a speedy trial has been the rule in a great majority of the states as well,[46] and Massachusetts is no exception. At least as early as 1958 in *Commonwealth v. Hanley*,[47] the Supreme Judicial Court found that the defendant had waived his right to a speedy trial despite the fact that there had been a delay of almost three years and that the defendant claimed to have written to the clerk asking for trial. In establishing the demand doctrine, the Court first found that the Massachusetts Declaration of Rights[48]

38 261 F.2d 381 (D.C. Cir. 1958), cert. denied, 359 U.S. 930 (1959).

39 Mathies v. United States, 374 F.2d 312, 314 n.1 (D.C. Cir. 1967).

40 Accord, 392 F.2d 185 (1st Cir. 1968); 378 F.2d 502 (1st Cir. 1967).

41 407 F.2d 95 (8th Cir. 1969).

42 Id. at 98.

43 361 F.2d 824 (2d Cir. 1966).

44 258 F.2d 475 (2d Cir. 1958).

45 United States v. Lustman, 258 F.2d 475, 478 (2d Cir. 1958).

46 Annot., 57 A.L.R.2d 302 (1958).

47 337 Mass. 384, 149 N.E.2d 608 (1958).

48 Mass. Const. pt. 1, art. 11. "Every subject of the commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right

gives the defendant in a criminal case the right to a speedy trial. It then states that: "The right is a personal one and may be waived";[49] and, in further elucidation of this doctrine, it states, "We think that the full intent of the constitutional protection will be afforded by a rule that in the absence of a showing of circumstances which negative the implication, the failure to demand a prompt trial implies a waiver of the right thereto."[50]

All of these cases discussed heretofore, however, seem to belie, or at least to ignore, the fact that constitutional guarantees, which include the right to a speedy trial, are fundamental rights. In *Brookhart v. Janis*,[51] in reference to the Sixth Amendment right to confront and cross-examine witnesses, Justice Black stated:

> . . . The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, . . . and for a waiver to be effective it must be clearly established that there was "an intentional relinquishment or abandonment of a known right or privilege."[52]

Although these cases do not apply precisely to the speedy trial clause of the Sixth Amendment, they would seem to incorporate it into their reasoning. Nevertheless it was not until *Klopfer v. North Carolina*[53] in 1967 that this was stated in so many words. In Klopfer, the petitioner's case had been postponed for two terms after an initial mistrial, and he finally filed a petition with the court to determine when he would be tried. The state declined to prosecute and instead filed a nolle prosequi with leave,[54] to which petitioner objected, claim-

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and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."

[49] 337 Mass. 384, 387, 149 N.E.2d 608, 610 (1958).

[50] Id. at 388, 149 N.E.2d at 611.

[51] 384 U.S. 1 (1966).

[52] Id. at 4. The Court has held that the defendant, even though an attorney himself, did not waive the assistance of counsel, stating: "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." Glasser v. United States, 315 U.S. 60, 70 (1942). The Court also stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." Id. at 76.

In 1938 the Court had already stated the need for a conscious and deliberate waiver. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938), accord, Carnley v. Cochran, 369 U.S. 506 (1962).

[53] 386 U.S. 213 (1967).

[54] This is a process peculiar to North Carolina whereby the accused is discharged from custody but remains liable for prosecution at any future time, subject only to the discretion of the prosecutor.

ing the right to a speedy trial. When the case reached the Supreme Court, Chief Justice Warren, speaking for the majority, stated that:

> By indefinitely prolonging this oppression, as well as the 'anxiety and concern accompanying public accusation', the criminal procedure condoned in this case by the Supreme Court of North Carolina clearly denies the petitioner the right to a speedy trial which we hold is guaranteed to him by the Sixth Amendment of the Constitution of the United States. [Footnote omitted.][55]

He further states, more importantly, "We hold here that the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment."[56]

These cases taken together would seem to establish that, henceforth at least, the Sixth Amendment right to a speedy trial is a fundamental right, applicable to the state as well as the federal courts, and that there is a strong presumption against the waiver of this fundamental right. A few cases, in fact, have held accordingly. One of the best reasoned of these was *People v. Prosser*,[57] decided 12 years before *Klopfer*.

> Under such decisions [those requiring a demand for a speedy trial], the burden of obtaining a prompt trial is on the defendant; the state, having procured an indictment, is not compelled to do anything until the defendant demands a trial, and even then, if the demand is not made promptly, it may claim that he has waived his right to a speedy trial. Years may have elapsed, so that the time between indictment and trial exceeds even that permitted by the applicable statute of limitations between commission of the crime and indictment, and yet, these cases hold, the prosecution remains free to press the charge and proceed to trial. . . .
>
> The second view [that waiver is not assumed] is the one we find sounder and more persuasive. It is the state which initiates the action and it is the state which must see that the defendant is arraigned. It is likewise the state which has the duty of seeing that the defendant is speedily brought to trial. And from this it follows that the mere failure of the defendant to take affirmative action to prevent delay may not, without more, be construed or treated as a waiver. [Footnote omitted.][58]

In *United States v. Lustman*, also decided before the Supreme Court decision in the *Klopfer* case, the court spends some time on this conflict, and though it seems to favor the nonwaiver doctrine,

55 Klopfer v. North Carolina, 386 U.S. 213, 222 (1967).
56 Id. at 223.
57 309 N.Y. 353, 130 N.E.2d 891 (1955).
58 Id. at 358, 130 N.E.2d at 894-895.

citing the *Prosser* case with approval, it finds that, at the time, the demand rule was still settled doctrine in the federal courts.

More recently, in *United States v. Richardson*,[59] the court again discusses these conflicting doctrines and tries to reconcile them, noting that many of the cases following the demand rule have placed emphasis upon the fact that the defendant was represented by counsel. However, in at least one of the cases asserting the nonwaivability of a fundamental right, the defendant was himself a lawyer, and was represented by a lawyer.[60] Consequently, this attempt at reconciliation seems somewhat weak and doomed to failure, the two doctrines remaining at opposite poles.

Finally, in Massachusetts, returning to the *Needel* case, the district court was found accepting and endorsing the Supreme Court's decision in *Klopfer v. North Carolina*, only to be overturned by the circuit court on a procedural point. The circuit court did, however, seem to be in sympathy with the district court insofar as the basic question of waiver went.

Currently, most of the federal courts still seem to adhere to the demand rule, as do a majority of the states.[61] However, it must be assumed that the force of *Klopfer* has not yet had much opportunity to be called upon, and that it will, in the future, more firmly establish the concept that a speedy trial is as much of a fundamental right as is the right to counsel. This conclusion would seem valid for a number of reasons. First, and probably most important, is that *Klopfer* establishes the right to a speedy trial as a fundamental constitutional right, and as such, it is just as applicable to the states — either directly through the incorporation of the Bill of Rights, or through the due process route of the Fourteenth Amendment — as it is to the federal courts. Consequently, it must not be presumed to be waived arbitrarily. It might be added that the right to a speedy trial is also found in the Federal Rules of Criminal Procedure,[62] offering another possible route.

Another factor which should tend to hasten the decline of the demand doctrine is the fact that nearly every state constitution has

[59] 291 F. Supp. 441 (S.D.N.Y. 1968).

[60] 314 U.S. 60 (1942).

[61] Annot., 57 A.L.R.2d 302 (1958). The count presently stands at 43 to 7, with the states not supporting the demand rule being: Arizona, State v. Maldonado, 92 Ariz. 70, 373 P.2d 583 (1962); Colorado, Hicks v. People, 148 Colo. 26, 364 P.2d 877 (1961); Indiana, Zehrlent v. State, 230 Ind. 175, 102 N.E.2d 203 (1951); Kansas, State v. Hess, 180 Kan. 472, 304 P.2d 877 (1956); New York, People v. Prosser, 309 N.Y. 353, 130 N.E.2d 891 (1955); Oklahoma, Davidson v. State, 82 Okla. Crim. 402, 171 P.2d 640 (1946); and Oregon, State v. Dodson, 226 Ore. 458, 360 P.2d 782 (1961).

[62] "If there is unnecessary delay in presenting the charge to a grand jury or in filing any information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint. Fed. R. Crim. P. 48(b).

some provision for a speedy trial,[63] and most of these even provide for some form of compensation if the defendant is denied this right.[64]

Another very basic reason for the rejection of the demand doctrine is the fact that, besides flying in the face of constitutional rights, it is based upon essentially fallacious reasoning. Discounting the arguments of crowded dockets and convenience to the state, both of which would probably be justifiable reasons for some delay, the demand doctrine is based on the rather strange assumption that any delay is more advantageous to the accused than to the prosecution. This assumption seems to ignore reality since the prosecution is much better able to keep track of facts and witnesses than is the accused. Furthermore, the demand doctrine assumes that the silence of the accused is a deliberate waiver whereas it could just as easily stem from ignorance of the need to demand a speedy trial, or even from ignorance of the indictment. To quote again from the decision in *Prosser*:

> As for the asserted danger that a defendant may sit back and, if the prosecution fails for one reason or another to move the indictment for a trial expeditiously, claim his right to a speedy trial and go free, it is somewhat less than real. Overlooked is the fact that the district attorney may at any time have the case placed on the calender for a particular day.[65]

Finally, there is the fact that the state, and not the defense, has an affirmative duty in prosecuting the case quickly.

> . . . The government and, for that matter, the trial court are not without responsibility for the expeditious trial of criminal cases. The burden for trial promptness is not solely upon the defense. The right to "a speedy . . . trial" is constitutionally guaranteed and, as such, is not to be honored only for the vigilant and the knowledgeable. The United States Attorney has a duty to press criminal cases to trial, to give them any necessary priority, and to prevent, whenever possible, even the suggestion of staleness.[66]

Consequently, despite the apparent reluctance of the Supreme Judicial Court, and, to a lesser degree, the First Circuit Court, to accept the decision in *Klopfer v. North Carolina*, it seems that the demand doctrine should become less and less viable, at least as regards silence being considered a waiver of the right to a speedy trial. The other three factors — length of delay, reasons for delay, and prejudice resulting from the delay — will continue to serve in considering

[63] See, e.g., Mass. Const. pt. 1, art. 11.

[64] See, e.g., G.L., c. 277, §73, which provides for compensation equivalent to lost earnings for any confinement beyond six months if the defendant is later discharged without trial, or is finally acquitted. See also Note, The Lagging Right to a Speedy Trial, 51 Va. L. Rev. 1587 (1965).

[65] People v. Prosser, 309 N.Y. 353, 361, 130 N.E.2d 891, 896 (1955).

[66] Hodges v. United States, 408 F.2d 543, 551 (8th Cir. 1969).

whether an accused has been denied a speedy trial, as will waiver, but only if the right is actively waived. No longer should the mere failure to demand his fundamental constitutional rights deny those rights to an accused.

H. SAGE WALCOTT

§10.8. Freedom of association: Knowingly being in the company of one illegally possessing a narcotic drug: Commonwealth v. Tirella.[1] On November 25, 1967, a Boston police officer observed one Juan Perez approach an automobile containing three individuals. The driver of the automobile passed money to Perez and in return received from him several glassine bags. The defendant, John Tirella, a passenger in the back seat observed the entire transaction. Later, a second police officer stopped the automobile and upon investigation found that the glassine bags contained heroin.

The defendant was convicted under the second clause of G.L., c. 94, §213A, which reads

> Whoever is present where a narcotic drug is illegally kept or deposited, or whoever is in the company of a person, knowing that said person is illegally in possession of a narcotic drug, or whoever conspires with another person to violate the narcotic drugs law, may be arrested without a warrant by an officer or inspector whose duty it is to enforce the narcotic drugs law, and may be punished by imprisonment in the state prison for not more than five years, or by imprisonment in a jail or house of correction for not more than two years or by a fine of not less than five hundred dollars nor more than five thousand dollars.[2]

On appeal to the Supreme Judicial Court, the defendant argued that the second clause violated his constitutional rights in that it was vague and indefinite, constituted cruel and unusual punishment, and interfered with the right of association.[3] The Supreme Judicial Court sustained the statute and HELD: The statute was a reasonable effort to suppress narcotics, and was indeed constitutional. The Court said that "in the company of" is specific enough so that men of common intelligence could comprehend its meaning. It means associating in a way that "smacks of . . . companionship, friendly intercourse, and the like."[4] As to the argument that punishment of the defendant is cruel and unusual, the Court summarily dismissed it by saying that the holding in *Commonwealth v. Buckley*,[5] that the first clause of §213A does not impose cruel and unusual punishment, is also applicable to the second clause.[6] As for the statute establishing guilt by

§10.8. 1 1969 Mass. Adv. Sh. 1075, 249 N.E.2d 573.
2 G.L., c. 94, §213A.
3 Commonwealth v. Tirella, 1969 Mass. Adv. Sh. at 1076, 249 N.E.2d at 574.
4 Id. at 1077, 249 N.E.2d at 575.
5 354 Mass. 508, 238 N.E.2d 335 (1968).
6 Commonwealth v. Tirella, 1969 Mass. Adv. Sh. at 1078, 249 N.E.2d at 576.

association, the Court said that the statute only made the association an offense and in no way set up a presumption of guilt.[7]

It is submitted that these constitutional arguments were unconvincingly brief and therefore deserving of review. In *Commonwealth v. Slome*,[8] the Supreme Judicial Court set forth some guidelines concerning the determination of whether a statute is vague and indefinite. For purposes of determining vagueness of a statute, the words must be given their usual and ordinary meaning. It then must be determined whether the statute, so construed, would allow an ordinary member of society to understand what is prohibited.[9] In the present case, the Supreme Judicial Court came to the conclusion that the words "in the company of" implied fellowship or friendly intercourse and were sufficiently definitive so as to provide a member of society with the knowledge of what is prohibited.[10]

It is submitted that the words "in the company of" do not allow the ordinary member of society to know what is prohibited. In *Alegata v. Commonwealth* (the *Mitchell* case),[11] the Court analyzed the statutory wording which empowered the police to arrest and prosecute suspicious persons abroad in the nighttime who could not give a "satisfactory account of themselves."[12] The Court held that the word "satisfactory" was imprecise and no guidance was supplied by the legislature to explain away this vagueness. "This leaves too much discretion in the hands of the police and the courts."[13] In the same manner, the legislature provided no guidance as to the construction of the equally imprecise words, "in the company of."[14] In the present case the courts and police are given too much power as to the interpretation and construction of that phrase. Even using the Court's interpretation, an average person would be hard put to know at what point his relations with a possessor of narcotics made his association criminal. Therein lies the imprecision. Imagine an average man meeting his neighbor, who commonly possesses marihuana. It would be impossible for that average man to determine whether a friendly greeting, an extended discussion about the weather, or a more intimate discussion was a violation of Section 213A. The Supreme Judicial Court properly noted the injustices involved in maintaining a constitutionally vague statute:

> . . . A citizen is entitled to protection from prosecution unless the statute on its face penalizes the particular conduct with which

[7] Id. at 1078, 249 N.E.2d at 576.

[8] 321 Mass. 713, 75 N.E.2d 517 (1947).

[9] Id. at 716, 75 N.E.2d at 519. Similar standards are set forth by the Supreme Court in Winters v. New York, 333 U.S. 507 (1948).

[10] Commonwealth v. Tirella, 1969 Mass. Adv. Sh. at 1076, 249 N.E.2d at 574.

[11] 353 Mass. 287, 289, 231 N.E.2d 201, 202 (1967).

[12] Id. at 289, 231 N.E.2d at 202.

[13] Id. at 293, 231 N.E.2d at 205.

[14] Commonwealth v. Tirella, 1969 Mass. Adv. Sh. at 1077 n.2, 249 N.E.2d at 575 n.2.

> he is charged. One ought not to be compelled to speculate at his peril as to whether a statute permits or prohibits any action which he proposes to take. If the standard of guilt prescribed by a statute is so variable, vague or uncertain that it is useless as a measure of criminal liability, then the statute must be struck down.[15]

The defendant, Tirella, also argued that the statute imposed a cruel and unusual punishment.[16] The Court in its opinion said: "The holding . . . in the *Buckley* case . . . that the first clause of §213A does not . . . impose a cruel and unusual punishment [is] equally applicable to the second clause."[17] In *Buckley,* the Court dismissed the argument of cruel and unusual punishment by saying: "No such violation of constitutional interests can reasonably be found in view of the requirement in the first clause of §213A, as interpreted by us, that there be proof of knowledge of facts constituting noncompliance with the statute."[18] It is difficult to imagine how this rationale relates to the constitutional question of severity of the sentence.

In *Trop v. Dulles,*[19] the United States Supreme Court set forth an explanation of the phrase "cruel and unusual punishment." It is evident from these standards that the Supreme Court's decision on any specific case depends greatly upon the sensitivities of the individual justices.

> The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.[20]

It is impossible to predict whether Tirella's punishment would be declared cruel and unusual if the Supreme Court were to review the present case. Yet, it can be argued that a statute which attempts to deter the narcotics offender by punishing his friends, by its very nature, is suspect of being primitive and does not meet the "evolving standards of decency that mark the progress of a maturing society." Even thousands of years ago the Bible broke away from ancient Near East law which commonly inflicted a penalty on a person other than the actual culprit.[21]

[15] Commonwealth v. Slome, 321 Mass. at 715, 75 N.E.2d at 519.
[16] Commonwealth v. Tirella, 1969 Mass. Adv. Sh. at 1076, 249 N.E.2d at 574.
[17] Id. at 1078, 249 N.E.2d at 576.
[18] Commonwealth v. Buckley, 354 Mass. 508, 513, 238 N.E.2d 335, 338-339.
[19] 356 U.S. 86 (1958).
[20] Id. at 100-101.
[21] Y. Kaufmann, Studies in Bible and Jewish Religion 5-28 (M. Haran ed. 1960).

> This principle of individual culpability in fact governs all of the biblical law. Nowhere does the criminal law of the Bible, in contrast to that of the rest of the Near East, punish secular offenses collectively or vicariously. Murder, negligent homicide, seduction, and so forth, are punished solely on the person of the actual culprit.[22]

In *Weems v. United States*,[23] the United States Supreme Court was faced with a defendant sentenced to 15 years hard labor for falsifying a public record. Justice McKenna said that justice could only be preserved by making the punishment proportionate to the offense. He also pointed out that crimes which were worse than the defendant's crime were not punished so severely.[24] Unfortunately, state appellate courts have been reluctant to judge their statutes on the basis of severity of the punishment.[25] However, using those standards applied by the Supreme Court, Section 213A appears to punish defendants disproportionately to the offense. Since the statute is rather unique and the offense does not resemble any common law crime, there is no traditional means by which a court may compare the punishment to the offense. Therefore, the lack of any comparable common law crime probably indicates the insignificant nature of the offense. Considering the unorthodox and insignificant nature of the offense, one is hard put to believe that a sentence of 18 months for a violation of the statute in question is anything but cruel and unusual punishment.

It is well accepted that where a state law defines a personal association as illegal, the law may be susceptible to attack as an infringement of the First Amendment constitutional "right of association."[26] The test for determining whether "the right of association" has been tampered with is a consideration of the balance between the constitutional right and the state's interest in regulating it.[27] For example, in *NAACP v. Alabama*,[28] the Court said that Alabama's need for NAACP membership lists did not justify a constitutional infringement upon that group. On the other hand, in *Communist Party of the United States v. Subversive Activities Control Bd.*,[29] the Court did not allow the Communist Party to withhold its membership lists. The Court reasoned:

> . . . Where the mask of anonymity which an organization's members wear serves the double purpose of protecting them from popular prejudice and of enabling them to cover over a foreign-directed conspiracy, infiltrate into other groups, and enlist the

22 Id. at 23.
23 217 U.S. 349 (1910).
24 Id. at 357-367.
25 D. Fellman, The Defendant's Rights 206 (1958).
26 Emerson, Freedom of Association and Freedom of Expression, 74 Yale L.J. 1, 20 (1964).
27 Id. at 7.
28 357 U.S. 449 (1958).
29 367 U.S. 1 (1961).

> support of persons who would not, if the truth were revealed, lend their support, . . . it would be a distortion of the First Amendment to hold that it prohibits Congress from removing the mask.[30]

Therefore, in applying the aforementioned test to the case in question, one must ask whether Section 213A is in the public interest and if that interest justifies interference with a First Amendment constitutional right.

The Supreme Judicial Court argued that Section 213A does not violate the right of association because "the Legislature may lawfully proscribe any substantial association with one illegally in possession of narcotics as a method of discouraging that serious evil and achieving social rejection of the illegal possessor, thus depriving him of any encouragement which may be given acquiescent companionship."[31] It is doubtful whether Section 213A actually achieves social rejection and a deterrent effect. Logic dictates that drug users and drug peddlers have displayed, by their very acts, antisocial characteristics. It is entirely possible that ostracism could increase those antisocial feelings and further harden the drug offender. In other words, the statute could have an effect opposite to that suggested by the Court in its opinion. One cannot help but believe that the words of Dr. Karl Menninger, eminent psychiatrist, apply to the statute in question: "[t]he deterrence theory is used widely as a cloak for vengeance."[32]

The complexity of the deterrence theory, at the very least, deserves a more careful approach than was evidenced by the legislature and the Court. Professor Johannes Andenaes of Oslo, Norway, in a speech to a group of criminologists at the University of Toronto, warned that the theory of deterrence is highly complex, and that the prime danger is that of generalization.[33] Dr. Richard L. Solomon, editor of the Psychological Review, has further demonstrated the complexity of deterrence by listing the factors which determine the effectiveness of punishment as a deterrent:

> (a) intensity of the punishment stimulus, (b) whether the response being punished is an instrumental one or a consummatory one, (c) whether the response is instinctive or reflexive, (d) whether it was established originally by reward or by punishment, (e) whether or not the punishment is closely associated in time with the punished response, (f) the temporal arrangements of reward and punishment, (g) the strength of the response to be punished, (h) the familiarity of the subject with the punishment being used, (i) whether or not a reward alternative is offered during the behavior-suppression period induced by punishment, (j) whether a

[30] Id. at 102-103.

[31] Commonwealth v. Tirella, 1969 Mass. Adv. Sh. at 1078, 249 N.E.2d at 576.

[32] K. Menninger, The Crime of Punishment 206 (1968).

[33] Andenaes, Does Punishment Deter Crime? 11 Crim. L.Q. 76, 80 (1968).

distinctive, incompatible avoidance response is strengthened by omission of punishment, (k) the age of the subject, and (l) the strain and species of the subject.[34]

When the complexity of the deterrence doctrine is thus considered, the Court's assumption that the drug possessor will be discouraged by social rejection is unconvincing. There is no question that it is within the state's interest to enact effective drug legislation. However, the degree of protection provided by Section 213A has not sufficiently been shown so as to justify interference with a major constitutional right.

The Supreme Judicial Court is justified in its concern over the seriousness of the Massachusetts narcotics problem. FBI Director J. Edgar Hoover, in his 1968 annual report stated that the northeast surpassed all national geographic areas in the number of heroin, cocaine and marihuana arrests.[35] The Court's concern, however, does not warrant the upholding of G.L., c. 94, §213A, on constitutional grounds. There are numerous means available to control the drug problem without resorting to laws that infringe upon basic constitutional rights.

Drug education is one means by which the tide of drug addiction and traffic may be stemmed. If the drug peddler is faced with an informed community, the degree of profitability may wane and put an end to his enterprise. An advisory committee in the State Department of Education is presently working on courses on drugs and narcotics for kindergarten through the 12th grade.[36] This project is long overdue when one considers that Massachusetts has not worked out a new health education program since 1940.[37] It is even more unfortunate that this commendable program only has a fraction of the finances needed to implement it.[38]

General Laws, c. 71, §1, dating back to the 19th century, provides that instruction on the effects of narcotics "be given to all pupils in all schools under public control."

Despite the statutory requirement, little, if anything, has been done. The Drug Abuse Advisory Committee of the state Department of Education has been working toward a program of prevention through education but has been given no funds at all by the legislature.

Despite the lack of financial support, the committee members, representing every interested agency in the state, have been working for two years without pay to bring basic, factual information to teachers and administrators caught up in the problems arising from drug abuse.[39]

One Boston journalist recently noted that drugs have pervaded our

[34] Menninger, The Crime of Punishment at 208.
[35] Boston Herald Traveler, Aug. 14, 1969, at 2, col. 5.
[36] Boston Herald Traveler, Oct. 29, 1969, Supplement at 6, col. 1.
[37] Ibid.
[38] Ibid.
[39] Id. at col. 2.

schools and have caused an alarming truancy rate.[40] In answering his own question as to what the Boston School Department was doing about the problem of drug abuse he said:

> Not too much apparently. I happened to be in a Roxbury school recently where the principal was reporting that more than 100 of the students were "missing." To deal with this particular situation some officials from the attendance department suggested that a list of the missing pupils' names be sent to other schools in the area to see if any of them were in another school.[41]

Problems such as these can only be solved by financing drug education programs, not by enacting legislation such as Section 213A.

Another effort to stem drug abuse will most likely be rendered ineffective due to the lack of proper financing. Attorney General Robert H. Quinn made known that former Governor Foster Furcolo was a leading choice "as chairman of his special advisory committee to spearhead programs against drug abuse in Massachusetts."[42] The committee would be composed of 15 to 20 persons who would set up programs to educate the public at all levels on the effects of drug abuse. However, it was reported that all those so asked to serve would receive no salary.[43]

Without proper financing these programs may be rendered ineffective. Certainly, providing these funds is far less costly than the abridging of human rights. The President's Task Force Report on Narcotics and Drug Abuse[44] emphasized the need for drug education for professionals and the general public alike. The report noted that "the problem [is] clouded by misconceptions and distorted by persistent fallacies."[45]

Another means by which drug addiction and sales may be hampered is through increased law enforcement. The President's task force strongly suggested that the flow of drug traffic might be hindered if there were to be an increase in customs personnel and activity. The customs workload increases at a rate of 5 or 10 percent a year. An additional 600 more customs officials are needed. "The need for more enforcement staff is . . . more urgent now than ever."[46] Speaking about the points at which drugs enter the United States, the task force said:

> . . . Illicit drugs regularly arrive at these points in significant quantities and in the hands of people who, while not at the highest, are at least not at the lowest level of the traffic. More frequent

[40] Boston Globe, Oct. 14, 1969, at 21, col. 4 (evening ed.).

[41] Ibid.

[42] Boston Globe, Oct. 2, 1969, at 1, col. 1 (evening ed.).

[43] Id. at 3, col. 1. The committee is now in operation and being directed by former Governor Foster Furcolo.

[44] Task Force on Narcotics and Drug Abuse, President's Commission on Law Enforcement and Administration of Justice, Narcotics and Drug Abuse (1967).

[45] Id. at 19.

[46] Id. at 8.

> interceptions of both the drugs and the people could reasonably be expected if the capacity to enforce customs laws was increased. Other important benefits, in the form of larger revenue collections and the suppression of smuggling generally, would also follow.[47]

Mail inspection is also far below the frequency needed to deter the mailing of drugs. An additional 60 employees, requested by the commissioner of customs in 1965, would allow the proper amount of inspection.[48]

An example of the type and degree of law enforcement needed to solve the drug problem was presented in September of 1969. President Nixon divulged the details of "Operation Intercept," in which the Mexican government was to cooperate with the United States in a massive search and seizure operation against narcotics. The program included remote sensor devices to detect opium and marihuana, remote sensors to pinpoint illegal border crossings, new Federal Aviation Administration regulations, and the authority for customs officials to force down private aircraft.[49] It would be absurd to ask the Massachusetts legislature to rely solely upon these federal activities. Yet, this sort of federal activity could be translated into local programming. For example, in August of 1969, Senator Joseph J. C. DiCarlo (D. Revere) filed a bill that would provide for 50 state troopers to deal exclusively with the drug problem. They would concern themselves with both drug users and drug traffic. It was reported that:

> DiCarlo's primary obstacle in passage of his proposal was a cost-conscious Legislature. He feared that the House might balk at adding 50 state troopers to the payroll.[50]

In summation, the Court's anxiety over the drug problem should not give way to an overly simple and dangerous solution. There are educational and enforcement projects, which have only been discussed briefly here, that could limit the drug problem considerably without the danger of punishing an innocent citizen for association with a possessor of narcotics.

STANLEY R. BERKOWITZ

§10.9. Trespass to public property: Commonwealth v. Egleson.[1] On April 2, 1968, at 6:45 A.M., Egleson, the defendant, was arrested

[47] Ibid.

[48] Id. at 9.

[49] Boston Herald Traveler, Sept. 9, 1969, at 1, col. 2. One practical effect of Operation Intercept has been the increased efforts by the Mexican government to enforce its narcotics control laws. See U.S. News and World Report, Dec. 29, 1969, at 21.

[50] Boston Globe, Aug. 12, 1969, at 13, col. 1 (evening ed.).

§10.9. [1] 1969 Mass. Adv. Sh. 175, 244 N.E.2d 589, cert. denied, 395 U.S. 336 (1969).

for trespassing inside a building owned by the city of Boston. The four-story building contained several facilities open to the public,[2] "numerous bulletins setting forth information of public interest,"[3] and an office of the Selective Service System, located on the fourth floor. Defendant, an instructor at the Massachusetts Institute of Technology and a worker for the Boston Draft Resistance Group, was arrested while attempting to inform a number of pre-inductees of their legal rights with regard to selective service induction.

At 6:15 that morning, the custodian in charge of the building had unlocked the doors, and "[t]hereafter the front doors were left open."[4] During the next 45 minutes, two employees of the draft board and about 20 pre-inductees entered the building. Under established procedure, pre-inductees check in with the draft board and obtain their files. They "normally arrive before 7 A.M. and stand in the lobby of the fourth floor . . . until 7:30 A.M.,"[5] at which time they are transported to the Boston Army Base. Between 6:20 and 6:25 A.M., the defendant arrived with three girls and entered the building. Having been informed of the reason for their presence, the custodian told the defendant that he was interfering with the cleaning of the building, and requested that he leave.[6] Egleson and the girls left peacefully.

The defendant, accompanying a pre-inductee, then reentered at 6:35 A.M. and proceeded to the landing between the third and fourth floors. There he began talking with pre-inductees about their legal rights with respect to the draft.[7] He neither forced conversation on his audience, nor did he advocate the commission of any illegal act, and, in the words of the court, he "did not intend to create a disturbance or interfere with the cleaning."[8] The custodian called the police, who gave defendant notice that if he left he would not be arrested.[9] Egleson expressed his belief that he had a right to remain.[10]

He was arrested, tried in the superior court, convicted of criminal trespass under G.L., c. 266, §120, and fined $20. An appeal was taken to the Supreme Judicial Court, where two issues were at bar: does Section 120 apply to publicly owned as well as to privately owned property;[11] and, did the First Amendment, as applied through the Fourteenth Amendment, give defendant a right to be in the building?[12]

[2] Civil Defense office, gymnasium and running track, dental clinic, baby clinic, offices of the Visiting Nurse Association, and a swimming pool, id. at 175-176, 244 N.E.2d at 590-591.
[3] Id. at 176, 244 N.E.2d at 591.
[4] Id. at 176, 244 N.E.2d at 591.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Id. at 177, 244 N.E.2d at 591.
[9] Ibid.
[10] Ibid.
[11] Ibid.
[12] Id. at 178, 244 N.E.2d at 592.

HELD: The criminal sanctions of Section 120 apply to trespass to publicly owned property;[13] and, on the facts of the case, defendant had no constitutional right to be in the building.[14]

This comment criticizes the Court's holding on both issues, and, more generally, reviews the historical distinction between trespass to publicly owned and privately owned property, and concludes that the present statutory provisions covering trespass to property to which individuals have a First Amendment right of access are unconstitutional. The relevant statutes are Section 120,[15] the statute applied in *Egleson,* and Section 123,[16] a limited public property trespass statute, which was amended during the 1969 SURVEY year to encompass property of public institutions of higher education.[17]

Massachusetts case law has implicitly recognized in certain cases a difference between trespass to privately owned property and trespass to publicly owned property.[18] Defenses to the charge of trespass have emerged in the form of rights to be on the property.[19] Generally, unlicensed entry to private property is prohibited. However, if a government health inspector,[20] a highway commissioner[21] or a police officer[22] is accused of trespass to privately owned property, he has a defense to

13 Id. at 177-178, 244 N.E.2d at 592.

14 Id. at 178-179, 244 N.E.2d at 592.

15 G.L., c. 266, §120, reads in part: "Whoever, without right, enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf or pier of another, after having been forbidden so to do by the person who has the lawful control of said premises, either directly or by notice posted thereon, shall be punished by a fine of not more than twenty dollars."

16 Acts of 1969, c. 362, amending G.L., c. 266, §123: "Whoever willfully trespasses upon land or premises belonging to the commonwealth, or to any authority established by the general court for purposes incidental to higher education, appurtenant to a public institution of higher education, the state prison, state prison colony, Massachusetts reformatory, reformatory for women, state farm, Tewksbury hospital, Soldiers' Home in Massachusetts, Soldiers' Home in Holyoke, any public institution for the care of insane, feeble minded or epileptic persons, any Massachusetts training school or state charitable institution, or upon land or premises belonging to any county and appurtenant to a jail, house of correction or courthouse, or whoever, after notice from an officer of any of said institutions to leave said land, remains thereon, shall be punished by a fine of not more than fifty dollars or by imprisonment for not more than three months."

17 Acts of 1969, c. 362.

18 Inhabitants of West Roxbury v. Stoddard, 89 Mass. 158 (1863); cf., Thurlow v. Crossman, 336 Mass. 248, 250-251, 143 N.E.2d 812, 814 (1957); Winslow v. Gifford 60 Mass. 327, 330 (1850).

19 The discussion here does not consider the many common law defenses to the charge of trespass on privately owned and used property by a private individual. See generally 1 Restatement of Torts Second §§191-203 (1965).

20 Thurlow v. Crossman, 336 Mass. 248, 250-51, 143 N.E.2d 812, 814 (1957); 8 Op. Mass. Atty. Gen. at 134 (1927).

21 Winslow v. Gifford, 60 Mass. at 330.

22 Id. at 330; Barnard v. Bartlett, 64 Mass. 501 (1852); Oystead v. Shed, 13 Mass. 519 (1816). On the authority of police to enter privately owned property, see also 1 Restatement of Torts Second §§204-209 (1965).

the complaint if he is on the property to fulfill his official duties.[23] As the Court said in an early case, a government surveyor has a right to enter upon private property as long as "the entry is reasonably necessary . . . it is but a temporary one, and [is] accompanied with no unnecessary damage."[24]

Entry upon public property is also limited by the law of trespass. However, the various rights to enter and remain upon such property are broader and more numerous than those relating to private property. Certain publicly owned property such as streets and parks has traditionally been subject to uses which would constitute trespass if private property were involved.[25] For example, an 1863 case[26] stated that by reason of a Massachusetts Bay Colony ordinance of 1647, ponds larger than ten acres are deemed to be public.[27] The Supreme Judicial Court held that the defendants who entered upon such property and carried away ice were not guilty of trespass.[28] The Court stressed the importance of an individual's right to be on such property:

> It would seem to afford some confirmation of the opinion that the ordinance of 1647 was designed to establish a large and important public right, that the provision concerning ponds is included in the same chapter of the colony laws which secures the right of free speech in courts and town meetings. . . .[29]

In addition, in *Hague v. CIO,*[30] the United States Supreme Court held that the Constitution establishes an individual's right of access to certain publicly owned property. Previously, in *Davis v. Massachusetts,*[31] the Supreme Court, affirming the Massachusetts Court, had upheld the constitutionality of a Boston city ordinance which prohibited speaking on city public grounds without a permit from the mayor. In *Hague* this holding was obstensibly distinguished but for practical purposes repudiated.[32] In *Hague,* the Supreme Court had before it a regulation investing an official with complete discretion to license meetings in streets and other public places. In holding the regulation

[23] These kinds of entry are now usually regulated by statutes, e.g., G.L., c. 94, §§35, 60 (inspection of milk and milk products); G.L., c. 111, §9 (inspection of food and drugs); G.L., c. 79, §10 (award of damages if inspector does damages).

[24] 60 Mass. at 330. See also, Onorato Bros. v. Massachusetts Turnpike Authority, 336 Mass. 54, 142 N.E.2d 389 (1957).

[25] Hague v. CIO, 307 U.S. 496 (1939).

[26] Inhabitants of West Roxbury v. Stodarrd, 89 Mass. 158 (1863).

[27] Id. at 171.

[28] Ibid.

[29] Id. at 168.

[30] Hague v. CIO, 307 U.S. 496 (1939).

[31] 167 U.S. 43 (1897).

[32] Hague v. CIO, 307 U.S. at 515; see also, Niemotko v. Maryland, 340 U.S. 268, 279 (1951) (Frankfurter, J., concurring): "An attempt to derive from dicta in the Davis case the right of a city to exercise any power over its parks, however, arbitrary or discriminatory, was rejected in Hague v. C.I.O. . . ."

unconstitutional, the Court established at least a limited right of access to publicly owned streets and parks for the purpose of appropriately exercising First Amendment freedoms.[33] This right of access to public property for the exercise of freedom of speech is one of the issues in *Egleson*.

Thus, publicly owned property is subject to different rights of access than private property. As a result, the defenses to a charge of trespass to each are different. Massachusetts, however, has one general criminal trespass statute, G.L., c. 266, §120. It applies to both private and publicly owned property. It purports to acknowledge the existence of rights which serve as defenses to a charge of trespass, in that it proscribes entry to or remaining upon property "without right." As discussed below, however, when Section 120 comes into conflict with the guarantees of the First Amendment of the Constitution, it is inadequate. In addition to this general trespass statute, G.L., c. 266, §123, pertains to entry to or presence upon the premises of certain enumerated public institutions. Unlike Section 120, it contains a disjunctive clause which can operate as an absolute prohibition of presence on the subject premises, without respect to right: "or whoever, after notice from an officer of any said institutions to leave said land, remains thereon, shall be punished. . . ."[34]

In 1969 Section 123 was amended to cover public institutions of higher education.[35] Section 123 applies to specific kinds of publicly owned property and coverage has been continually expanded since its inception in 1885.[36] In its original form, Section 123 covered only trespass to the state prison and reformatories and county owned land appurtenant to jails.[37] Subsequent revisions added to the list of institutions protected.[38] Section 123 provides a harsher penalty[39] for trespass than Section 120. Section 123 proscribes two separate offenses: "willful trespass," which incorporates the concept of absence of right;[40] or, mere failure to leave the enumerated premises after notice. Either is an offense under Section 123. However, trespass will not lie under Section 120 unless there is both a trespass "without right" and notice to leave. On its face, the disjunctive clause of Section 123, "or whoever, after

[33] "The time immemorial from which the streets and parks have been required to be held open for First Amendment activities dates from 1939, when Hague v. C.I.O. . . . was decided." In re Hoffman, 67 Cal. 2d 845, 849, 434 P.2d 353, 355, 64 Cal. Rptr. 97, 99 (1967).

[34] G.L., c. 266, §123.

[35] Acts of 1969, c. 362.

[36] Acts of 1885, c. 303.

[37] Ibid.

[38] Acts of 1885, c. 303; Acts of 1905, c. 434; Acts of 1911, cc. 104, 181, 194; Acts of 1913, c. 404; Acts of 1918, c. 257, §307; Acts of 1931, c. 426, §308; Acts of 1941, c. 344, §27; Acts of 1958, c. 613, §8E; Acts of 1959, c. 213; Acts of 1960, c. 315; Acts of 1969, c. 362.

[39] See notes 15 and 16 *supra*.

[40] Harper and James, The Law of Torts §1.11, at 38 (1950).

notice . . . to leave said land, remains . . . shall be punished," can be invoked without regard to whether the intruder has a right to be on the property. Mere refusal to leave constitutes an offense.[41]

From the examination below of cases which consider the appropriateness of publicly owned property as a forum for First Amendment freedoms, it can be seen that the holding in *Egleson* that the building is not an appropriate forum is incorrect. Egleson had a First Amendment right which was an adequate defense to the charge of trespass under Section 120. The Court's misapplication of Section 120 merely serves to affirm that Section 120 is unconstitutional when applied to public property.

Before comparing *Egleson* with other cases involving the proper forum for First Amendment rights, one should realize that some of them involved breach of the peace[42] rather than trespass laws.[43] The former directly regulate[44] the First Amendment freedoms of speech, assembly, and petition for redress of grievances. Trespass statutes protect property, but the result of implementation of a trespass statute may also be an unconstitutional curtailment of First Amendment freedoms.[45] The Supreme Court has declared statutes of the former type unconstitutional by reason of vagueness or overbreadth.[46] Although the Court has never invalidated a trespass statute for vagueness or overbreadth, it has rectified misapplications of trespass statutes.[47] This seeming reluctance to invalidate trespass statutes is due to the fact that the court has seldom been called on to consider the constitution-

[41] An alternative to this reading is that the offense of failure to leave "said land" after notice means a failure to leave land which has been willfully trespassed upon. This reading would make trespass a necessary element of the offense of failure to leave after notice. However, this reading of the statute is interpretive and not literal.

[42] Brown v. Louisiana, 383 U.S. 131 (1966); Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

[43] In the following discussion, the cases which deal with trespass or trespass statutes are: Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); Adderley v. Florida, 385 U.S. 39 (1966); Bouie v. Columbia, 378 U.S. 347 (1964); In re Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967); Parrish v. Municipal Court, Modesto Judicial District, 258 Cal. App.2d 497, 65 Cal. Rptr. 862, (1968); In re Bacon, 240 Cal. App. 2d. 34, 49 Cal. Rptr. 322 (1966); Inhabitants of West Roxbury v. Stoddard, 89 Mass. 158 (1863); State v. Kirk, 84 N.J. Super. 151, 201 A.2d 102 (1964).

[44] For a discussion of direct versus indirect regulation of speech, see Note, 49 B.U.L. Rev. 346 (1969).

[45] E.g., Amalgamated Food Employees Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968); In re Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). That trespass statutes, like statutes which directly regulate First Amendment freedoms, can be misapplied is suggested by Justice Douglas in his dissent in Adderley: "Today a trepass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach-of-the-peace statute, a vagrancy statute will be put to the same end." 385 U.S. at 56.

[46] E.g., Cox v. Louisiana, 379 U.S. 536 (1965).

[47] Amalgamated Food Employees Union Local 590 v. Logan Plaza, 391 U.S. 308 (1968).

ality of trespass statutes which conflict with First Amendment freedoms exercised on property used by the general public.[48] The cases discussed below, however, can legitimately be used in reference to a trespass situation because they all involve the problem of defining a proper situs and manner for the exercise of First Amendment freedoms.

In deciding whether the exercise of First Amendment freedoms on publicly owned property will be allowed, courts examine certain characteristics of the property and the form of the demonstration.[49] One basic determination about the property is whether it is used in a public or a private manner.[50] Regardless of who owns the property, if it has a private use (private residence,[51] prison,[52] or state farm[53]), access to it will be severely limited and freedom of speech and assembly will not serve as rights to enter or remain. If the property has traditionally been used in a public manner, the exercise of First Amendment rights will usually be allowed thereon.[54] The court in *Egleson* relies on *Adderley v. Florida*[55] for its conclusion that the building, housing the draft board, is "not a propitious . . . place"[56] for dialogue on the draft. This is an unjustified application of the case. In *Adderley,* the Supreme Court affirmed convictions for trespass to jail grounds. The Court said, "Jails, built for security purposes, are not open [to the public]."[57] The situation in *Egleson* is very different. The building involved contained bulletins of public interest, offices of public facilities, and public athletic facilities, all of which are implicit invitations to the general public to enter the building.

In *Brown v. Louisiana,*[58] the Supreme Court reversed breach of the peace convictions of five black men who refused to leave a small branch library traditionally reserved for whites on the grounds that defendants' actions did not fall within the statute. The court went further, stating that a library is a proper forum for the exercise of First Amendment freedoms, and that "even if the accused action were within the scope of the statutory instrument . . . , we would have to hold that the statute cannot constitutionally be applied to punish petitioners' ac-

48 In Adderley v. Florida, 385 U.S. 39 (1966), the Court refused to declare vague a state trespass statute similar to G.L., c. 266, §120. However, the property involved in that case, jail grounds, had a private use, although publicly owned. Unlike the building in Egleson, the property was not open to the general public; cf., Bouie v. Columbia, 378 U.S. 347 (1964).

49 Adderley v. Florida, 385 U.S. 39 (1966). See generally, Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967).

50 Wolin v. Port of New York Authority, 268 F. Supp. 855, 859 (S.D.N.Y. 1967), aff'd, 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1968).

51 Commonwealth v. Richardson, 313 Mass. 632, 638, 48 N.E.2d 678, 682 (1943).

52 G.L., c. 266, §123.

53 Ibid.

54 Hague v. CIO, 307 U.S. 496 (1939) (publicly used, publicly owned property); Marsh v. Alabama, 362 U.S. 501 (1946) (publicly used private property).

55 385 U.S. 39 (1966).

56 Commonwealth v. Egleson, 1969 Mass. Adv. Sh. at 178, 244 N.E.2d at 592.

57 385 U.S. at 41.

58 383 U.S. 131 (1966).

tions. . . .[59] The building in *Egleson,* like this library reading room, exists for the use of the public. Mere presence in the building should not be a punishable offense. Two courts have held that transportation terminals are also proper forums for First Amendment activities.[60] Just as "certain portions of the Terminal (such as the concourse) may be used by members of the public for the purpose of patronizing shops or other services,"[61] the public is invited and expected to enter and use the services of the building in *Egleson.* On the authority and reasoning of these cases, Egleson's presence in the building, absent any specific offense, should not have been condemned.

In determining the appropriateness of a situs for First Amendment freedoms, several other factors are traditionally considered: the appropriateness of the location to the subject of the demonstration;[62] the availability of the same audience at another location;[63] and whether or not the building is open for business.[64] With regard to the first of these points, one may deduce a general rule that the more private and narrow the function of the property (e.g., a privately owned shopping center,[65] World's Fair grounds leased from a city,[66] a public jail[67]), the closer the relationship must be between that function and the protesters' cause. Conversely, where the property has a wide public use (e.g., streets and parks,[68] transportation terminals[69]), only the form of the demonstration, and not the subject matter, can be restricted. As suggested above, it would seem that the building in *Egleson* has a general public use, and therefore the Court should only concern itself with the acceptability of defendant's behavior and not his message.[70]

[59] Id. at 142.

[60] Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1968); In re Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967). Contra, State v. Kirk, 84 N.J. Super. 151, 201 A.2d 102 (1964).

[61] 268 F. Supp. at 860.

[62] Adderley v. Florida, 385 U.S. 39, 49 (1966) (Douglas, J., dissenting).

[63] State v. Kirk, 84 N.J. Super. 151, 157, 201 A.2d 102, 106 (1964).

[64] Parrish v. Municipal Court, Modesto Judicial District, 258 Cal. App. 2d 497, 65 Cal. Rptr. 862 (1968). In re Bacon, 240 Cal. App. 2d 34, 49 Cal. Rptr. 322 (1966).

[65] In Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 308 (1968), the court states that it would be a different question if petitioner's picketing "was not thus directly related in its purpose to the use to which the shopping center property was being put." 391 U.S. at 320 n.9.

[66] Farmer v. Moses, 232 F. Supp. 154, 161 (S.D.N.Y. 1964).

[67] Adderley v. Florida, 385 U.S. 39 (1966).

[68] Hague v. CIO, 307 U.S. 496 (1939).

[69] In re Hoffman, 67 Cal. 2d 845, 434 P.2d 353, 64 Cal. Rptr. 97 (1967): "In this respect, a railway station is like a street or park. Noise and commotion are characteristic. . . . The railroads seek neither privacy within nor exclusive possession of their station. They, therefore, cannot invoke the law of trespass . . . to protect those interests."

[70] When free speech is exercised in a recognized public forum, the content of the speech will be censored only in extreme situations, such as when violence may result. See generally Regulation of Demonstrations, 80 Harv. L. Rev. 1773. The content of defendant's speech in Egleson raises no such problems, and this note does not explore the intricacies of when content is censored.

However, the Court states flatly that a building containing a draft board is not a "propitious" place at which to discuss the rights of draftees.[71] Assuming arguendo that the function of the building is so limited that it must be closely related to defendant's cause, the Court's holding still contradicts *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*[72] which involved union picketing of a nonunion store in a privately owned shopping plaza. The Supreme Court upheld the exercise of First Amendment rights on the ground that a nonunion shop is an appropriate situs for picketing to induce unionization.[73] A building containing a draft board is as logical and appropriate a location for dialogue on selective service law as a nonunion shop is for union leafleting and picketing.

The Court in *Egleson* also suggests that the defendant could have meaningfully addressed his audience outside the building.[74] This line of reasoning is in conflict with the United States Supreme Court in *Schneider v. State*.[75] There the Court declared invalid municipal ordinances prohibiting handbilling in streets and alleys but allowing it in other public places. The Court stated "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."[76] On the facts of *Egleson*, meaningful conversation with the pre-inductees would have been impossible outside the building. The pre-inductees arrived separately and were not assembled until they were inside the building. A similar situation arose in *Wolin v. Port of New York Authority*,[77] a case concerning the exercise of First Amendment rights in a transportation terminal. In *Wolin*, a federal district court accepted logic similar to that offered by counsel for Egleson:

> . . . plaintiff desired to engage in such activities [setting up a table, carrying placards, leafleting, and talking with pedestrians] inside the Terminal rather than be relegated to the sidewalk perimeters for the reason that plaintiff's communication of his group's messages [opposition to the Viet Nam war] to pedestrians waiting inside the Terminal would be more effective than attempts to communicate views to persons using the sidewalks to enter or leave the Terminal, since passengers waiting inside the Terminal concourse had more time and hence were more receptive than those hurrying across the sidewalk to or from the Terminal.[78]

For this same reason, Egleson should have been allowed to address his audience inside the building containing the draft board.

71 Commonwealth v. Egleson, 1969 Mass. Adv. Sh. at 178, 244 N.E.2d at 592.
72 391 U.S. 308 (1968).
73 Id. at 319-320.
74 Commonwealth v. Egleson, 1969 Mass. Adv. Sh. at 178, 244 N.E.2d at 592.
75 308 U.S. 147 (1939).
76 Id. at 163.
77 268 F. Supp. 855 (S.D.N.Y. 1967), aff'd, 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1968).
78 Id. at 858.

If the building were not open for business, the *Egleson* Court's finding that the defendant had no right to be there would be correct.[79] However, the Court does not say that the building was not open for business, but only that the hour chosen by Egleson "was not a propitious time."[80] Thus, the Court's equivocation and the fact that the draft board personnel and 20 or so pre-inductees were in the building, and, in addition, the fact that the custodian had opened the doors for the day all indicate that the building was open for business in some sense.

Since, for the above reasons, the inside of the building was a proper situs for exercising First Amendment rights, and the defendant therefore had a right to be where he was, one must now determine whether he forfeited that right by his behavior; that is, whether his activities interfered excessively with the valid competing state interest of the proper functioning of the selective service office.[81] If he were disruptive, he would have lost his constitutional right to be in the building.[82] This balancing of interests test was enunciated as early as 1863 by the Supreme Judicial Court:[83]

> . . . The right of any individual to use for his own pleasure or profit such a place of public resort must be limited by the rule that the similar right of others is not to be impaired or infringed.[84]

This rule also prohibits interference with a so called "public right."[85]

Defendant in *Egleson* did not interfere with the rights of others. When arrested, he was alone, rather than part of a large crowd of demonstrators which could be disruptive merely by its presence; this factor is at least considered in several cases.[86] He did not enter the draft board itself, but stayed on the landing between floors, thereby minimizing the possibility of interference with the office. The men he was talking to were not actively being processed but were merely waiting for the bus to the army base. In the words of the Court, "he . . .

[79] Cases cited at note 64 *supra*.

[80] 1969 Mass. Adv. Sh. at 178, 244 N.E.2d at 592.

[81] The Court in Egleson is silent on the question of whether defendant's presence interfered with the cleaning of the building. However, even if defendant had interfered. the Supreme Court has held that First Amendment rights may not be abridged in a similar situation. Schneider v. State, 308 U.S. 147, 162-163 (1939).

[82] "[A] person could not exercise this liberty [of free speech] by taking his stand in the middle of a crowded street, contrary to traffic regulations, and maintain his position to the stoppage of all traffic. . . ." Schneider v. State, 308 U.S. at 160. However, the right of free speech will prevail over minor inconveniences to the government: "States cannot consistently with our Constitution abridge those [First Amendment] freedoms to obviate slight inconveniences or annoyances." Cox v. Louisiana, 379 U.S. 559, 564 (1965).

[83] Inhabitants of West Roxbury v. Stoddard, 89 Mass. 158 (1863).

[84] Id. at 170.

[85] Id. at 171.

[86] Cox v. Louisiana, 379 U.S. 536, 541 (1965); Edwards v. South Carolina, 372 U.S. 229, 231-232 (1963).

did not intend to create a disturbance. . . . The defendant's purpose could at best be of no help, and probably would be a deterrent, to the efficient work of the Draft Board."[87] However, there was no explicit finding that the defendant in fact did interfere in any way with the functioning of the draft board. Thus, *Egleson* is different from *Adderley,* which was cited by the Supreme Judicial Court[88] for support of defendant's conviction, in that the *Adderley* holding was based in part on the fact that the demonstration interfered with the functioning of the jail.[89]

In *Egleson,* the Court was also concerned with deterring possible future intrusions. The Court feared that: "If the defendant . . . could enter with one pre-inductee, an indefinite number of others could, equally unsolicited, enter with one or more other pre-inductees."[90] The inequity of this logic is pointed out in *Wolin v. Port of New York Authority:*

> The contention that the operation of the Terminal building would be stifled by a flock of leafleters subsequent to a decision adverse to the [Port Authority] carries little weight since the Court is dealing only with the rights of the plaintiff and those whom he represents.[91]

Thus, the rights of Egleson, based only on the merits of his own actions, should have been the sole determination of the Court.

Since, then, the building in *Egleson* was a proper forum for First Amendment freedoms, and the defendant did not, in the exercise of free speech, forfeit his right to be present and speak, the Court erred in affirming his conviction. The *Egleson* decision overlooks the historical distinction between the offenses of trespass to privately owned and publicly owned property. The Court ignores Massachusetts[92] and Supreme Court cases[93] which hold that individuals often have rights to use publicly owned property for purposes forbidden on privately owned property. Specifically, the constitutional right to First Amendment freedoms in publicly owned buildings[94] is denied in *Egleson.* The Court misapplies Section 120, a statute intended and more suited to cover privately owned property. The Court implicitly sanctions the practice of investing government employees with the discretion to determine whether individuals have a First Amendment right of access to the public property in question. As discussed below, the United States Supreme Court has consistently rejected this practice. In short, al-

87 Commonwealth v. Egleson, 1969 Mass. Adv. Sh. at 177-178, 244 N.E.2d at 591-592.

88 Id. at 179, 244 N.E.2d at 592.

89 Adderley v. Florida, 385 U.S. 39, 45 (1966).

90 Commonwealth v. Egleson, 1969 Mass. Adv. Sh. at 178, 244 N.E.2d at 592.

91 268 F. Supp. at 863; the principle was first enunciated by this same court in Farmer v. Moses, 232 F. Supp. 154, 162 (S.D.N.Y. 1964).

92 Inhabitants of West Roxbury v. Stoddard, 89 Mass. 158 (1863).

93 Hague v. CIO, 307 U.S. 496 (1939).

94 Brown v. Louisiana, 383 U.S. 131 (1966).

though the Supreme Judicial Court acknowledges the existence of all these developments when applied to public property as a situs for free speech, nevertheless it seems to treat the building in *Egleson* like privately owned property. It summarily dismisses defendant's constitutional right to be in the building without adequately supporting the state's position. Thus, in *Egleson* the Court affirmed that Section 120 can be applied unconstitutionally by upholding defendant's conviction.

When Section 120 is applied to property owned and used by the public, it violates the due process clause of the Fourteenth Amendment by reason of overbreadth.[95] Section 120 grants complete discretion to public officials (e.g., the custodian[96] in *Egleson*) to determine whether or not the alleged trespasser has a First Amendment right to be on the property. As discussed above this determination is complex; Section 120 requires public officials to decide whether the property is a proper forum for free speech and whether the intruder's behavior is objectionable. The words "without right" are too broad to supply guidelines to the officials vested with the discretion or to potential trespassers. Thus, First Amendment violations are inherently possible, making Section 120 unconstitutional.

When Section 120 is used to protect privately owned property, it is constitutional. In most private property trespass situations, since there is no First Amendment right to be on the property, whoever has "lawful control" of the premises can demand that the intruder leave.[97] However, when an individual seeks to exercise a First Amendment right on public property, the Supreme Court has traditionally preferred regulation by specific laws rather than regulations based on the broad discretion of officials[98] for two reasons. First, individual members of the public are entitled to know exactly what conduct is forbidden; and second, specific rules decrease the possibility of selective enforcement of the law which can result from overly broad official discretion.

In attacking a trespass law for overbreadth, there is no extensive

[95] See generally Amsterdam, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

[96] It is not clear from the decision in Egleson whether the Court was acknowledging that the custodian or the police officer had the authority to give defendant notice to leave. Commonwealth v. Richardson, 313 Mass. 632, 48 N.E. 2d 678 (1943), would seem to stand for the proposition that only the person in full legal control of the premises, and not a police officer who has been called in, has the authority to give such notice; cf., Fitzgerald v. Lewis, 164 Mass. 495, 41 N.E. 687 (1895).

[97] Commonwealth v. Richardson, 313 Mass. 632, 638, 48 N.E.2d 678, 682 (1943).

[98] "There is [a] plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms . . . for appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct; and for all such laws and regulations to be applied with an equal hand." Cox v. Louisiana, 379 U.S. 559, 574 (1965).

Supreme Court precedent,[99] but argument can be made by analogy. The Court has insisted that other kinds of laws which directly regulate First Amendment freedoms be extremely explicit and invest a minimum of discretion in officials. Among the earliest cases to consider the matter of unconstitutionally broad discretion were the licensing cases. The ordinance in *Hague v. CIO* enabled a public official to deny a permit for a public meeting if, in his opinion, the meeting would be disorderly. The ordinance could thus "be made an instrument of arbitrary suppression of free expression of views,"[100] and was invalidated by the Court. In *Schneider v. State,* the Supreme Court considered an ordinance which "banned unlicensed communication of any views . . . from door to door, and permits canvassing only subject to the power of a police officer to determine, as a censor, what literature may be distributed from house to house. . . ."[101] The Court held the ordinance void as applied to the petitioner, a Jehovah's Witness arrested for soliciting funds without a permit, in that it gave a public official the power to act arbitrarily. This broad discretion was considered an unwarranted abridgement of freedom of speech.[102]

Procedurally, Section 120 is different from these licensing laws in that the statute takes effect after the alleged offense. However, the Supreme Court has made it clear that the net effect of infringement of speech is the same whether the statute requires licensing of protected activities or goes into effect after the fact. Thus, in *Cox v. Louisiana,*[103] the Court reversed petitioner's conviction for obstructing a public passage, stating:

> It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not . . . either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of

[99] See note 48 *supra.* Support for the contention that trespass statutes which conflict with First Amendment freedoms must, like statutes which directly regulate these freedoms, be specific and grant minimal discretion to public officials is found in Justice Douglas' dissent in Adderley:

"[It is going too far to say] that the 'custodians' of the public property in his discretion can decide when public places shall be used for the communication of ideas, especially the constitutional right to assemble and petition for redress of grievances. . . . It gives him the awesome power to decide whose ideas may be expressed and who shall be denied a place to air their claims and petition their government. . . . [Before] a First Amendment right may be curtailed under the guise of a criminal law, any evil that may be collateral to the exercise of the right, must be isolated and defined in a 'narrowly drawn' statute. . . ." 385 U.S. at 54-55.

[100] Hague v. CIO, 307 U.S. 496, 516 (1939).

[101] Schneider v. State, 308 U.S. 147, 163 (1939). See also, Cantwell v. Connecticut, 310 U.S. 296 (1940).

[102] Schneider v. State, 308 U.S. at 164.

[103] 379 U.S. 536 (1965).

> such a system by selective enforcement of an extremely broad prohibitory statute.[104]

There, the statute, as applied by the state court to the fact situation, allowed "unfettered discretion in local officials in the regulation of the use of the streets,"[105] which resulted in a denial of petitioner's First Amendment rights.

The Supreme Court in *Thornhill v. Alabama*[106] also equates licensing statutes and penal statutes which invest public officials with unfettered discretion over behavior which involves protected freedoms. In that case the Court declared unconstitutional a statute forbidding the publicizing of facts of a labor dispute. In the Court's discussion, the danger inherent in statutes like General Laws, Chapter 266, Section 120, is outlined:

> It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. . . . A like threat is inherent in a penal statute . . . which does not aim specifically at evils within the allowable area of state control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech. . . . The existence of such a statute, which readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview.[107]

The same susceptibility to selective enforcement is present in Section 120. In *Egleson,* the Court seems to condemn defendant's message rather than his presence:

> This was not a propitious time nor place for a self-appointed layman who was a [member of a] draft resistance group to offer his ideas on constitutional or other "rights" or to volunteer expositions of grounds of opposition to the Vietnam War.[108]

If defendant had entered the building to congratulate the draftees on their compliance with the Selective Service System, it is doubtful that a trespass conviction would have resulted.

Section 123, a limited public trespass statute, grants even broader discretion to public officials than Section 120, and is patently unconstitutional on its face. The weakness of Section 120 is that it grants to public officials discretion to determine whether the intruder has a right to be on the property. As discussed at the outset of this note,

104 Id. at 557-558.
105 Id. at 558.
106 310 U.S. 88 (1940).
107 Id. at 97-98.
108 Commonwealth v. Egleson, 1969 Mass. Adv. Sh. at 178, 244 N.E.2d at 592.

Section 123 proscribes two separate offenses: Willful trespass *or* mere failure to leave the property after notice. The fact that the statute is stated in the disjunctive indicates that willful trespass is not an element of the second offense. Therefore, the public official does not even have to consider whether the individual has a right to be on the property to invoke the second clause of Section 123. His discretion is complete and without qualification.

Prior to the 1969 amendment, Section 123 pertained to enumerated, specific premises used in a private way. That is, like private residential property, the listed premises were used in such a way that any entry by private individuals would by definition by considered an interference. Premises of the kind listed were closed to First Amendment activities. Since it pertained to such special, limited kinds of property, the failure of Section 123 to make provisions for rights of entry did not render the statute unconstitutional. The 1969 amendment, however, has expanded it to include public institutions of higher education, property to which certain individuals have a First Amendment right of access. The second clause of the amended statute does not, on its face, recognize any right whatsoever to be on the property. Unconstitutionally, broad discretion to admit or to expel individuals is thereby invested in agents of the state.

The right of access to public university property for demonstrating was first established in 1967 in *Hammond v. South Carolina State College.*[109] There the court declared that a college rule requiring prior approval of demonstrations was an invalid prior restraint on First Amendment freedoms. The court rejected the proposition that the entire college campus is comparable to the jail grounds in *Adderley,* and therefore totally immune from First Amendment activities.[110] Rather, relying on *Edwards v. South Carolina,*[111] where the Supreme Court condoned demonstrating to express grievances at a state house, the court in *Hammond* concluded: "I am not persuaded that the campus of a state college is not similarly available for the same purposes for its students."[112]

The same conclusion is reached in several decisions subsequent to *Hammond.*[113] In *Barker v. Hardway*[114] the court refused to grant students an injunction against the enforcement of college suspensions incurred for a disruptive demonstration at a football game. However, in the decision, the court recognizes that state university property is often a proper situs of First Amendment freedoms:

109 272 F. Supp. 947 (D.S.C. 1967).

110 Id. at 950-951.

111 372 U.S. 229 (1963).

112 Hammond v. South Carolina State College, 272 F. Supp. at 951.

113 Cf., Powe v. Mills, 407 F.2d 73 (2d Cir. 1968); Scoggin v. Lincoln Univ. 291 F. Supp. 161 (W.D. Mo. 1968); see generally Van Alstyne, The Student As University Resident, 45 Denver L.J. 582 (1968); Comment, 45 Denver L.J. 622 (1968).

114 283 F. Supp. 228 (S.D.W. Va. 1968), aff'd, 399 F.2d 638 (4th Cir. 1968), cert. denied, 394 U.S. 905 (1969).

> True it is that enrollment in school does not mean the student surrenders any of his constitutional rights. . . . Nor can it be gainsaid that the plaintiffs and their fellow demonstrators had the right under the First Amendment to bring their grievances to the attention of [the college president] and other college officials in attendance at the football game . . . but when they [were] abusive and disorderly . . . they thereby exceeded this constitutional privilege and forfeited its protection.[115]

The First Amendment right of access to public university property, then, is still in the process of emerging and being defined. However, what seems settled is that such property is not of a private or restricted nature. The considerations involved in determining the First Amendment right of access to public property generally (e.g., streets, parks, jails) seem to be the relevant considerations when access to public university property is sought. Therefore, Section 123, which categorizes public university property with other more restricted property and gives the person in legal control absolute discretion over who has access to the property, is unconstitutional by reason of overbreadth.

The constitutional flaw of Section 123 is clearly illustrated in *Shuttlesworth v. Birmingham*.[116] There the ordinance under consideration was structurally the same as Section 123 but proscribed loitering. Although the Supreme Court held the ordinance constitutional as applied by the state court, it nevertheless found it unconstitutionally overbroad on its face:

> On its face, the here relevant paragraph of [the ordinance] sets out two separate and disjunctive offenses. The paragraph makes it an offense to "so stand, loiter or walk upon any street or sidewalk . . . as to obstruct free passage over, on or along said street or sidewalk." The paragraph makes it "*also* . . . unlawful for any person to stand or loiter upon any street or sidewalk . . . after having been requested by any police officer to move on. . . ." [Emphasis added.]
>
> Literally read, therefore, the second part of this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration. It "does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat." . . . Instinct with its ever-present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state.[117]

[115] Id. at 238. Another example of a precise statute which was held a constitutional regulation of the First Amendment right of access to publicly owned property is found in Coppock v. Patterson, 272 F. Supp. 16, 20 (S.D. Miss. 1967).

[116] 382 U.S. 87 (1965).

[117] Id. at 90-91.

The Massachusetts public trespass statute, Section 123, suffers from the same overbreadth. It can be used by government employees to evict persons from public university property regardless of whether they have a right to be present. Traditionally, every effort will be made by the courts to interpret statutes in a way that will render them constitutional. However, Section 123, no matter how it is applied, will still be dangerously overbroad.

The error of *Egleson* then is that the Court unconstitutionally applies a broad trespass statute to publicly owned and used property, and thereby denies defendant's First Amendment right to remain in the building. The decision, in effect, overlooks the distinction between the elements of trespass to such property and trespass to property owned and used privately, a distinction recognized by Massachusetts and federal courts. The amended Section 123, like Section 120, is unconstitutional in that it grants overly broad discretion to government employees to regulate access to property which is often properly open to free speech and assembly activities. In view of the present need for a trespass statute applicable to all publicly owned property, it is unfortunate that the state merely expanded Section 123, instead of taking the opportunity to draft a statute which would narrowly define the offense of trespass to publicly owned property generally, and limit the discretion of public officials in such situations.

LEO BOYLE

§10.10. Editorial note: Narcotic drug laws: Commonwealth v. Leis. In perhaps the most publicized decision in the 1969 SURVEY year, the Supreme Judicial Court, in *Commonwealth v. Leis*,[1] upheld the constitutionality of the sections of the Commonwealth's narcotic drugs law regulating the possession, use and sale of marihuana.[2] These sections were attacked on the ground that they were (1) "arbitrary and irrational" because they were not aimed at the achievement of valid police power goals; (2) in violation of constitutional guarantees of a right to smoke marihuana; and (3) invalid as creating penalties which, "as applied to marihuana, constitute cruel and excessive punishment."

Defendants were apprehended at Logan International Airport after having attempted to claim a trunk in which five pounds of marihuana had been secreted. They were then tried and convicted in the district court on complaints of possessing marihuana,[3] and for conspiracy to violate the Narcotics Drug Law.[4] Upon appeal to the superior court, they were indicted for illegal possession of marihuana with intent to

This editorial note was written by STEPHEN D. CLAPP, a member of the SURVEY staff.

§10.10. [1] 1969 Mass. Adv. Sh. 97, 243 N.E.2d 898.

[2] G.L., c. 94, §§205, 213A and 217B.

[3] G.L., c. 94, §205.

[4] G.L., c. 94, §213A.

sell it unlawfully.[5] After the trial judge in the superior court had denied defendants' motions to dismiss the complaints and indictments, he reported the case on the question of the constitutionality of the statutes under the federal and state constitutions.

The defendants contended that the laws, "as applied to marihauna, [go] beyond the police power of the Commonwealth in that [they are] not and cannot be aimed at achieving any valid legislative end, namely protection of the health, safety, welfare and morals,"[6] and are therefore violative of federal and state due process guarantees. The Court replied by citing the familiar proposition of the presumption of the validity of a legislative enactment unless it can be shown that the act "cannot be supported upon any rational basis of fact that can reasonably be conceived to sustain it . . . ,"[7] and by calling upon the testimony of the Commonwealth's experts as more than sufficient to justify legislative classification of marihuana as a "narcotic" drug with many potentially destructive and otherwise dangerous effects.

The defendants' contention that the right to smoke marihuana was constitutionally protected under both the Federal and Massachusetts Constitutions[8] was given little sympathy by the Court. The Court noted that "[t]he right to smoke marihuana is not 'fundamental to the American scheme of justice . . . necessary to an Anglo-American regime of ordered liberty,"[9] that "[i]t is not within a 'zone of privacy' formed by 'penumbras' of the First, Third, Fourth and Fifth Amendments and the Ninth Amendment . . .";[10] and concluded that the defendants enjoyed "no right, fundamental or otherwise, to become intoxicated by means of the smoking of marihuana."[11]

The next major argument of defendants took the form that the narcotics drug law, by "singling out" for punishment possessors of, and possessors with intent to sell, marihuana (while other laws permitted the regulated sale and use of allegedly far more dangerous substances, for example alcohol), was "arbitrary," and therefore violative of defendants' rights to the equal protection of the laws under the Fourteenth Amendment and also Article 1 of the Declaration of Rights of the Constitution of the Commonwealth.[12] The Court was singularly unim-

5 G.L., c. 94, §217B.

6 Commonwealth v. Leis, 1969 Mass. Adv. Sh. at 99, 243 N.E.2d at 901.

7 Id. at 100, 243 N.E.2d at 902.

8 Defendants argued that Article I of the Declaration of Rights of the Constitution of the Commonwealth vested them with a protected right to use marihuana. Article 1 states: "All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their Lives and Liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness."

9 1969 Mass. Adv. Sh. at 103, 243 N.E.2d at 903. The Court cited Duncan v. Louisiana, 391 U.S. 145, 149-150 n.14, for this proposition.

10 Ibid.

11 Ibid.

12 See text at note 8 *supra*.

pressed by the merits of this argument, stating that it "ignore[d] the rules by which this contention must be tested. . . ."[13] The fact, said the Court, that some of the drugs defined in G.L., c. 94, §197 are more dangerous than other such drugs is not sufficient to render the legislative classification arbitrary and irrational, since all the drugs so classified are "mind-altering," and capable of producing psychotic disorders of varying intensities and durations, with a consequent danger to the health and safety of the community. With specific reference to the comparison with alcohol, a substance not proscribed within the narcotic drug law, the Court distinguished the two substances on two basic grounds: First, alcohol can be regulated less restrictively because its abuse can be readily detected; and second, its effects upon the user have been the subject of such exhaustive study over such a prolonged period of time as to be well-known. The Court concluded that "the Legislature is warranted in treating this known intoxicant differently from marihuana, . . . the effects of which are largely still unknown and subject to extensive dispute."[14]

Defendants' last argument consisted of their contention that the penalties prescribed by the relevant sections of the narcotics drug law were cruel and excessive and thus violative of both federal and state constitutions.[15] Although the Court noted that the fact that sentence had not yet been pronounced upon the defendants would probably be sufficient to deny them standing to have the contention adjudicated before the Court on this appeal,[16] the Court nevertheless chose to comment upon this issue. The Court stated that neither constitution required the legislature to fix a specific penalty for any given crime, and that it would be improvident for the Court to presume anything but a proper exercise of the discretion vested in the sentencing judge by the legislature.

[13] Commonwealth v. Leis, 1969 Mass. Adv. Sh. at 104, 243 N.E.2d at 904. These rules, cited by the Court as appearing in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79, are as follows: "1. . . . The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

[14] Commonwealth v. Leis, 1969 Mass. Adv. Sh. at 105-106, 243 N.E.2d at 905.

[15] Article 26 of the Declaration of Rights of the Constitution of the Commonwealth states, "No magistrate or court of law, shall . . . impose excessive forms, or inflict cruel or unusual punishments." The Eight Amendment of the Federal Constitution states, "[E]xcessive fines [shall not be] imposed, nor cruel and unusual punishments inflicted."

[16] Commonwealth v. Leis, 1969 Mass. Adv. Sh. at 106, 243 N.E.2d at 906.

A concurring opinion by Justice Kirk stressed his agreement with the substantive conclusions of the Court but recorded his determination that the decision of the Court was unnecessary in view of the obvious fact that much of the evidence accumulated in the district and superior courts was supportive of the legitimacy of the legislative classification of marihuana as a dangerous narcotic drug. To entertain an appeal where such obvious ground existed for the presumption of the validity of the narcotic drug law's treatment of marihuana was a dangerous incursion on the doctrine of separation of powers.

It seems clear that as a proponent of traditional constitutional doctrine, Justice Kirk cannot be faulted. It is difficult to envision the Court unaware that defendants' own admissions in the record of the existence of scientific evidence contravening their contentions of the arbitrary nature of the classification of marihuana as a dangerous narcotic drug should have precluded a judicial forum for defendants' arguments. As Justice Kirk noted, once it is established that the legislative judgment is debatable, there can be no attack on the statute. Two possible reasons for the Court's departure from normative constitutional adjudication suggest themselves. Perhaps the Court fell victim to pressures generated by the media to deliver an opinion on the merits. It is also possible that the Court utilized the opportunity afforded by the case to deliver an affirmation of its approval of the legislative scheme prescribing penalties for drug violations for the benefit of the other courts of the Commonwealth, many of which are presently inundated by cases dealing in one way or another with the drug laws.