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# Pinnick v. Cleary – Another Step in the Continuing Demise of Economic Due Process

William F. Fox Jr.

# Pinnick v. Cleary[1]—Another Step in the Continuing Demise of Economic Due Process

On January 3, 1971, two days after the Massachusetts no-fault automobile insurance statute[2] (Chapter 670) became effective, Milton Pinnick was injured in an automobile accident in Boston caused solely by Carl Cleary's negligence. Pinnick received various sprains and bruises, incurring $115 in medical expenses and missing several days of work at two jobs.[3] In a traditional negligence jurisdiction Mr. Pinnick would have been permitted to pursue a common law tort action against Cleary. However, Cleary blocked his attempt to do so in this case by raising the new Massachusetts statute as a defense. The Massachusetts law requires the accident victim to be reimbursed by his own insurance company and forbids a tort action against the other party when total damages are under $2000, medical expenses are less than $500, or when the injury suffered is not within one of five categories.[4]

In a petition for declaratory relief directed to the Massachusetts Supreme Judicial Court, the plaintiff contended that the statute was unconstitutional. His two major arguments were that the statutory classification violates equal protection standards and that the limitation on plaintiff's right to sue in tort constitutes a limitation prohibited by the due process provisions of both the Massachusetts and the federal constitutions.

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1. ___ Mass. ___, 271 N.E.2d 592 (1971). [Hereinafter all page citations for the *Pinnick* opinion are given only to Northeastern reporters.]

2. MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1971).

3. Mr. Pinnick is an employee of the United States Post Office. He used a wage continuation plan (accrued sick and annual leave) to offset the monetary loss resulting from his absence from work. He had no such plan covering his second part-time job. The parties stipulated that Pinnick's recovery in a tort action would have amounted to $1,565 ($115 for medical expenses plus $650 for loss of earning capacity plus $800 for pain and suffering). 271 N.E.2d at 596.

4. MASS. GEN. LAWS ANN. ch. 231, § 6D (Supp. 1971). The five categories under which recovery for pain and suffering is permitted regardless of the dollar amount of the medical expenses are: (1) fracture, (2) injury causing death, (3) permanent and serious disfigurement, (4) whole or part loss of a body member, or (5) loss of sight or hearing.

Because of the factual simplicity of the instant case many of the criticisms directed toward the statute were not considered, *e.g.*, the problem of potential unfairness arising out of computation of lost wages suffered by a person who was unemployed the previous year but gainfully employed at the time of the accident (the statute uses the previous year's income as a base for figuring wage losses). For a brief and distinctly partisan summary of such criticisms *see* Sargent, *A Drastic Legal Change*, 6 TRIAL 22 (Oct./Nov. 1970).

In a unanimous opinion, the court held the statute constitutional concluding that Chapter 670 gives the driver "the security of prompt and certain recovery . . . of his out-of-pocket expenses."[5] By giving up his right to sue in tort the insured surrenders only "the possibly minimal damages for pain and suffering recoverable in cases not marked by serious economic loss or objective indicia of grave injury."[6]

Concurring separately in the result, Chief Justice Tauro agreed only that the plaintiff had failed to meet the burden of proof necessary to sustain a holding of unconstitutionality, *i.e.*, that the legislation lacked a rational basis.[7] In a lengthy attack on the majority reasoning Justice Tauro called the opinion "unduly generous" and "overly optimistic"[8] as to the operation of the statute and asserted that the court had "gone too far in lauding this experimental . . . plan."[9] He distinguished the workmen's compensation analogy as "overly simplified"[10] and deemed the classification system established by the statute as "[o]ne of the most important and difficult issues raised by this case . . . ."[11] Justice Tauro recommended that the case be remanded for further inquiry into the basis for the legislation.[12]

A recent comment on *Pinnick* disagreed with the result and attacked the opinion as "shallow reasoning, unsupported dicta."[13] It was also asserted that the court "settled for a second-rate opinion based largely on conjecture and speculation which failed to come to grips significantly with the great constitutional issues at stake."[14] The premise of this paper is to the contrary. The court dealt adequately and correctly with the constitutional issues raised. Mr. Pinnick's case was doomed not by an inept court but by long-established standards for judicial review of state economic legislation which, when applied to his facts could produce no other result.

However, there were a number of minor issues raised by the plaintiff with which the court did not deal. Pinnick asserted that the statute was invalid as applied to the members of his household and as applied to the "pure" pedestrian (one who neither owns a car nor is a member of a household which owns

5. 271 N.E.2d at 597
6. *Id.*
7. *See* text accompanying notes 57-68 *infra.*
8. 271 N.E.2d at 612.
9. *Id.* at 617.
10. *Id.* at 613. *See* text accompanying notes 70-76 *infra.*
11. *Id.* at 615.
12. *Id.* at 617.
13. TRIAL Jul./Aug., 1971, at 60.
14. *Id.* at 63.

one). Since Pinnick was both an owner and a driver these contentions were dismissed by the court on grounds of plaintiff's lack of standing.[15] The opinion instead dealt at length with the two major questions raised by the plaintiff—whether Chapter 670 violated contemporary standards of equal protection or of due process.

*The Statutory Classification and Equal Protection of the Laws*

Chapter 670 allows recovery in tort for pain and suffering only by persons whose injuries fall into any of five enumerated categories[16] or whose medical expenses exceed $500. Persons outside these categories are barred from tort recovery.[17] The five classes were attacked as arbitrary and unreasonable. He also assailed the $500 limitation for allegedly discriminating between the rich and the poor.[18] The plaintiff appears to have disputed the classification mainly on the grounds that the injuries exempted from the pain and suffering prohibition do not necessarily cause greater suffering than bruises and sprains—which are within the statute.

Chief Justice Tauro expressed particular discomfort with some of the possibilities for inequity which may arise under the classification:

> For example, a slight linear fracture of a single bone in the little finger, regardless of the amount of resulting medical expenses, would permit a suit for pain and suffering . . . . On the contrary,

15. 271 N.E.2d at 609. Plaintiff's arguments going to the deprivation of his right to a jury trial, the separation of governmental powers, and the impairment of legal remedies were dismissed by the court with virtually no comment. *Id.* at 611.

The questioning of the validity of no-fault automobile insurance statutes is not an entirely new phenomenon. *See, e.g.*, Dowling, *Constitutional Questions*, in Smith, Lilly & Dowling, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785, 813 (1932) (concluding, before the era of permissive standards of review for state economic legislation, that a no-fault scheme was constitutional); Ruben & Williams, *The Constitutionality of Basic Protection*, 1 CONN. L. REV. 44 (1968) (emphasizing the deprivation of the right to trial by jury as the most significant constitutional hurdle); Comment, *Constitutionality of Automobile Insurance Reform in Illinois*, 1969 U. ILL. L.F. 266 (reaching the conclusion of constitutionality in light of specific provisions of the Illinois constitution and the workmen's compensation analogy).

16. For an enumeration of the categories, *see* note 4 *supra*.

17. 271 N.E.2d at 598.

18. The Massachusetts Declaration of Rights contains an equal protection provision similar to the fourteenth amendment to the United States Constitution. Article 10 of the Massachusetts Declaration of Rights states: "Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty and property, according to standing laws." The provision has been construed by the Supreme Judicial Court as raising the same constitutional principles as the fourteenth amendment. Opinion of the Justices, ___ Mass. ___, 257 N.E.2d 94, 95 (1970); Universal Adjustment Corp. v. Midland Bank, Ltd., 281 Mass. 303, 320, 184 N.E. 152, 161 (1933).

> absent reasonable medical expenses in excess of $500 . . . a person suffering serious disability from torn muscles . . . or from sprained . . . joints, may not seek damages in court for the pain and suffering.[19]

Most equal protection cases require the reviewing court to perform a two-step analysis. The court must first determine the legitimacy of the purpose of the legislation and then, if the purpose is deemed legitimate, the court must examine the reasonableness of the classification involved.[20] Often purpose can be quickly discerned. There may be an express statement of purpose or of legislative intent in the statute itself; or the court may inquire into the circumstances surrounding the enactment and examine the relevant statutory language. Even when there is no express legislative declaration of purpose, it may be strongly inferred from the nature of the statute.

In *Pinnick* the court apparently had little difficulty in determining purpose. Court statistics,[21] jury verdict figures,[22] and the 1971 Department of Transportation study on automobile accident reparations were examined and judicially noticed.[23] After a brief discussion, the court concluded that the legislative intent

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19. 271 N.E.2d at 615. This argument by the Chief Justice appears to fall squarely under the "parade of horribles" rubric. It is difficult to imagine an injury causing such "serious disability" as envisoned by Justice Tauro which would not very quickly accumulate $500 in medical bills at current levels of medical care prices.

20. *See generally Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1076-77 (1969); Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 366 (1949).

21. 271 N.E.2d at 603. The figures were compiled by the Executive Secretary of the Supreme Judicial Court and relate to docket entries in the Massachusetts Superior Court (the court of general jurisdiction in Massachusetts). The figures reveal that approximately two-thirds of the total docket entries in Superior Court between 1967 and 1970 were motor vehicle entries.

22. *Id.* at 604. The compilation of verdict figures had been discontinued in 1956 but the court nevertheless found them "interesting." *E.g.*, 315 out of 502 (62.8%) plaintiff's verdicts in which the recovery was $2000 or less were automobile accident claims.

23. U.S. DEP'T OF TRANSP., MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES (April 1971) (prepared by J. Volpe).

In determining the legislative purpose the court took judicial notice of statistics, the personal knowledge of the justices, and the Department of Transportation study. Chief Justice Tauro took issue with this method of proof asserting that such judicial notice is mere "speculation." 271 N.E.2d at 612. It is submitted that Justice Tauro misconstrued the nature of judicial notice both as it applies generally and as it applies in Massachusetts at the appellate level. The leading Massachusetts case permits wide-ranging judicial notice at the court's discretion in any case "involving questions of pressing public importance." School Comm. of Boston v. Bd. of Educ., 352 Mass. 693, 697, 227 N.E.2d 729, 732 (1967). In advocating a remand for broader lower court fact-finding, Justice Tauro appears to disregard the general rule in *School Committee* that judicial notice may be taken at any level including the highest state court if the case is fully briefed and argued. *Id.* at 697, 227 N.E.2d at 732. *Cf.* Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 655 (1966). Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 95 (recognizing the viability of either alternative: remand to lower court or a

of the statute—its purpose—was "to eliminate minor claims for pain and suffering" primarily to decrease the burden of automobile accident litigation on the court system.[24]

*The Classification—Suspect or Non-Suspect?*

As noted above, the determination of purpose is only the first step in an equal protection problem. Given legitimacy of purpose, the classes established by Chapter 670 present the more difficult problem of determining the reasonableness of the classification scheme. This analysis also requires a two-step approach. First, the nature of the classification must be examined to determine whether it fits under one of two rubrics—suspect or non-suspect. Cases involving classification of persons by race or alienage, for example, are normally deemed "suspect."[25] The burden of justification applicable to such classifications—the second step of the analysis—requires the state to affirmatively show some "overriding statutory purpose" to withstand the constitutional attack.[26] There is case law at the Supreme Court level which tends to support the proposition that classifications based on financial status may be achieving this same suspect status.[27]

The non-suspect classification (*e.g.*, a guest passenger regulation applicable to automobiles but not to other vehicles) imposes a less stringent burden on the state. Non-suspect schemes need merely be shown to have a reasonable relation to the legislative purpose.[28]

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decision employing judicial notice based on fully briefed arguments). Further, at least one writer has contended that the Supreme Court "looks at facts for one purpose only: to determine whether the legislature could rationally have believed the measure to be in the interest of the public welfare." Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13, 26 (1958). For an article noting with approval broad judicial notice *see* Comment, *The Presently Expanding Concept of Judicial Notice*, 13 VILL. L. REV. 528 (1968).

24. 271 N.E.2d at 609. Indulging in a little judicial overkill the court went a step beyond normal judicial restraint to assert that "[i]t cannot be seriously argued that it was beyond legislative competence to assess this situation and to effect the necessary statutory repairs." *Id.* at 605. The plaintiff demonstrated that the issue can be seriously argued. The critical factor is whether the court accepts the argument.

25. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (statute prohibiting interracial marriage held unconstitutional); Brown v. Bd. of Educ., 347 U.S. 483 (1954) (racially segregated schools held unconstitutional); Korematsu v. United States, 323 U.S. 214 (1944) (internment of Japanese during World War II permitted but the concept of "suspect" classifications discussed at length).

26. McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

27. *See* McGowan v. Maryland, 366 U.S. 420, 426 (1961); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911).

28. *See, e.g.*, McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969) (dictum); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) ("Lines drawn on the basis of wealth . . . are traditionally disfavored."); *cf.* Boddie v. Connecticut, 401 U.S. 371 (1971) (state may not

The plaintiff in *Pinnick* tried to force the defendant to satisfy the stricter test by demonstrating an overriding statutory purpose. He asserted that persons of limited financial means who are able to afford only low-cost medical treatment will be less likely to accrue the $500 minimum, and, therefore, will be less likely to recover for pain and suffering in any given accident. The court dismissed this argument on two grounds: plaintiff's failure to develop any evidentiary support for the proposition and his lack of standing to raise the issue. As to standing, the court noted that nowhere did plaintiff assert that he could not afford adequate medical treatment.[29]

Having determined that the classification of Chapter 670 was non-suspect, the test applied by the court was the more relaxed standard generally used to assess challenged economic legislation, *i.e.*, whether the classification is rationally related to the legislative purpose. The test was originally applied by the Supreme Judicial Court in an earlier decision which held the Massachusetts compulsory automobile insurance law constitutional.[30] In the economic sphere, the Massachusetts equal protection clause, as interpreted by the court, prohibits only those classifications which are "arbitrary or irrational."[31] This rule reflects the standard set out by the Supreme Court which currently requires a court to determine only

> [whether] the classification rests on grounds wholly irrelevant to the achievement of the state's objective . . . . [since a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.[32]

Since there is at least some positive correlation between intensity of pain and the five classes of injuries, the court decided that the classification reasonably

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deny divorce on the basis of parties' inability to pay court costs; opinion rested on due process clause); Gideon v. Wainwright, 372 U.S. 335 (1963) (state may not deny counsel to accused felon because of his inability to pay); Griffin v. Illinois, 351 U.S. 12 (1956) (state must provide a trial transcript on appeal for those defendants not able to afford costs). In *Boddie*, Justice Douglas, supported in part by Justice Brennan, argued that all government imposed fee requirements which effectively bar indigents from access to the courts are invalid on equal protection grounds. 401 U.S. at 383-86 (concurring opinion).

29. 271 N.E.2d at 611. The result may be somewhat different if an indigent plaintiff able to afford only public hospital treatment comes before the court and demonstrates that his poverty actually decreases his recovery. A lower court judge in Illinois has held the Illinois no-fault statute unconstitutional on this ground—that poor persons would receive less compensation than persons who can afford private hospital care. Grace v. Howlett, 40 U.S.L.W. 2437 (Jan. 18, 1972).

30. Opinion of the Justices, 251 Mass. 569, 601, 147 N.E. 681, 695 (1925).

31. *Id.*

32. McGowan v. Maryland, 366 U.S. 420, 425-26 (1961). One of the earliest statements of this test was set out in Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911): "A classification having some reasonable basis does not offend [the Constitution] merely because . . . in practice it results in some inequality."

supported the purpose of the legislation. It further concluded that the $500 minimum for medical expenses did not fail for arbitrariness. The court held that even if the $500 dividing line is arbitrary, it does not affect the validity of the statute. Two reasons were given: there is no constitutional need to classify with mathematical certainty, and ". . . the decision of the Legislature must be accepted unless we can say it is very wide of any reasonable mark."[33]

### *The Rights of the Insured and Substantive Due Process of Law*

#### *The Right Involved—Fundamental or Ordinary?*

Review of due process issues, like the review of equal protection cases, requires a two-step analysis to determine what burden of justification will be imposed on a statute in order to uphold the law.[34] A court usually considers first the nature of the right. If the legislation impinges on a right which the court is willing to deem fundamental, an imposing burden generally styled as the "compelling state interest"test is applied.[35] If, on the other hand, the court holds the right in question to be something less than fundamental, a more lenient standard commonly known as the "rational basis" test[36] is used, requiring only that the legislation have some plausible basis. The respective tests imposed by virtue of the fundamental/non-fundamental distinction clearly dictated the plaintiff's strategy—he must show the right to sue in tort for automobile accident injuries to be fundamental in order to prevail.

In asserting his due process arguments, the plaintiff contended first that a citizen's right to recover in tort for injuries arising out of an automobile accident is a "vested property right." As such it is on a higher level than the "ordinary common law action."[37] Plaintiff's theory was apparently founded in part on a dictum in an earlier Massachusetts decision on workmen's compensation which mentioned, in another context, a "right of action which has accrued under existing laws for personal injuries [and] constitutes a vested right or interest."[38] In the alternative, plaintiff contended that the purpose of the auto-

33. 271 N.E.2d at 610-11 *citing* Mr. Justice Holmes *in* Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32, 41 (1928).

34. It is important to note that the Supreme Judicial Court expressly drew no distinction between the due process protections to be found in the Massachusetts Constitution and the due process clause of the fourteenth amendment. The court said "[The Massachusetts provisions] raise no distinct issues in dealing with this kind of statute and do not, therefore, warrant separate discussion." 271 N.E.2d at 601 n.8.

35. *E.g.*, the right to marital privacy discussed in Griswold v. Connecticut, 381 U.S. 479 (1965). *See* NAACP v. Button, 371 U.S. 415 (1963); Shelton v. Tucker, 364 U.S. 479 (1960).

36. See discussion in text accompanying notes 57-68 *infra*.

37. 271 N.E.2d at 599.

38. Opinion of the Justices, 209 Mass. 607, 610, 96 N.E. 308, 315 (1911).

mobile accident tort action is to ensure the preservation of the fundamental "right of personal security and bodily integrity" grounded in the Bill of Rights of the United States Constitution.[39]

The court initially dealt with the "vested property right" argument by examining the two provisions of the Massachusetts constitution which plaintiff contended supported his theory.[40] The court held that neither citation to the Massachusetts constitution is controlling here. It found that Article 6 "explicitly contemplates" legislative change in the law and that Article 11 is merely "directed toward the preservation of procedural rights."[41] Since the Massachusetts due process provision had earlier been construed as being equivalent to the federal due process clause[42] the court found, contrary to plaintiff's argument, the applicable rule is the one used by the Supreme Court in *Munn v. Illinois*:[43] "A person has no property, no vested interest, in any rule of the common law . . . .[The law] may be changed at the will, or even the whim, of the legislature . . . ."[44]

If there is no vested property right in a tort action, is the right to pursue an injury claim in tort a fundamental right protected by the United States Constitution? The Supreme Judicial Court said no. The plaintiff by relying heavily on Justice Goldberg's concurring opinion in *Griswold v. Connecticut* had contrived a "fundamental right of personal security and bodily integrity" which, he claimed, was protected by a common law tort action and was impaired by the new statute. However, the plaintiff seemingly ignored Mr. Justice Goldberg's own *caveat* in *Griswold* which emphasized that the ninth amendment (on

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39. 271 N.E.2d at 599.

40. MASS. CONST., pt. 2, ch. 6, art. 6, which provides:

> All the laws which have heretofore been adopted, used and approved in the Province, Colony or State of Massachusetts Bay, and usually practiced on in the courts of law, shall still remain and be in full force, until altered or repealed by the legislature; such parts only excepted as are repugnant to the rights and liberties in this constitution.

Art. 11 of the Massachusetts Declaration of Rights, MASS. CONST., pt. 1, provides:

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

41. 271 N.E.2d at 600.

42. *See* note 34 *supra*.

43. 94 U.S. 113 (1876).

44. *Id.* at 134. The same rule was restated in a decision on the New York workmen's compensation statute: "No person has a vested interest in any rule of law entitling him to insist that it shall remain unchanged for his benefit." New York Central R.R. v. White, 243 U.S. 188, 198 (1917). In *Pinnick*, the rule was put somewhat differently: ". . . [C]hanges in prior law are necessary in any ordered society, and to argue that Art. 11 prohibits [such] alterations . . . flies in the face of all reason and precedent." 271 N.E.2d at 600.

which the concurrence rested) does not constitute "an independent source of rights."[46] The *Pinnick* court claimed to have been "baffled" by this contention and summarily dismissed it as being inapplicable to the statute under consideration.[47]

The ultimate effect of discounting plaintiff's attempt to place the right to sue in tort in a preferred status was to reject consideration of Chapter 670 under the more rigid "compelling state interest" test. Having deemed the right asserted by plaintiff to be non-fundamental, the court decided that "the principles by which [the statute] should be judged are those generally applied when economic and social regulations enacted under the police power are attacked as a violation of due process . . . ."[48] These "general principles" which were applied by the *Pinnick* court were not always as "general" as one might be led to believe. To understand fully the reasoning in *Pinnick* on this issue requires a brief examination of both the history and the scope of the doctrine of "economic due process."

*The Current Status of Economic Due Process*

Statutes such as the Massachusetts no-fault law are generally assailed on due process grounds as being an unconstitutional deprivation of "liberty" or a wrongful "taking" prohibited by the fifth and fourteenth amendments. Had plaintiff raised these arguments fifty years ago he might have succeeded. Older decisions by many state courts and by the United States Supreme Court often struck down state economic measures as violative of the due process clause.[49] The language used in these opinions is somewhat akin to the language used by the courts today to invalidate racially discriminatory measures and impairments of freedom of speech. In one such decision the Supreme Court characterized a state statute limiting baker's hours of work as

45. 381 U.S. 479 (1965).

46. 381 U.S. at 492. Plaintiff's reliance was somewhat misplaced. A look at the subsequent history of *Griswold* indicates that even the Supreme Court has had little affection for the opinion. Mr. Justice Goldberg's concurrence has never been cited in a later Supreme Court opinion and the opinion of the Court has been cited only six times, mainly for incidental propositions: *e.g.*, in a footnote reference in a libel case, Time Inc. v. Hill, 385 U.S. 374, 380-81 n.3, and in an extraneous dictum, Stanley v. Georgia, 394 U.S. 557, 564 (1969). *Cf.* Bertelsman, *The Ninth Amendment and Due Process of Law—Toward a Viable Theory of Unenumerated Rights*, 37 U. CIN. L. REV. 777, 792 (1968).

47. 271 N.E.2d at 600.

48. *Id.* at 601.

49. *See, e.g.*, Ribnik v. McBride, 277 U.S. 350 (1928); Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926); Adkins v. Childrens Hospital, 261 U.S. 525 (1923); Coppage v. Kansas, 236 U.S. 1 (1915).

> mere meddlesome interferences with the rights of the individual, and they are not saved from condemnation by the claim that they are passed in the exercise of the police power . . . unless there be some fair ground, reasonable in and of itself, to say that there is material danger to the public health. . . .[50]

This rigid standard of review of economic measures was completely altered during the 1930's.[51] The present standard is so relaxed that it is no longer viable to invoke the doctrine of substantive due process when contesting state economic measures before the United States Supreme Court. In one of the more recent cases raising this issue, *Williamson v. Lee Optical Co.*,[52] Mr. Justice Douglas sounded what appears to have been the death knell for the rigid standard by remarking at the outset of the opinion that

> The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought . . . .For protection against abuses by legislators the people must resort to the polls, not to the courts.[53]

While a number of writers have noted some continuing vitality for the doctrine in certain states,[54] the Massachusetts court has generally followed the lead of the Supreme Court. In a series of three cases extending from 1936 to 1946,[55] the Supreme Judicial Court adopted the lenient national standard which holds, in its most recent restatement, that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[56]

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50. Lochner v. New York, 198 U.S. 45, 61 (1905). *But cf.* Munn v. Illinois, 94 U.S. 113 (1876).

51. *Compare* Ribnik v. McBride, 277 U.S. 350 (1928) *with* Olsen v. Nebraska, 313 U.S. 236 (1941) (regulation of employment agency rates) *and* Adkins v. Children's Hospital, 261 U.S. 525 (1923) *with* West Coast Hotel v. Parrish, 300 U.S. 379 (1937). *West Coast Hotel* is generally regarded as the dividing line between the restrictive standard and the contemporary permissive standard of review. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 42.

52. 348 U.S. 483 (1955).

53. *Id.* at 488 (citations and quotation marks omitted). One of the most recent cases reiterating the Court's reluctance to sit in judgment upon state legislation is Dandridge v. Williams, 397 U.S. 471 (1970) (an equal protection issue but using the same language as *Lee Optical*).

54. *See* Carpenter, *Our Constitutional Heritage: Economic Due Process and the State Courts*, 45 A.B.A.J. 1027 (1959); Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950). Paulsen has noted that in those states which rely most heavily on the doctrine of economic due process the courts have often "set up almost insurmountable barriers to government's attempt to deal with important public problems." *Id.* at 117.

55. Merit Oil Co. v. Director of Div. of Necessaries of Life, 319 Mass. 301, 306, 65 N.E.2d 529, 532 (1946); Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 418, 30 N.E.2d 269, 274 (1940); Howes Bros. Co. v. Unemployment Compensation Comm., 296 Mass. 275, 283-84, 5 N.E.2d 720, 726 (1936).

56. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

*The Presumption of Constitutionality and the Rational Basis Test*

It is hornbook law that a presumption of constitutionality attaches to any legislative enactment. In practice, however, a court may accord the presumption greater or lesser weight depending on the court's own perception of the scope and operation of the legislation. For example, a close analysis of recent Supreme Court cases interpreting legislation in the area of race or first amendment freedoms tends to indicate that the burdens of justification imposed on the legislature are so great as to reverse the rule, resulting in a presumption against constitutionality.[57] In economic areas, on the other hand, courts consistently give great weight to the statute *qua* statute.

The presumption of validity accorded economic measures appears to have been developed as an attempt to prevent the court's imposing its own sense of propriety on a measure produced and approved by a coordinate branch of government.[58] In its most basic form the presumption is a self-imposed restriction to forestall the court's deciding an issue on the basis of the legislation's desirability. As Mr. Justice Murphy, writing for the Court in *Daniel v. Family Security Life Insurance Co.*,[59] fairly stated the notion:

> . . . [W]e cannot fail to recognize [the contention of invalidity] as an argument for invalidity because this Court disagrees with the desirability of the legislation . . . . We are not equipped to decide desirability; and a court cannot eliminate measures which do not happen to suit its tastes if it seeks to maintain a democratic system.[60]

The *Pinnick* court agreed with the premise that a court should refuse to impose its value judgments upon a legislative enactment. The presumption of constitutionality was applied by limiting the inquiry into the statute to the single question of whether the statute bears "a rational basis to a legitimate legislative objective."[61] As indicated earlier, the court had determined that the statute's purpose was to eliminate minor injury claims in an attempt to relieve some of the pressures of court congestion.[62]

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57. *See generally* Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. PA. L. REV. 637, 659 (1966); Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW. U. L. REV. 13, 226 (1958).

58. At least one writer contends that while early Supreme Court opinions mention such a presumption, it "meant no more than that the Court should give weight to the opinion of other branches of government and, if possible, avoid confrontation." Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 206-07 (1971).

59. 336 U.S. 220 (194).

60. *Id.* at 224. The Supreme Judicial Court has adopted virtually the same standard. Sperry & Hutchinson Co. v. McBride, 307 Mass. 408, 418, 30 N.E.2d 269, 274 (1940).

61. 271 N.E.2d at 602.

62. *See* text accompanying notes 21-24 *supra*.

The rational basis test is currently applied by both the Massachusetts court and by the United States Supreme Court to virtually all types of economic legislation. In one of the latest decisions, Mr. Justice Black, tracing the history of the use of the due process clause to strike down state legislation, noted that all tests more restrictive than the rational basis test had "long since been discarded"[63] and went on to emphasize that

> We refuse to sit as a "super-legislature to weigh the wisdom of legislation," and we emphatically refuse to go back to the time when courts used the Due Process Clause to strike down state laws . . . .[64]

Applying the test to the no-fault statute, the *Pinnick* court concluded that "it cannot be successfully maintained that [the statute's] salient provisions . . . are not a rational approach to the solution of these patent inefficiencies and inequities."[65]

In so holding, the Supreme Judicial Court properly avoided any notions of judicially-imposed desirability. It is at this point that Justice Tauro's concurrence falters. Justice Tauro believes that the majority opinion, in searching for a plausible explanation for the legislation, affirmatively endorsed the "social policy" of no-fault insurance. He criticizes the court for "gratuitously discuss[ing] at great length the reasonableness and merits of the legislation."[66] However, in setting out his own negative reactions to the legislation he mistakes the majority's search for any conceivable justification for the statute as an endorsement of the law's desirability. Tauro seems to forget that the rational

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63. Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). This test, like the equal protection test, has been adopted by the Supreme Judicial Court. Druzik v. Bd. of Health, 324 Mass. 129, 138-39, 85 N.E.2d 232, 237 (1949).

64. Ferguson v. Skrupa, 372 U.S. at 731-32 (footnotes ommitted). The test was perhaps most concisely stated as, "It is enough that there be an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." William v. Lee Optical Co., 348 U.S. 483, 488 (1955).

65. 271 N.E.2d at 605. The court went on to examine and discard due process attacks on each of three specific provisions in the statute: (1) the requirement that a driver insure himself through a private profit-making corporation; (2) that persons who have different or nonexisting wage continuation plans are assessed the same premiums on an unallocated, undifferentiated basis; and (3) that a wage continuation plan must first be exhausted before one may recover for lost wages in tort.

66. *Id.* at 612. Justice Tauro's concurrence is as wide-ranging as he purports to find the majority opinion. For example, he criticizes the statute for permitting the plaintiff to recover only a fraction of the $1,565 potential recovery in tort and disregards the fact that the "fraction" would have been received immediately after the accident on application to the plaintiff's insurance company. While the $1,565 is merely a possibility, recoverable only after a two-year delay before trial. He further proposes, with little evidentiary support, that the statute will have a devastating effect on the Massachusetts trial bar: "We must have a sufficiency of dedicated and competent trial lawyers . . . ." *Id.* at 617 n.3.

basis test requires finding only that there is some logical explanation for the enactment, not that the explanation proffered by the court be the best or most-likely reason. The *Pinnick* methodology is much like that used by the Supreme Court in *South Carolina State Highway Department v. Barnwell Brothers*[67] and is replete with phrases such as "the legislature might have thought," or "the legislature might have found." Clearly, the majority does not so much support the statute as it merely examines alternative explanations in an attempt to discover some credible basis for the enactment.[68]

### *The Adequate Substitution of Rights and the Workmen's Compensation Analogy*

The *Pinnick* opinion noted that "the nature and direction of the opposition to Chapter 670 . . . is highly reminiscent of that which attended passage of the first workmen's compensation acts."[69] There are significant comparisons between the two. For example, workmen's compensation acts typically eliminate all of an employee's rights to sue in tort, while Chapter 670 prohibits suits in tort only for relatively minor claims.[70] The no-fault statute is mandatory in Massachusetts; that is, no Massachusetts motorist may elect not to be covered, while some workmen's compensation acts are voluntary with respect to either the employer or employee. Although many of the earliest compensation acts were optional for one or both of the parties, the decisions sustaining their constitutionality usually did not emphasize the distinction of voluntariness.[71] In 1941 the Supreme Judicial Court approved a workmen's compensation statute which was compulsory only for the employer with relatively little discussion of the voluntary aspects of the legislation.[72] The original Massachusetts workmen's compensation statute had been sustained against similar constitutional attacks thirty years earlier in 1911.[73] This examination and comparison of both workmen's compensation and no-fault insurance shows the no-fault statute to

67. 303 U.S. 177 (1938). For an extended discussion of the Supreme Court's methodology in this area *see* McCloskey, *Economic Due Process and the Supreme Court*, 1962 SUP. CT. REV. 40-54.

68. It might be said, however, that some of the majority's language seems singularly inappropriate to a neutral discussion of the statute, *e.g.*, "[The automobile tort claim] remains, however, a cancer to be rooted out in American courts." 271 N.E.2d at 604.

69. 271 N.E.2d at 602 n.9. Other analogies briefly considered by the court as examples of legislative modification of pre-existing common law rights were the "heart balm" statutes, automobile guest statutes, and compulsory automobile insurance.

70. *See generally* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION 37-39 (1968).

71. *See, e.g.*, Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); New York Central R.R. v. White, 243 U.S. 188 (1917).

72. Opinion of the Justices, 309 Mass. 562, 35 N.E.2d 1 (1941).

73. Opinion of the Justices, 209 Mass. 607, 96 N.E. 308 (1911).

be the milder of the two in terms of its revision of pre-existing common law rights and procedures. The *Pinnick* court found that both types of legislation substituted administrative modes of recovery for earlier common law tort actions.

However, a suggestion in the landmark workmen's compensation decision, *New York Central Railroad v. White*[74]—that a legislature might not be able to set aside all common law rules and remedies in a particular area without providing an adequate substitute—persuaded the court to carry the due process analysis one step beyond the rational basis test. The question posed was whether Chapter 670 provides an adequate substitute for pre-existing rights. The court answered affirmatively by quoting the language in *New York Central:*

> If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of damages.[75]

The court held that a similar substitution had been made by Chapter 670. The insured motorist had exchanged the possibility of a greater recovery after lengthy litigation for the sure and immediate recovery of a lesser amount. The substitute was held reasonable and the statute constitutional.

### *Conclusion*

All is not yet well in Massachusetts. There are some rough edges remaining in the *Pinnick* opinion which may provide additional problems for the court. The court might have discussed at greater length the contention that the $500 minimum placed on medical expenses unduly penalizes those unable to afford the optimum in medical treatment.[76] A plaintiff with standing to assert this claim who can also demonstrate actual inequality of treatment under Chapter 670 may provoke a more thorough examination of this issue.

The secondary problems of requiring both mandatory coverage and a waiver of the right to sue in tort for members of the owner's household and the "pure pedestrian" have not yet been decided.[77] It remains to be seen whether the statute may properly restrict the common law rights of plaintiffs other than driver-owners.

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74. 243 U.S. 188 (1917).
75. *Id.* at 201.
76. *See* text accompanying notes 28, 29 *supra.*
77. *See* text accompanying note 15 *supra.*

However, the court has unequivocally answered the central questions. The basic concept of no-fault automobile insurance is constitutional in Massachusetts. The right to sue in tort for automobile accident injuries is no different from any other common law action and may be modified or eliminated by legislative fiat. There is virtually nothing left of the old concept of economic due process. The prerogatives of the legislature under the rational basis test are so nebulous that it is difficult to conceive of any economic legislation which violates present standards. Even if the limits of economic legislation can be determined, the Massachusetts no-fault statute is well within accepted boundaries.

*William Fox*