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Chapter 4: Evidence

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CHAPTER 4

Evidence

SURVEY STAFF†

§4.1. Polygraph Evidence—Admissibility in Criminal Prosecutions.* Courts in many jurisdictions have held that polygraph evidence should not be admitted in any circumstances.[1] In other jurisdictions courts have allowed polygraph evidence to be admitted in criminal prosecutions provided the parties agreed prior to examination that the results of the test would be introduced.[2] In *Commonwealth v. Fatalo*[3] the Supreme Judicial Court adopted the view that polygraph evidence was not admissible in criminal prosecutions because the polygraph had not yet achieved general acceptance by the community of scientists involved.[4] Eleven years later, however, in *Commonwealth v. A Juvenile*,[5] the Court changed its position on the admissibility of polygraph results. The Court noted that, while polygraph testing had not yet reached the general acceptance standard required by *Fatalo*, the polygraph had advanced to the point where it could be of significant value in the criminal trial process if its admissibility was confined to carefully defined circumstances.[6] Therefore, the Court held that the results of a defendant's

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1 *See, e.g.*, Pulakis v. State, 476 P.2d 474, 479 (Alaska 1970); People v. Sweeney, 46 Ill. App. 3d 858, 867, 361 N.E.2d 344, 351 (1977); People v. Ranes, 63 Mich. App. 498, 502, 234 N.W.2d 673, 676 (1975); Harrison v. State, 307 So. 2d 557, 562 (Miss. 1975); State v. Steinmark, 195 Neb. 545, 548, 239 N.W.2d 495, 497 (1976); Warden, Nev. State Prison v. Lischko, 90 Nev. 221, 224, 523 P.2d 6, 8 (1974); State v. Montgomery, 291 N.C. 235, 243-44, 229 S.E.2d 904, 909 (1976); Commonwealth v. Gee, 467 Pa. 123, 141, 354 A.2d 875, 883-84 (1976); State v. Watson, 248 N.W.2d 398, 399 (S.D. 1976); Robinson v. State, 550 S.W.2d 54, 59 (Tex. Crim. App. 1977); Jones v. Commonwealth, 214 Va. 723, 725, 204 S.E.2d 247, 248 (1974).

2 *See, e.g.*, Robinson v. Wilson, 44 Cal. App. 3d 92, 103, 118 Cal. Rptr. 569, 576 (1974); State v. McNamara, 252 Iowa 19, 29, 104 N.W.2d 568, 574 (1960); State v. Fields, 434 S.W.2d 507, 512-14 (Mo. 1968).

3 346 Mass. 266, 191 N.E.2d 479 (1963).

4 *Id.* at 270, 191 N.E.2d at 481.

5 365 Mass. 421, 313 N.E.2d 120 (1974).

6 *Id.* at 425, 313 N.E.2d at 124.

polygraph examination may be admitted, at the discretion of the trial judge, provided:

1) The examination is at the defendant's request.[7]

2) The defendant agrees in advance to the admission of the test results regardless of outcome.[8]

3) The court informs the defendant that, to the extent of the agreement, he is waiving his Fifth Amendment right against self-incrimination.[9]

4) The court determines such a waiver is voluntary.[10]

5) The court makes a determination, after a close and searching inquiry, that the polygraph examiner is qualified, that the defendant is fit for such examination, and that the examination methods are proper.[11]

The decision in *A Juvenile* left unresolved many questions regarding the use of polygraph results. For example, the Court did not state for what purpose the polygraph results could be used but rather merely noted that the test results should be "considered with all other evidence."[12] In two cases decided during the *Survey* year, *Commonwealth v. Vitello*[13] *and Commonwealth v. Moynihan*,[14] the Court directly addressed this issue and determined that polygraph test results are admissible only for the limited purpose of corroborating or impeaching the defendant's testimony.[15]

In *Vitello* the defendant was charged with armed robbery.[16] Prior to trial, he requested the court's permission to take a polygraph examination at the state's expense for the purpose of introducing the results at trial.[17] The defendant agreed to allow the test results to be admitted into evidence even if the results proved unfavorable. The defendant took the examination and the prosecution offered the unfavorable polygraph results into evidence as part of the prosecution's main case. The trial judge admitted the evidence and the defendant was found guilty.[18]

In *Moynihan* the defendant was also charged with armed robbery and a polygraph examination was administered. The defendant requested

[7] *Id.* at 430-31, 313 N.E.2d at 126.
[8] *Id.* at 431, 313 N.E.2d at 126-27.
[9] *Id.* at 431-32, 313 N.E.2d at 127.
[10] *Id.*
[11] *Id.* at 426, 313 N.E.2d at 124.
[12] *Id.* at 431, 313 N.E.2d at 127.
[13] 1978 Mass. Adv. Sh. 2603, 381 N.E.2d 582.
[14] 1978 Mass. Adv. Sh. 2654, 381 N.E.2d 575.
[15] 1978 Mass. Adv. Sh. at 2632, 381 N.E.2d at 596.
[16] *Id.* at 2603, 381 N.E.2d at 584.
[17] *Id.* at 2604, 381 N.E.2d 584.
[18] *Id.* at 2603-04, 381 N.E.2d 584.

the examination for the purpose of introducing the results at trial.[19] The results of the test were favorable to the defendant. The trial court denied the defendant's request to introduce the polygraph results as independent evidence. Instead, the trial court ruled that the results were admissible only to corroborate the defendant's testimony.[20] Consequently, the defendant was required to take the witness stand in order to introduce the polygraph results. As a result of the defendant taking the stand, the prosecutor was able to introduce evidence of the defendant's long record of criminal convictions.[21] The defendant was convicted of armed robbery.

The Supreme Judicial Court reversed the conviction in *Vitello* but upheld the conviction in *Moynihan* for reasons it set forth in *Vitello*.[22] The Court, in clarifying the purpose for which the results of a polygraph examination may be admitted, weighed three factors: (1) the nature of the polygraph method, (2) the pertinent rules of evidence, and (3) policy.[23] In so doing, the Court initially observed that while it was an appropriate time to elaborate upon *A Juvenile*'s holding that polygraph results could be admitted in carefully defined circumstances, no further evidence had been submitted on the question of scientific reliability or acceptability of the polygraph.[24] Consequently, the Court accepted as still valid its finding in *A Juvenile* that the polygraph had not yet reached the "general acceptance" standard of *Fatalo*.[25] Nevertheless, the Court in *Vitello* conducted a detailed review of the polygraph method.

In considering the nature of the polygraph method, the Court noted that the polygraph's underlying premise—that conscious lying can be detected by measuring involuntary physiological changes—is based on the assumption of "a regular relationship between lying and certain emotional states, and a regular relationship between emotional states and changes in the body."[26] It observed that the validity of these assumptions has been questioned.[27] In addition, the Court emphasized that in order for the polygraph to be effective the subject must be instilled with a belief that the polygraph is infallible and must be concerned about the possibility of detection.[28] The Court concluded that

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19 1978 Mass. Adv. Sh. at , 381 N.E.2d at 581.
20 *Id.*
21 *Id.; see* G.L. c. 233, § 21.
22 1978 Mass. Adv. Sh. at 2632, 381 N.E.2d at 596.
23 *Id.* at 2608, 381 N.E.2d at 586.
24 *Id.*
25 *Id.*
26 *Id.* at 2609-10, 381 N.E.2d at 586.
27 *Id. See, e.g.*, Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie Detection*, 70 YALE L.J. 694, 700 (1961).
28 1978 Mass. Adv. Sh. at 2612-13, 381 N.E.2d at 587-88.

the success of the polygraph is almost completely dependent upon the skill of the polygraph examiner[29] and is highly dependent upon the mental attitude and beliefs of the subject.[30] The Court noted that if a subject does not believe in the infallibility of the process or is unconcerned about the outcome, the polygraph procedure is seriously compromised.[31]

With these considerations as to the effectiveness of polygraph examinations in mind, the Court reviewed basic evidentiary principles in order to determine whether the results of a polygraph test should be admissible. The Court observed that when evidence consists of expert testimony the expert must be qualified in the subject of his testimony.[32] Additionally, the Court stated that when the expert's opinion is based on a newly developed body of scientific knowledge, the reliability of the body of knowledge must also be substantiated.[33] The Court nonetheless concluded that failure to achieve the *Fatalo* standard of general acceptance need not preclude the use of the polygraph in view of its unique potential as a tool of justice.[34] Rather, the Court indicated that the circumstances in which polygraph test results would be admissible could be delineated by balancing certain policy considerations.

The first policy consideration noted by the Court was that polygraph evidence may confuse and prejudice the jury because the polygraph may assume "mystic infallibility" in the eyes of the jury.[35] A second and related concern was that the polygraph may usurp the jury's role as a fact finder. The Court recognized the possibility that the jury would be so influenced by the polygraph evidence that it might abdicate its responsibility as an independent fact finder.[36] The Court also observed that the "appearance of justice and the preservation of the perception that conviction rests on the judgment of one's peers" may be compromised by the use of polygraph evidence.[37] A third consideration weighed by the Court was the consumption of time and trial resources by the use of polygraph evidence. The Court noted that extensive use of the polygraph would place a burden on the trial system.[38] The burden would result both from the time needed to question and cross-examine witnesses at trial and from the time needed by judges to ascertain that

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[29] *Id.* at 2618, 381 N.E.2d at 590.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 2620, 381 N.E.2d at 591.
[33] *Id.* at 2621, 381 N.E.2d at 591.
[34] *Id.* at 2622-23, 381 N.E.2d at 592.
[35] *Id.* at 2624, 381 N.E.2d at 592-93.
[36] *Id.* at 2626, 381 N.E.2d at 593.
[37] *Id.* at 2626-27, 381 N.E.2d at 593-94.
[38] *Id.* at 2627, 381 N.E.2d at 594.

the subject was amenable to testing, that past conditions were proper, and that the polygraph examiner was fully qualified.[39]

After reviewing the relevant policy considerations, the Court considered the approaches other jurisdictions have taken with respect to the use of polygraph evidence. Many courts have concluded that polygraph evidence should not be admitted under any circumstances.[40] At the other extreme, one jurisdiction has allowed polygraph results into evidence even without prior agreement of the parties.[41] Several jurisdictions, however, occupy intermediate positions. It was on these intermediate positions that the *Vitello* Court focused its review.

Some courts have invoked a notion of estoppel and held that a defendant who stipulated beforehand that the polygraph operator was qualified and that the procedure was accurate cannot later object to the introduction of unfavorable results.[42] The *Vitello* Court found this reasoning unpersuasive. If the polygraph test is unreliable, the Court noted, the presence of a prior stipulation or agreement will not imbue the polygraph results with reliability and probative value.[43] Another intermediate approach, adopted by a number of courts,[44] imposes restrictions on admissibility notwithstanding the prior stipulation or agreement of the parties. The *Vitello* Court referred to *State v. Valdez*[45] as the seminal case for this position.[46] *Valdez* held that pursuant to an agreement polygraph results are admissible to corroborate other evidence of the crime *and* to impeach or corroborate the defendant's testimony.[47] The *Valdez* Court, however, imposed a number of conditions, including reserving to the trial judge the decision of admissibility notwithstanding the agreement.[48]

While noting that the *Valdez* formulation avoided the more serious shortcomings of the "estoppel" decisions, the *Vitello* Court was not prepared wholly to adopt the *Valdez* approach.[49] Instead, the Court ana-

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[39] *Id.*

[40] *Id.* at 2628, 381 N.E.2d at 594. *See* cases listed in note 1 *supra.*

[41] *Id.* at 2628, 381 N.E.2d at 594. *See* State v. Dorsey, 88 N.E. 184, 185, 539 P.2d 204, 205 (1975).

[42] *See* cases listed in note 2 *supra.*

[43] 1978 Mass. Adv. Sh. at 2629-30, 381 N.E.2d at 595.

[44] *See, e.g.*, State v. Valdez, 91 Ariz. 274, 283, 371 P.2d 894, 900 (1962); State v. Lassley, 218 Kan. 758, 760, 545 P.2d 383, 385 (1976); State v. McDavitt, 62 N.J. 36, 46-47, 297 A.2d 849, 854-55 (1972); State v. Souel, 53 Ohio St. 2d 123, 132-33, 372 N.E.2d 1318, 1323 (1978); State v. Stanislawski, 62 Wis. 2d 730, 741-43, 216 N.W.2d 8, 13-14 (1974).

[45] 91 Ariz. 274, 371 P.2d 894 (1962).

[46] 1978 Mass. Adv. Sh. at 2631, 381 N.E.2d at 595.

[47] 91 Ariz. at 283, 371 P.2d at 900.

[48] *Id.*

[49] 1978 Mass. Adv. Sh. at 2632, 381 N.E.2d at 596.

lyzed what it considered to be three possible roles for polygraph evidence in criminal cases: use of unfavorable polygraph results as independent evidence of guilt;[50] use of favorable polygraph evidence as independent evidence of innocence;[51] and use of polygraph results to impeach or corroborate the defendant's testimony.[52] The Court determined that most policy considerations—confusion and prejudice of the jury, intrusion into the jury's function, and use of trial resources—outweighed the probative value of polygraph results when used as independent evidence of either guilt[53] or innocence.[54] The Court concluded, however, that different considerations apply when polygraph results are used to impeach or corroborate the defendant's testimony.[55] Referring to the polygraph examiner as a potential "expert character witness,"[56] the Court compared the use of polygraph evidence for this purpose with the use of character evidence.[57] The Court noted that the limited use of polygraph evidence would serve several policy goals.[58] First, if the results are favorable, a defendant with a criminal record may elect to testify where he otherwise would not. The defendant may determine that the results of the polygraph would outweigh the prejudicial impact of his criminal history. Thus, the court stated, the capacity of the trial process to determine the truth will be significantly enhanced by encouraging defendants to testify.[59] Moreover, the Court noted that the polygraph method arguably would provide the jury with a more direct method for judging the credibility of a witness than would the introduction of past criminal behavior.[60] Also, in the case where an innocent defendant is erroneously determined by the polygraph examiner to have lied, the defendant may protect himself from the damaging evidence by forfeiting his right to take the stand.[61] Therefore, the Court determined that polygraph results will remain admissible but only for the limited purpose of impeaching or corroborating the defendant's testimony.[62]

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[50] *Id.*
[51] *Id.* at 2634, 381 N.E.2d at 597.
[52] *Id.* at 2635, 381 N.E.2d at 597.
[53] *Id.* at 2632-33, 381 N.E.2d at 596.
[54] *Id.* at 2634-35, 381 N.E.2d at 597.
[55] *Id.* at 2636, 381 N.E.2d at 597.
[56] *Id.* at 2636, 381 N.E.2d at 598.
[57] *Id.*
[58] *Id.* at 2637, 381 N.E.2d at 598.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 2638, 381 N.E.2d at 598. The Court noted that a voir dire hearing could be held prior to the defendant's main case to determine whether or not the polygraph results would be admissible. This hearing would eliminate the possibility of the defendant taking the stand only to have the polygraph results excluded for reasons within the discretion of the judge. *Id.* at 2639, 381 N.E.2d at 599.
[62] 1978 Mass. Adv. Sh. 2654, , 381 N.E.2d 575, 581; 1978 Mass. Adv. Sh. 2603, 2632, 381 N.E.2d 582, 596.

The question arising out of *Vitello* and *Moynihan* is whether the line drawn by the Court—allowing polygraph results to impeach or corroborate but not as independent evidence—can withstand analysis. The Court placed great emphasis on the dependence of the integrity of the polygraph method upon the subject's concern for the possibility of a deception being detected.[63] Yet under the *Vitello-Moynihan* decisions any concern over detection is eliminated. Previously, a defendant applied for the polygraph examination under an agreement that the results would be admissible regardless of the outcome. The defendant knew that an unfavorable result would be introduced by the prosecution and, consequently, if he were lying he would be concerned with the possibility of detection. Under the present system, however, the guilty defendant has nothing to lose by taking the polygraph exam. If the results are favorable he can take the stand and the evidence will be admissible. If the results are unfavorable he can keep the evidence out by not testifying. Moreover, according to the Court's analysis of the polygraph method,[64] the defendant's awareness of his nothing-to-lose position gives him a much better chance to elicit favorable results.

In view of this situation, in which favorable polygraph results can help a defendant but unfavorable results can be excluded, it would not be surprising if there is a significant increase in the number of defendants applying to the court for polygraph examinations. Such an increase in defendant requests for polygraph examinations will be a drain on judicial resources as the trial courts are required under *A Juvenile* to supervise closely the administration of the examination. Ironically, one of the reasons the *Vitello* Court advanced for refusing to allow polygraph results to be used as independent evidence of innocence or guilt was its concern over the consumption of time and trial resources.[65]

In addition to the "windfall" given to the guilty defendant by giving him a chance to pass the polygraph examination without fear of failing it, the *Vitello-Moynihan* decisions will have an impact on the innocent defendant. Under the holding of *A Juvenile* it appeared that the defendant could introduce the results of the polygraph without taking the witness stand. This is no longer true. The defendant must now testify in order to introduce the favorable polygraph results to corroborate his testimony. This ruling will force a difficult choice upon the innocent defendant who has a long criminal record. Once the defendant takes the stand his prior record will be introduced by the prosecution, with

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[63] 1978 Mass. Adv. Sh. at 2613, 381 N.E.2d at 588.
[64] *Id.*
[65] *Id.* at 2626-27, 381 N.E.2d at 593-94.

the consequent risk that such a record may have more of an impact on the jury than the favorable polygraph results.

Obviously, the Court in *Vitello* and *Moynihan* attempted to reach a middle ground on the use of polygraph results. On one hand, the Court was troubled by the polygraph's lack of general scientific acceptance and desired to limit the use of polygraph results. On the other hand, the Court was reluctant to exclude completely polygraph evidence owing to the highly probative value of the results and the enormous potential of the polygraph method. In balancing these interests, however, the Court has reached a somewhat troubling compromise.

Several other decisions regarding the use of polygraph results decided during the *Survey* year illustrate the difficulties courts faced in interpreting and applying the compromise that *Vitello* had reached. In *Commonwealth v. Allen*[66] the trial had taken place prior to the *Vitello-Moynihan* decisions, and the trial court had admitted unfavorable polygraph results, which were a part of the prosecution's main case.[67] The state contended that the admission was harmless error as the defendant had later taken the stand and the results would have been admissible at that point for impeachment purposes.[68] The Supreme Judicial Court rejected this argument on two grounds. First, the Court noted that the defendant might have chosen not to testify had it not been for the unfavorable polygraph results introduced by the prosecution.[69] Second, the Court found that the defendant was entitled to a limiting instruction explaining that the polygraph testimony is admitted solely for the purpose of corroborating or impeaching the defendant's testimony.[70]

In *Commonwealth v. Foley*[71] the Appeals Court was required to reverse, as the trial again had taken place prior to *Vitello* and *Moynihan*, and the trial court had admitted unfavorable polygraph results as independent evidence. The Appeals Court noted that because the defendant may choose to testify at the second trial the polygraph results may be introduced for limited purposes.[72] Because of this possibility, the court addressed two additional objections by the defendant. First, the defendant objected to the trial court's allowing the polygraph examiner to testify as to the statistical reliability of the polygraph.[73] Second, the defendant objected to the trial judge's jury instruction compar-

[66] 1979 Mass. Adv. Sh. 863, 387, N.E.2d 553.
[67] *Id.* at 864, 387 N.E.2d at 554-55.
[68] *Id.* at 867, 387 N.E.2d at 556.
[69] *Id.*
[70] *Id.*
[71] 1979 Mass. App. Ct. Adv. Sh. 999, 389 N.E.2d 762.
[72] *Id.* at 1001, 389 N.E.2d at 765.
[73] *Id.* at 1002, 389 N.E.2d at 765.

ing polygraph experts to ballistic experts, surgeons, architects, engineers, and handwriting experts.[74] The appellate court agreed with the defendant's objections in both instances. The court found it impermissible to allow the polygraph examiner to testify as to the test's statistical reliability. Such statistics, the court noted, are of questionable reliability, invade the province of the jury, and are of minimal probative value.[75] As for the jury charge, the court cautioned trial judges against treating polygraph examiners on a par with scientific experts in more established fields.[76]

In *Commonwealth v. Moore*[77] the issue arose as to the use of polygraph results to impeach or corroborate the testimony of prosecution witnesses. In *Moore* the trial court excluded evidence of a polygraph test offered to impeach a prosecution witness.[78] The Supreme Judicial Court specifically reserved the question of whether polygraph evidence is ever admissible to impeach a prosecution witness.[79] Assuming, without deciding, that such evidence may be admissible, the Court noted that the trial court did not abuse its discretion by excluding the evidence in the present case.[80]

§4.2. Impeachment—Defendant's Right to Establish Bias—Juvenile Records and Evidence of Prior Arrest.* The general rule in Massachusetts is that a defendant may not introduce into evidence juvenile records[1] or records of prior arrests[2] to impeach the credibility of an adverse witness. With the decision in *Commonwealth v. Ferrara,*[3] Massachusetts had recognized an exception to this rule where the defendant is able to establish that such records have a rational tendency to show specific bias on the part of the witness.[4] In *Ferrara,* the Su-

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74 *Id.* at 1004, 389 N.E.2d at 766.
75 *Id.* at 1002-03, 389 N.E.2d at 765.
76 *Id.* at 1004, 389 N.E.2d at 766.
77 1979 Mass. Adv. Sh. 2334, 393 N.E.2d 904.
78 *Id.* at 2341, 393 N.E.2d at 908.
79 *Id.* at 2345, 393 N.E.2d at 910.
80 *Id.*

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1 G.L. c. 119, § 60 (juvenile records not admissible); *cf.* G.L. c. 233, § 21 (records of convictions may be used to impeach credibility). *See also* Michelson v. United States, 335 U.S. 469, 482 (1948) (arrest records admissible in cross-examination of defendant's character witness); *see generally* LEACH & LIACOS, MASSACHUSETTS EVIDENCE 123 (4th ed. 1967).

2 Commonwealth v. Nassar, 351 Mass. 37, 44-45, 218 N.E.2d 72, 78 (1966), *appeal after remand,* 354 Mass. 249, 237 N.E.2d 39; *cert. denied,* 393 U.S. 1039 (1969) (reference to prior arrest prejudicial error).

3 368 Mass. 182, 330 N.E.2d 837 (1975). *See* Krasnoo & Ottenberg, *Evidence,* 1975 ANN. SURV. MASS. LAW § 14.3, at 365-67.

4 368 Mass. at 186-87, 330 N.E.2d at 841.

preme Judicial Court adopted the rationale of the United States Supreme Court decision in *Davis v. Alaska*[5] and declared that cross-examination on the issue of bias is an essential part of a defendant's constitutional right to confront an adverse witness.[6] As a result of *Ferrara,* the trial judge must decide, in light of each particular situation, if a juvenile record or prior arrest is relevant to the issue of bias. If there is a rational tendency to show bias, the defendant's right to full cross-examination outweighs the state policy of maintaining the confidentiality of juvenile records or prior arrests not resulting in conviction.[7]

During the *Survey* year, the Massachusetts courts of appeal considered two cases stemming from the exclusion of juvenile records offered for purposes of impeachment. In *Commonwealth v. Santos,*[8] the defendant, on trial for rape and related charges, attempted to impeach the credibility of the complainant by introducing her sealed juvenile records.[9] During a lobby conference, the trial judge contacted the probation department, learned that the record had been sealed, and then refused to admit the record.[10] Subsequently, the defendant was convicted of rape and kidnapping.[11]

On appeal the sole issue before the Supreme Judicial Court was whether the defendant's right to confront and cross-examine an adverse witness was infringed by the trial judge's refusal to admit the complainant's sealed juvenile record.[12] The defendant argued that a general attack on credibility is not materially different from an effort to establish specific bias or motive to prevaricate where credibility is a central issue in the trial.[13] The Supreme Judicial Court rejected this argument and held that a sealed juvenile record may be introduced only when the record is probative of bias or motive.[14] The Court stated that neither *Davis* or *Ferrara* permits juvenile records to be admitted under all circumstances.[15] Rather, both decisions require the trial judge to weigh several factors in deciding whether to admit juvenile records.

The *Santos* Court set forth three factors to be considered in determining the probative value of juvenile records on the issue of bias. The

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[5] 415 U.S. 308 (1974).
[6] 368 Mass. at 189, 330 N.E.2d at 842 (citing Pointer v. Texas, 380 U.S. 400, 405 (1965).
[7] 368 Mass. at 190, 330 N.E.2d at 842-43 (citing Davis v. Alaska, 415 U.S. at 320).
[8] 1978 Mass. Adv. Sh. 3221, 384 N.E.2d 1202.
[9] *Id.* at 3224, 384 N.E.2d at 1204.
[10] *Id.* at 3224-25, 384 N.E.2d at 1204.
[11] *Id.* at 3221-22, 384 N.E.2d at 1203.
[12] *Id.* at 3221, 384 N.E.2d at 1202.
[13] *Id.* at 3225, 384 N.E.2d at 1204.
[14] *Id.* at 3229, 384 N.E.2d at 1206; *see* note 21 *infra.*
[15] *Id.* at 3226, 384 N.E.2d at 1204-05.

trial judge must consider the probationary status of the witness, any motive of the witness to divert suspicion from himself by means of his testimony, and any other motives for pleasing the prosecution with his testimony.[16] In applying these criteria, the *Santos* Court found that the defendant's right to confront an adverse witness had not been violated. No evidence suggested that the complainant was on probation, was under suspicion for any crime, or had any reason to be unduly cooperative with the prosecution.[17] Furthermore, the sealing of the complainant's juvenile record showed that she had not been convicted of a crime or adjudicated a delinquent at any time during the three years prior to the request that such record be sealed.[18] Therefore, the Court concluded that in the instant case the state's policy of securing the confidentiality of juvenile records was clearly superior to the limited value of the records to impeach the credibility of the complainant.[19]

The *Santos* decision is significant because it limits *Ferrara* to those situations in which a juvenile record is offered to show a witness's bias or motive. The defendant's effort to extend and apply the rationale of *Ferrara* to a general attack on the witness's credibility was rejected by the Court, even when credibility is a central issue at trial.[20] Consequently, a juvenile record remains admissible only on the narrow issue of bias or motive.

With respect to the more narrow issue of the use of *sealed* juvenile records, the Court did not hold them inadmissible under all circumstances. By setting forth a three-part test for admissibility, the Court in *Santos* implied that there may be situations where such sealed records may be introduced.[21] It appears, nevertheless, that a juvenile record which has passed judicial scrutiny and has been sealed in accordance with

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16 *Id.* at 3227-28, 384 N.E.2d at 1205.
17 *Id.* at 3228, 384 N.E.2d at 1205-06.
18 *Id.* at 3228, 384 N.E.2d at 1205; *see* G.L. c. 276, § 100B.
19 *Id.* at 3229, 384 N.E.2d at 1206.
20 *Id.* at 3225, 384 N.E.2d at 1206.
21 Throughout its opinion the Court in Santos makes no distinction between sealed juvenile records and juvenile records generally. The holding, therefore, leaves open the possibility that a sealed record could be admissible under different circumstances. Most troubling is the Court's suggestion that if the witness were on probation for some other offense or had motives to please the prosecution, the sealed record might then also be admissible. *See id.* at 3228, 384 N.E.2d at 1205. Under the provisions of G.L. c. 276, § 100B, the sealing of a juvenile record would appear to be conclusive proof that the prosecution witness was no longer susceptible to pressure by means of that record. In effect, the record no longer exists. Thus, the Court in *Santos* could have based its decision on the mere fact that the records were sealed. An analysis under *Ferrara* would have been unnecessary and sealed juvenile records would have been excluded under all circumstances because a witness could never show a rational tendency toward witness bias. *See also* Commonwealth v. Cheek, 1978 Mass. Adv. Sh. 649, 651, 373 N.E.2d 1161, 1163.

the relevant statute will seldom satisfy also the *Santos* test for admissibility at trial.

Pertinent to this aspect of the *Santos* decision is rule 609(g) of the revised Proposed Rules of Evidence for Massachusetts.[22] Rule 609(g) excludes all prior convictions—whether juvenile or otherwise—which have been sealed pursuant to the law of the jurisdiction where the original conviction was obtained. If adopted, this rule would remove any remaining ambiguity with respect to the admission of juvenile records in Massachusetts. By excluding sealed records in all situations, this rule would accomplish directly what the *Santos* decision has apparently accomplished indirectly.

Later in the *Survey* year, the issue of admissibility of juvenile records arose in a situation similar to *Santos*. In *Commonwealth v. Carty*,[23] the Appeals Court reversed a conviction for rape and kidnapping because the defendant was not permitted to introduce the complainant's juvenile record in his attempt to establish both bias and motive to prevaricate.[24] At the time of the alleged rape, the complainant was on probation after having been adjudicated a delinquent.[25] When she later testified at trial, final hearings were pending concerning the possible revocation of her probation, and she was in the custody of the Division of Youth Services.[26] Furthermore, evidence was presented at trial that the complainant had used marijuana and had participated in an attempted car theft on the night of the alleged rape.[27] Offering the complainant's juvenile record, the defendant hoped to suggest that the complainant was lying during her testimony in order to disguise her actual conduct on the night in question and thereby gain favorable treatment in the pending probation revocation hearings.[28]

In a terse opinion, the Appeals Court held that the exclusion of the complainant's juvenile record had infringed the defendant's rights under the confrontation clause and therefore reversed his convictions.[29] Citing *Ferrara* and *Davis*, the Court in *Carty* found strong indications that the complainant may have fabricated the rape allegations in order to prevent revocation of her probation.[30] The defendant, therefore, had made the

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[22] Rule 609(g) states: "Sealed Records. Notwithstanding any other provision of this rule, no evidence of a conviction shall be used or admissible if the record of such has been sealed under the law of the Jurisdiction where it occurred." *See* K. HUGHES, 19 MASSACHUSETTS PRACTICE, EVIDENCE 309-10 (Supp. 1978).

[23] 1979 Mass. Adv. Sh. 2425, 397 N.E.2d 1138.

[24] *Id.* at 2426, 397 N.E.2d at 1140.

[25] *Id.* at 2426-27, 397 N.E.2d 1139-40.

[26] *Id.* at 2427, 397 N.E.2d at 1140.

[27] *Id.* at 2425-26, 397 N.E.2d at 1139.

[28] *Id.* at 2426, 397 N.E.2d at 1140.

[29] *Id.* at 2427, 397 N.E.2d at 1140.

[30] *Id.*

required showing that the juvenile records had a rational tendency to suggest both bias and a motive to prevaricate.

Like juvenile records, evidence of an adult's prior arrest may have a rational tendency to show bias where the testimony of an adverse witness may be influenced by charges pending against him. The rationale of *Ferrara* and *Davis*, factually limited to juvenile records, has been utilized to permit the introduction into evidence of prior arrests to show a witness's desire to please the prosecution.[31] Even where there has been no express agreement between the witness and the prosecution, the defendant may attempt to use such evidence to raise an inference that the witness's testimony is affected by his motivation to obtain a lenient disposition of the pending charges.[32] During the *Survey* year, there were several cases in which the defendant urged on appeal that his right to confront an adverse witness was infringed by the trial court's refusal to admit arrest records.

In *Commonwealth v. Haywood*[33] the defendant sought to introduce pending armed robbery and assault and battery charges against the prosecution's lead witness.[34] During a voir dire, the trial judge concluded that the arrest record was irrelevant to the issue of bias or motive to prevaricate.[35] The defendant subsequently was convicted of second-degree murder.[36] The Supreme Judicial Court, noting the defendant's right to show a witness's motives to seek favor with the prosecution, stated that juvenile or criminal records cannot remain confidential where they are relevant to the issue of bias.[37] On the particular facts of the case, however, the Court held that the trial judge did not abuse his

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[31] *See* Commonwealth v. Dougan, 1979 Mass. Adv. Sh. 380, 388, 386 N.E.2d 1, 5; Commonwealth v. Haywood, 1979 Mass. Adv. Sh. 965, 971, 388 N.E.2d 965, 971. In the area of pending criminal charges against a witness, *Ferrara* simply lends additional weight to the defendant's right to cross-examine on the issue of bias where the witness has motives to seek favor with the prosecution. Commonwealth v. Ahearn, 370 Mass. 283, 287, 346 N.E.2d 907, 909-10 (1976) (citing *Ferrara* and *Davis*); *see also* Commonwealth v. Graziano, 368 Mass. 325, 330, 331 N.E.2d 808, 811-12 (1975); Alford v. United States, 282 U.S. 687 (1931).

[32] Commonwealth v. Michel, 367 Mass. 454, 327 N.E.2d 720 (1975); *see* Giglio v. United States, 405 U.S. 150, 154-55 (1972) (prosecution required to reveal understandings or agreements with witness made to secure his testimony); Commonwealth v. Ellison, 1978 Mass. Adv. Sh. 2072, 2094, 379 N.E.2d 560, 570-71 (withholding of material evidence by the prosecution a denial of due process); *cf.* Alford v. United States, 282 U.S. 687 (1931) (abuse of discretion to refuse to permit cross-examination of prosecution witness concerning detention by federal authorities).

[33] 1979 Mass. Adv. Sh. 965, 388 N.E.2d 648.

[34] *Id.* at 967-68, 388 N.E.2d at 651.

[35] *Id.* at 968, 388 N.E.2d at 651.

[36] *Id.* at 967, 388 N.E.2d at 650.

[37] *Id.* at 970-71, 388 N.E.2d at 652; Commonwealth v. Dougan, 1979 Mass. Adv. Sh. 2453, 396 N.E.2d 978; *see generally* Commonwealth v. Graziano, 368 Mass. 325, 331 N.E.2d 808 (1975); *see* LEACH & LIACOS, *supra* note 1, at 120-21.

discretion by excluding the records.[38] On the night of the crime, the witness had identified the defendant as the assailant and had given other material information to the police.[39] Three days later the witness gave a full statement to the police.[40] The evidence offered by the defendant concerned an arrest which did not occur until one month after these two initial statements had been made.[41] All the witness's statements after that arrest and his later testimony at trial were consistent with the pre-arrest statements.[42] The trial judge reasoned—and the Supreme Judicial Court agreed—that the defendant would have to make some showing that the witness's testimony "was motivated by partiality for the Commonwealth or hostility toward the defendant" before the evidence of prior arrests would be admitted.[43] The Supreme Judicial Court found that the trial judge had acted properly within the scope of his discretion.[44]

In *Commonwealth v. Hogan* [45] the Supreme Judicial Court affirmed the decision of the Appeals Court [46] to reverse multiple convictions of three defendants.[47] During cross-examination of the two crucial prosecution witnesses, the defendants offered evidence of pending indictments against each witness.[48] After conducting a voir dire, the trial judge found that no promises of special treatment had been made.[49] He thus excluded evidence of the indictments and refused to allow even general inquiry on the issue of promises, rewards, or inducements.[50] The Appeals Court held, *inter alia*, that the defendants were entitled to present evidence of the pending indictments as part of their right to cross-examine on the issue of bias.[51] While agreeing with the trial judge that the witnesses, in all likelihood, were not motivated by promises of special treatment, the court held that the defendants had a right to raise the issue for consideration by the jury.[52] In the court's view, since the testimony was critical to the prosecution's case, the exclusion of the impeaching evidence was prejudicial error.[53]

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[38] 1979 Mass. Adv. Sh. at 974, 388 N.E.2d at 654.
[39] *Id.* at 966, 388 N.E.2d at 650.
[40] *Id.* at 971, 388 N.E.2d at 652.
[41] *Id.* at 971-72, 388 N.E.2d at 652-53.
[42] *Id.* at 972-73, 388 N.E.2d at 653.
[43] *Id.* at 974, 388 N.E.2d at 653-54.
[44] *Id.* at 974, 388 N.E.2d at 654.
[45] 1979 Mass. Adv. Sh. 2453, 396 N.E.2d 978.
[46] 1979 Mass. App. Ct. Adv. Sh. 447, 387 N.E.2d 158.
[47] 1979 Mass. Adv. Sh. 2454, 396 N.E.2d at 979.
[48] *Id.*; 1979 Mass. App. Ct. Adv. Sh. at 451, 387 N.E.2d at 161.
[49] 1979 Mass. App. Ct. Adv. Sh. at 451, 387 N.E.2d at 161.
[50] *Id.*
[51] *Id.* at 454, 387 N.E.2d at 162.
[52] *Id.*
[53] *Id.*

In affirming the decision of the Appeals Court, the Supreme Judicial Court reiterated the rationale set forth by the court below.[54] Even if the possibility of witness bias is "an unlikely one," the defendant has a right to explore the issue.[55] Where the possibility of bias exists, the jury should determine whether a witness's testimony has been affected by prosecutorial pressure.[56] The Court distinguished *Santos* as an instance where the proffered juvenile records displayed "no possible basis for a finding of prosecutorial threat to the witness's freedom."[57] Furthermore, the Court noted that in *Haywood* the witness's testimony was not affected by bias since it remained substantially similar to the witness's statements made prior to an unrelated arrest.[58]

Commonwealth v. Dougan[59] provides an excellent counterpoint to the decision in *Hogan*. While *Hogan* focused on the defendant's right to cross-examine on the issue of bias, *Dougan* emphasized that the trial judge still retains discretionary power to control the scope and extent of that cross-examination. In *Dougan*, the Supreme Judicial Court reinstated jury verdicts which convicted three defendants of rape, kidnapping, and related crimes[60] after the Appeals Court had overturned the convictions.[61] After extensive cross-examination during the trial by defense counsel with respect to the witness's earlier arrest and subsequent guilty plea, the trial judge, acting *sua sponte*,[62] refused to permit a question concerning the witness's awareness of the maximum penalty when he entered a guilty plea.[63] The Appeals Court held, *inter alia*, that the defendants were entitled to present evidence of bias by questioning a crucial witness as to his knowledge of the maximum penalty for a firearms charge at the time he pleaded guilty and agreed to cooperate with the prosecution.[64] The court concluded that, by refusing to allow the question, the trial judge abridged the defendant's right to show bias.[65]

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54 1979 Mass. Adv. Sh. at 2454, 396 N.E.2d at 979.

55 *Id.*

56 *Id.*

57 *Id.*; see text at notes 8-21 and 33-41 *supra*.

58 *Id.*

59 1979 Mass. Adv. Sh. 380, 386 N.E.2d 1.

60 *Id.* at 381-82, 386 N.E.2d at 3.

61 1978 Mass. App. Ct. Adv. Sh. 649, 376 N.E.2d 1255.

62 1979 Mass. Adv. Sh. at 389, 386 N.E.2d at 5. The Supreme Judicial Court suggested that it would have been better for the trial judge to permit the question since there was no objection from the commonwealth. As a discretionary decision, however, there was no error. *Id.*

63 *Id.*; 1979 Mass. App. Ct. Adv. Sh. at 652, 376 N.E.2d at 1257. There is a factual discrepancy between the Supreme Judicial Court and the Appeals Court opinions at this point. The Appeals Court seems to have assumed that the witness's testimony was obtained in exchange for a lenient sentence. The record showed—and the Supreme Judicial Court took pains to point out—that the witness denied any connection between his testimony and the prior guilty plea.

64 1978 Mass. App. Ct. Adv. Sh. at 652, 376 N.E.2d at 1257.

65 *Id.*

In reversing the Appeals Court decision, the Supreme Judicial Court found that the trial judge merely had restricted the scope of cross-examination and, thus, had not abused his discretion.[66] The jury had been sufficiently exposed to the matter during cross-examination, and the witness had denied any relationship between his earlier guilty plea and his present testimony.[67] Contrary to the Appeals Court, the Supreme Judicial Court determined that the defendant had sufficient opportunity to reveal any bias resulting from the earlier guilty plea. The defendant had inquired on the issue, raised the matter for the jury's consideration, and then the trial judge, in his discretion, concluded that the inquiry had gone far enough. Thus, where the Court in *Hogan* focused on the defendant's right to explore fully possible bias arising from pending criminal charges, the Court in *Dougan* reasserted the trial judge's discretionary power to control the scope of cross-examination once the issue of possible bias has been raised.

The decisions of this *Survey* year display the continued vitality of the defendant's right to establish witness bias. If the defendant can meet the "rational tendency" test of *Ferrara,* the trial judge has no discretion to weigh probative value against prejudicial impact. The defendant is entitled, as part of rights under the confrontation clause, to present evidence of witness bias for consideration by the jury.

§4.3. Impeachment—Prior False Accusations.* Massachusetts consistently has prohibited impeachment of an adverse witness by the introduction of evidence of his prior bad acts not resulting in a conviction.[1] Such evidence is considered a specific example of reputation

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[66] 1979 Mass. Adv. Sh. at 388-89, 386 N.E.2d at 5.

[67] *Id.* at 388, 386 N.E.2d at 5; see note 45 *supra.*

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[1] Commonwealth v. Binkiewicz, 342 Mass. 740, 754-56, 175 N.E.2d 473, 483-84 (1961); Davidson v. Massachusetts Cas. Ins. Co., 325 Mass. 115, 123, 89 N.E.2d 201, 205 (1949); Commonwealth v. Schaffner, 146 Mass. 512, 515-16, 16 N.E. 280, 282-83 (1888). *See* K. HUGHES, 19 MASSACHUSETTS PRACTICE, EVIDENCE § 238, at 277-79 (settled law in Massachusetts that prior acts of misconduct other than conviction not admissible to impeach credibility); *but see* Commonwealth v. Bohannon, 1978 Mass. Adv. Sh. 2176, 2180-81, 378 N.E.2d 987, 990-9 (rule against admission of prior bad acts not inflexible; may be cases where such evidence might be competent). The Court in *Bohannon* cited for authority Miller v. Curtis, 158 Mass. 127, 131, 32 N.E. 1039, 1040 (1893). The Court in *Miller,* however, stated that the general rule excluding specific acts to impeach a witness's character "has been adhered to with great strictness." It is difficult, moreover, to read *Miller* as controlling authority when other decisions have clearly stated that prior bad acts are inadmissible on the issue of credibility. *See, e.g.,* Commonwealth v. Schaffner, 146 Mass. at 515-16, 16 N.E. at 282-83 (rule against admission of prior bad acts stated as settled law); Jones v. Commonwealth, 327 Mass. 491, 494, 99 N.E.2d 456, 458 (1951) (questions concerning membership in the Communist Party not admissible to impeach); Davidson v. Massachusetts Cas. Ins. Co., 325 Mass. at 123, 89 N.E.

evidence and thus a collateral matter beyond the permissible scope of cross-examination.[2] During the *Survey* year, two decisions appear to have created an exception to this rule for a specific form of prior misconduct: prior false accusations. Prior to these decisions, a judge retained no discretion to admit evidence of witness's prior bad acts.[3] By virtue of these two recent decisions, however, it now seems that the trial judge has discretionary power to admit evidence of misconduct which may be characterized as prior false accusations.

In *Commonwealth v. Bohannon*,[4] a prosecution for rape and related charges, the complainant was the only witness for the commonwealth. She testified on direct in a vague and confusing manner.[5] On cross-examination defense counsel sought to impeach her credibility. At a side-bar conference,[6] counsel requested permission to examine the complainant concerning unsubstantiated allegations of rape made by her as a result of earlier unrelated events. Counsel also offered hospital records to corroborate his line of inquiry.[7] The trial judge, however, ruled that the defendant could not question the complainant with respect to her past conduct.[8] This determination by the trial judge was the sole issue raised on appeal.[9]

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at 205-06 (reversing judgments for several reasons including improper admission of prior misconduct). *Davidson* is of further interest because the decision cites *Miller* for the proposition that specific evidence of prior misconduct is not admissible to show reputation. *Id.*

[2] It is important to distinguish between the rule allowing the trial judge discretion in the control of cross-examination and the rule excluding evidence of prior bad acts. The trial judge, in controlling the extent and scope of cross-examination, may permit or foreclose questioning as the situation demands. *See* Commonwealth v. Franklin, 366 Mass. 284, 295-98, 318 N.E.2d 469, 472-74 (1974) (Tauro, C.J., dissenting). With respect to prior bad acts, however, the trial judge has no choice but to exclude such evidence. Prior bad acts are *per se* beyond the scope of cross-examination both as a collateral matter and a specific example of reputation evidence. Commonwealth v. Binkiewicz, 342 Mass. at 755, 175 N.E.2d at 483-84; Commonwealth v. Schaffner, 146 Mass. at 515-16, 16 N.E.2d at 283; *see also* Campbell v. Ashler, 320 Mass. 475, 481, 70 N.E.2d 302, 305 (1946) (statement of general discretionary rule with respect to cross-examination). *See generally* C. McCormick, Evidence § 42, at 82 (2d ed. 1972).

[3] *See* Commonwealth v. Binkiewicz, 342 Mass. at 755, 175 N.E.2d at 483-84; Commonwealth v. Roberts, 1979 Mass. Adv. Sh. 1302, 1314-17, 389 N.E.2d 989, 996-97 (juxtaposition of selected prior convictions with questions concerning unrelated matters in effort to show propensity for violence was improper).

[4] 1978 Mass. Adv. Sh. 2176, 378 N.E.2d 987.

[5] *Id.* at 2177-78, 378 N.E.2d at 989.

[6] The Court applauded counsel for asking permission before pursuing a potentially objectionable line of inquiry, particularly where the questions might elicit testimony about prior sexual conduct. *Id.* at 2179 n.2, 278 N.E.2d at 989 n.2; see text at note 17 *infra*.

[7] *Id.* at 2179, 378 N.E.2d at 990.

[8] The opinion does not disclose why the judge excluded this evidence. Quite clearly, the rule excluding prior bad acts would have been one legitimate reason. Also pertinent to the judge's decision, however, was the "rape-shield" statute. See

The Supreme Judicial Court held that the exclusion of this evidence denied the defendant the opportunity to present a full defense.[10] Noting the critical relationship between the complainant's credibility and the issue of consent, the Court reasoned that evidence of prior false accusations, substantially the same as the charges in the present trial, could significantly affect the complainant's credibility in the eyes of the jury.[11] The complainant's credibility was especially suspect where her direct testimony was inconsistent and confused.[12] Because the determination of credibility rests exclusively with the trier of fact, the Court concluded that the defendant was entitled to introduce, as part of his right to present a full defense, evidence which may have had "a significant impact on the issue of consent." [13]

The Court then expanded upon its basic rationale and highlighted two distinctive aspects of the facts in *Bohannon*.[14] First, the Court emphasized the importance of the hospital records offered by the defendant to support his proposed questions. It cautioned, however, that where the inquiry may reveal past sexual conduct of a rape complainant, counsel must present a clear factual basis for questions even remotely touching this subject.[15] The hospital records were important for a related reason not stressed by the Court. One consistent objection to the use of prior accusations is the collateral issue of whether the allegations were,

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text and note at note 19 *infra*. Evidence of prior false accusations could be construed as evidence of prior sexual conduct of the complainant and, thus, inadmissible under the statute.

[9] *Id.* at 2179, 378 N.E.2d at 990.

[10] *Id.* at 2181, 378 N.E.2d at 990-91. At trial, defense counsel did not argue that the evidence was admissible as part of the defendant's right to present a full defense. The Court, however, scrutinized the record and allowed the point to be raised on appeal in order to avoid "a substantial miscarriage of justice." *Id.* at 2181 n.4, 378 N.E.2d at 990-91 n.4. *See* Commonwealth v. Barton, 367 Mass. 515, 517, 326 N.E.2d 885, 887 (1975).

On appeal, the defendant also attempted to establish that the evidence was relevant on the issue of bias. A defendant may cross-examine as of right if the evidence is found to be probative of the issue of bias. Commonwealth v. Ferrara, 368 Mass. 182, 330 N.E.2d 837 (1975); Commonwealth v. Haywood, 1979 Mass. Adv. Sh. 965, 388 N.E.2d 648; Davis v. Alaska, 415 U.S. 308 (1974). The Court in *Bohannon*, however, found that the issue of bias was waived at the trial since counsel offered the evidence solely on the issue of credibility. 1979 Mass. Adv. Sh. at 2180 n.3, 378 N.E.2d at 990, n.3.

[11] *Id.* at 2182, 378 N.E.2d at 991.

[12] *Id.*

[13] *Id.* The obvious relevance of prior false accusations is to suggest that the witness is lying during the present testimony. A second more subtle object of such evidence is to impeach the care, powers of observation, and seriousness of purpose of the witness. Rather than suggest outright mendacity, counsel may simply wish to portray a witness who is hasty, careless, or unappreciative of the seriousness of a criminal accusation.

[14] *Id.* at 2182-83, 378 N.E.2d at 991.

[15] *Id.*

in fact, untrue.[16] Without reliable proof that the allegations were false, the jury is forced to consider an additional and confusing issue. In *Bohannon* the hospital records did establish the false nature of the previous accusations [17] and thus vitiated any fear of jury confusion.

The second factor highlighted by the *Bohannon* Court pertained to the so-called "rape-shield" statute enacted by the Massachusetts legislature in 1977.[18] The statute is concerned specifically with the problem of victim harassment during cross-examination in rape trials and prohibits inquiry into past sexual conduct of the complainant except for very limited purposes.[19] The Court found no conflict with this statute since the defendant's questions focused, not on the victim's earlier sexual activity or reputation for chastity, but rather on the lack of truth in her prior rape accusations.[20] To ensure a proper interpretation of its decision, the Court reiterated its firm disapproval of "a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assassination in open court." [21]

A question which remained after *Bohannon* was whether the decision was limited to its facts or applied more generally to evidence of prior false accusations. The Supreme Judicial Court apparently answered this question in *Commonwealth v. Sperrazza.*[22] In *Sperrazza,* a prosecution for murder and kidnapping, the defendant attempted to impeach the credibility of the only prosecution witness who placed the defendant at the scene of the two murders.[23] During a bench conference, defense counsel offered to prove that an allegedly false kidnapping report had been made by the witness approximately one year earlier.[24] The trial

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[16] *See, e.g.,* Commonwealth v. Sperrazza, 1979 Mass. Adv. Sh. 2423, 2426, 396 N.E.2d 449, 451 (doubt as to whether the prior kidnapping report was in fact falsely made); *see generally* McCormick, *supra* note 2, § 42, at 82-83. An analogous situation is the use of records of prior convictions. The party offering the evidence need not prove the validity of the proceeding resulting in the conviction. The records themselves are conclusive proof, and there is no problem of jury confusion. G.L. c. 233, § 21. *See* Commonwealth v. Bowlen, 351 Mass. 655, 223 N.E.2d 391 (1967), *cert. denied,* 389 U.S. 916, *reh. denied,* 389 U.S. 1010.

[17] 1979 Mass. Adv. Sh. at 2182-83, 378 N.E.2d at 991.

[18] *Id.* at 2183, 378 N.E.2d at 991-92; *see* G.L. c. 233, § 21B, *as enacted by* Acts of 1977, c. 110.

[19] *Cf.* Commonwealth v. Manning, 367 Mass. 605, 328 N.E.2d 496 (1975) (evidence of prior sexual conduct admissible to impeach credibility and to establish consent). The statute was enacted to prevent the use of evidence of sexual conduct during cross-examination in situations such as that presented by the *Manning* decision.

[20] 1979 Mass. Adv. Sh. 2183, 378 N.E.2d at 991-92.

[21] *Id.* (citing Commonwealth v. Manning, 367 Mass. at 613-14, 328 N.E.2d at 501 (Braucher, J., dissenting)).

[22] 1979 Mass. Adv. Sh. 2423, 396 N.E.2d 449.

[23] *Id.* at 2426, 396 N.E.2d at 451.

[24] *Id.*

judge refused the offer of proof and excluded the evidence.[25] Subsequently, the defendant was convicted of four offenses—two counts of first-degree murder and two counts of kidnapping.[26]

On direct appellate review,[27] the Supreme Judicial Court affirmed the convictions and distinguished *Bohannon* on its facts.[28] The Court in *Sperrazza* indicated that the prior false accusations in *Bohannon* were held admissible because of "the special circumstances of that particular case."[29] Among other factors, the Court in *Sperrazza* noted that in *Bohannon* the witness was also the victim, her testimony was inconsistent, her consent was a central issue in the trial, and third-party records established the falseness of her earlier rape allegations.[30] Finding no "similar features" in the instant case, the Court in *Sperrazza* held, *inter alia,* that exclusion of the proffered evidence was not an abuse of the trial judge's discretionary power to limit the scope of cross-examination on a collateral matter.[31]

Sperrazza indicates that after *Bohannon* prior false accusations are a distinct category of prior witness misconduct to be considered apart from the general rule excluding such evidence. When prior false accusations are offered the trial judge may balance the probative value of the evidence against the prejudicial impact of either embarrassment of the witness or confusion of the jury. It remains unclear whether in the future the Supreme Judicial Court will apply a discretionary standard to other types of prior bad acts offered for impeachment purposes. Of note in this regard are the Proposed Rules of Evidence for Massachusetts. If enacted, rule 608(b) would supplant the common law rule excluding prior bad acts not resulting in convictions and give the trial judge full discretion in admitting such evidence if relevant to the witness's character for truthfulness.[32] Whether the Supreme Judicial Court will follow this proposed rule even before it is enacted cannot be determined.

§4.4. **Impeachment of Jury Verdicts—Juror Testimony.*** The traditional rule governing the admissibility of juror testimony to show juror

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[25] *Id.*

[26] *Id.* at 2423, 396 N.E.2d at 450.

[27] G.L. c. 278, § 33E, *as amended by* Acts of 1979, c. 346, § 2. The 1979 amendment limited the automatic right to expanded appellate review by the Supreme Judicial Court solely to convictions of first-degree murder.

[28] 1979 Mass. Adv. Sh. at 2426, 396 N.E.2d at 451.

[29] *Id.*

[30] *Id.*

[31] *Id.*, see note 2 *supra.*

[32] *See* HUGHES, *supra* note 1 (1978 West Supp. at 308).

§4.4. * By Louise M. Gessel, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

misconduct is that a juror cannot impeach his own verdict.[1] The Massachusetts rule, however, does not absolutely prohibit juror testimony to impeach a verdict.[2] In the commonwealth, juror testimony is admissible to establish the existence of an extraneous influence on the jury, although it is not admissible to show the role which the extraneous influence played in the jury's decision.[3] During the *Survey* year, the Supreme Judicial Court applied this rule for the first time to statements made by a juror in the jury room concerning matters not in evidence at trial. The Court also presented procedural guidelines for procuring juror testimony through post-verdict interviews.[4]

In *Commonwealth v. Fidler*,[5] the defendant Fidler was convicted of armed robbery.[6] The defendant filed a motion for a new trial, supported by a juror's affidavit which recited four alleged instances of juror misconduct during the jury's deliberations.[7] Two of the allegations of misconduct involved consideration by the jurors of matters which the judge had instructed them to disregard.[8] The third and fourth allegations in the affidavit charged that the jurors had been exposed to information which was not introduced at the trial. One juror reportedly stated, "People who run around with guns like that ought to be afraid. Maybe someone might shoot at them, someday,"[9] and another juror replied, "They did shoot at him last month and almost got him in Charlestown."[10]

At the hearing on the motion for a new trial, the trial judge denied the motion, refusing to consider the juror's affidavit or to take oral testi-

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[1] *See* McDonald v. Pless, 238 U.S. 264, 267 (1915). *See generally* 8 J. WIGMORE, EVIDENCE § 2354 (McNaughton ed. 1961) [hereinafter cited as WIGMORE]; R. Carlson and S. Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247 (1977). This rule, known as the "Mansfield Rule," was first articulated by Lord Mansfield in Vaise v. Delaval, 99 Eng. Rep. 944 (K.B. 1785) and has been followed by most jurisdictions in the United States. *See* list of jurisdictions in WIGMORE, *supra*, § 2354, at 702 n.2. The policy behind the rule is to protect the jury system by preventing the harassment of jurors by the losing party, the destruction of frankness and freedom in jury deliberations, and jury tampering and by promoting finality and confidence in jury verdicts. Government of Virgin Islands v. Gereau, 523 F.2d 140, 148 (1975), *cert. denied*, 424 U.S. 917 (1976); Commonwealth v. Fidler, 1979 Mass. Adv. Sh. 240, 243-44, 385 N.E.2d 513, 516; Note, *Impeachment of Jury Verdicts*, 53 MARQ. L. REV. 258, 261 (1970).

[2] Commonwealth v. Fidler, 1979 Mass. Adv. Sh. 240, 244-45, 385 N.E.2d 513, 516. *See* Woodward v. Leavitt, 107 Mass. 453 (1871).

[3] 107 Mass. at 466; 1979 Mass. Adv. Sh. at 245, 385 N.E.2d at 516.

[4] 1979 Mass. Adv. Sh. at 251-54, 385 N.E.2d at 519-20.

[5] 1979 Mass. Adv. Sh. 240, 385 N.E.2d 513.

[6] Facts appear in Commonwealth v. Fidler, 1978 Mass. App. Ct. Adv. Sh. 65, 65-68, 371 N.E.2d 1381, 1383-84.

[7] 1979 Mass. Adv. Sh. at 241-42, 385 N.E.2d at 515.

[8] *Id.* at 241, 385 N.E.2d at 515.

[9] *Id.* at 242, 385 N.E.2d at 515.

[10] *Id.*

mony.[11] On appeal,[12] the Appeals Court ruled that the defendant must be granted a new hearing on the motion for a new trial to determine whether the jurors had been exposed to objective extrinsic facts about the defendant that were not introduced at trial but that would tend to prejudice the defendant.[13] The commonwealth appealed to the Supreme Judicial Court, arguing that the trial judge's refusal to accept the affidavit was mandated by the rule prohibiting use of juror testimony to impeach jury verdicts.[14] The commonwealth also asked the Court to address the issue of what constituted the proper procedure for conducting post-verdict interrogation of jurors by litigants or counsel.[15]

The Supreme Judicial Court agreed with the Appeals Court that a new hearing should be held but limited the scope of that hearing.[16] The Court stated that the trial judge was correct in refusing to consider the portions of the affidavit concerning juror discussion of matters they were instructed to disregard, since such discussions are part of the internal decision-making process of jury deliberations.[17] The Court also agreed with the trial judge's refusal to consider the general comment made concerning "people who run around with guns."[18] This statement, the Court said, may well have been an expression of that juror's view of the evidence presented at trial.[19] The Court did find, however, that the statement that the defendant had been shot at in Charlestown constituted information extraneous to the trial.[20] According to Massachusetts law, a juror may testify to the existence of extraneous facts that might influence the jury.[21] The Supreme Judicial Court remanded the case for a limited hearing to determine whether the statement in fact was made, and if so, whether it may have constituted an "extraneous disturbing influence."[22]

The *Fidler* Court based its decision on the case of *Woodward v. Leavitt*,[23] which established the Massachusetts rule regarding juror testimony. The *Woodward* Court held that juror testimony is admissible to show the existence of an improper influence on the jury, but not

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11 *Id.* at 243, 385 N.E.2d at 515.
12 1978 Mass. App. Ct. Adv. Sh. 65, 371 N.E.2d 1381.
13 *Id.* at 76-78, 371 N.E.2d at 1387-88.
14 1979 Mass. Adv. Sh. at 243, 385 N.E.2d at 515.
15 *Id.* at 240-41, 385 N.E.2d at 515.
16 *Id.* at 241, 385 N.E.2d at 515.
17 *Id.* at 248, 385 N.E.2d at 517.
18 *Id.* at 248, 385 N.E.2d at 518.
19 *Id.*
20 *Id.* at 249, 385 N.E.2d at 518.
21 *Id.* at 245, 385 N.E.2d at 516; 107 Mass. at 466 (1871).
22 1979 Mass. Adv. Sh. at 249-50, 385 N.E.2d at 518.
23 107 Mass. 453 (1871); 1979 Mass. Adv. Sh. at 250-51, 385 N.E.2d at 518-19.

to show how the improper influence affected the jury's deliberations.[24] Although the *Woodward* Court did not specify how the line between the two categories of juror testimony was to be drawn, it did imply that all discussions in the jury room are a part of the deliberation process, and, therefore, evidence of such discussions would be inadmissible.[25] The *Woodward* rule, as the Fidler Court perceived it, permitted the introduction of evidence of unauthorized views of sites by jurors, of improper communications to the jurors by third persons, and of the presence of a paper or document in the jury room that was not introduced as evidence.[26] The *Fidler* Court interpreted this rule as allowing a juror to testify to the existence of statements of fact made by another juror in the jury room, if those facts had not been introduced at the trial.[27] The Court reasoned that if the facts had been communicated to the jury by a third party, the communication would be an extraneous influence and provable by juror testimony under the *Woodward* rule. The Court saw no valid distinction between extraneous facts introduced by a juror and those communicated to the jury by a third person.[28]

In reaching its decision, the Court balanced the competing objectives of preserving the stability of jury verdicts by keeping deliberations inviolate and of achieving a just result between the litigating parties.[29] It reasoned that "[w]here a verdict is the product of misconduct based on extraneous matter, an inflexible rule that bars the best evidence of

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[24] 107 Mass. at 466. The Court said, "A juryman may testify to any facts bearing upon the question of the existence of the disturbing influence, but he cannot be permitted to testify how far that influence operated upon his mind." *Id.*

[25] *See id.* at 467. The Court stated,

> [W]here the cause which is alleged to have prevented a fair trial is misconduct or partiality on the part of a juror, and testimony of his acts or declarations *outside* the jury room has been introduced for that purpose, his testimony in direct denial or explanation of those facts is admissible. [But this rule] cannot . . . be extended to allow the same or other jurors to testify to the part which they took, or the motives which influenced them, in their private deliberations.

Id. (emphasis added).

In a later decision, Commonwealth v. Meserve, 156 Mass. 61, 30 N.E. 166 (1892), the Court interpreted *Woodward* as establishing a hard and fast rule that no juror testimony concerning what was said inside the jury room is admissible as evidence in a motion for a new trial. *Id.* at 62, 30 N.E. at 166. The Court in this case said, "It is not denied that the testimony of a juror to what he said in the deliberations of the jury-room is inadmissible as evidence in a motion for a new trial, or that one juror cannot be permitted to testify to what was said by another juror during such deliberations." *Id.*

[26] 1979 Mass. Adv. Sh. at 246, 385 N.E.2d at 517.

[27] *Id.* at 250, 385 N.E.2d at 518. In reaching this decision the Court declined to follow Commonwealth v. Meserve, 156 Mass. 61, 30 N.E. 166 (1892). 1979 Mass. Adv. Sh. at 251 n.7, 385 N.E.2d at 519 n.7.

[28] *Id.* at 249-50, 385 N.E.2d at 518.

[29] *Id.* at 246, 385 N.E.2d at 517.

that misconduct does not serve the interests of providing a fair and just trial for the litigants." [30] This decision does not alter the rule which excludes juror testimony concerning the subjective issues of whether, or how, the introduction of extraneous matter affected the jury's decision.[31] Testimony concerning the reasons for decisions, discussions of matters the judge instructed the jury to disregard, and discussions concerning a judge's instructions would continue to be excluded.[32] While the Court recognized that it could not easily draw the line between objective factors and the juror's subjective mental processes, it concluded that it should not refuse to try.[33]

In deciding to make certain testimony of jury room statements admissible, the Court realized that proper procedural guidelines were needed to permit counsel and litigants to obtain such evidence, while at the same time protecting the jury system. Consequently, the Court outlined the appropriate procedures to be followed in gathering evidence of jury misconduct for presentation at a hearing. In the interest of preventing harassment of jurors, the Court stated that attorneys and litigants may not independently contact jurors after a verdict is rendered.[34] The Court cautioned that any attorney or litigant who does so "acts at his peril, lest he be held as acting in the obstruction of the administration of justice." [35] If an attorney or litigant does receive unsolicited information of jury misconduct, the attorney may investigate it only to the extent necessary to determine if it is a matter worth bringing to the judge's attention.[36] The attorney should then convey the information to the judge,[37] and if the court finds some suggestion that extraneous matters were considered during the jury's deliberations, it may authorize the initiation of post-verdict interviews of jurors.[38]

The *Fidler* Court believed that the jury system could best be protected by requiring that any post-verdict interviews of jurors by counsel or litigants take place under the court's supervision.[39] The Court, however, gave no specific recommendations concerning the type of supervision

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[30] *Id.* *See* Note, *Impeachment of Jury Verdicts,* 53 MARQ. L. REV. 258 (1970).
[31] 1979 Mass. Adv. Sh. at 247, 385 N.E.2d at 517.
[32] *Id.* at 247-48, 385 N.E.2d at 517.
[33] *Id.*
[34] *Id.* at 255, 385 N.E.2d at 520.
[35] *Id.* (quoting Rakes v. United States, 169 F.2d 739, 745-46 (4th Cir.), *cert. denied,* 335 U.S. 826 (1948)).
[36] 1979 Mass. Adv. Sh. at 254, 385 N.E.2d at 520.
[37] *Id.* Information should be brought by affidavit, if possible, as was done in this case. *Id.*
[38] *Id.*
[39] *Id.* at 252, 385 N.E.2d at 519. *See also* Note, *Impeachment of Jury Verdicts: A Proposal,* 1969 U. ILL. L.F. 388, 394.

required. It allowed the trial judge broad discretion in his decision to grant or deny requests for interviews, to question jurors himself, or to allow the parties to conduct interrogations.[40]

Once testimony alleging juror misconduct has been procured through a court-supervised interview, it may be presented at a hearing on a motion for a new trial. At such a hearing, the defendant bears the burden of demonstrating that the jury in fact was exposed to extraneous matter.[41] If the judge finds that the extraneous matter was introduced, the burden shifts to the commonwealth to show, beyond a reasonable doubt, that the defendant was not prejudiced by the extraneous matter.[42] In determining whether the extraneous matter was prejudicial, a judge may not receive any evidence concerning the actual effect of the matter on the jury's decision, since this procedure would involve probing the jurors' thought process. Instead, the judge must focus on the probable effect of the extraneous facts on an average, hypothetical jury.[43]

The *Fidler* Court's decision is a logical application of the Massachusetts rule concerning the admissibility of juror testimony. In rejecting the strict rule of prohibition and formulating the rule to be followed in the commonwealth, the *Woodward* Court expressed a desire to allow the best evidence of jury irregularity to come to light without destroying the public policies that engendered the original strict rule of exclusion.[44] The *Fidler* Court expressed the same concerns as it brought the Massachusetts rule closer to the more liberal rules applied in a number of other jurisdictions.[45] In allowing jurors to testify to statements made in the jury room, the Court was sensitive to the possibility that jurors might be approached and even harassed by the losing party in order to establish grounds for a new trial. Thus, it prohibited counsel from approaching jurors and required that all post-verdict interviews be conducted under the court's supervision. In so doing, the Court has added the measures necessary for the protection of the jurors and the jury system.

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[40] 1979 Mass. Adv. Sh. at 253, 254, 385 N.E.2d at 520.

[41] *Id.* at 251, 385 N.E.2d at 519.

[42] *Id.*

[43] *Id.*

[44] *See id.* at 244-45, 385 N.E.2d at 516.

[45] *See, e.g.*, Wright v. Illinois Cent. & Miss. Tel. Co., 20 Iowa 195 (1866), in which the "Iowa Rule" was established: "[A]ffidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself . . . ." *Id.* at 210. A number of jurisdictions have adopted the Iowa Rule or variations of it. *See* WIGMORE, *supra* note 1, § 2354, at 702 n.1; Carlson & Sumberg, *Attacking Jury Verdicts: Paradigms for Rule Revision*, 1977 ARIZ. ST. L.J. 247, 257 & n.19 (1977).

§4.5. Hearsay—Business Records Exception.* In *Commonwealth v. Walker*,[1] the defendant was indicted on multiple charges including assault and battery by means of a dangerous weapon (an automobile).[2] The charges stemmed from an occurrence following a racial confrontation in Dorchester on the night of July 4, 1976.[3] It was alleged that the defendant, driving at a high rate of speed, had turned his automobile towards three persons and had collided with them.[4] The three persons were seriously injured.[5] The defendant allegedly left the scene of the incident on foot.[6]

At trial, over defendant's objection, the court admitted into evidence, as a regular business entry pursuant to chapter 233, section 78,[7] a police record of a stolen car report.[8] The stolen car identified in the report was the same automobile involved in the Dorchester incident.[9] The report contained a name, telephone number, and address for the owner, and was dated and stamped 9:31 p.m., July 4, 1976.[10] It listed a "Mr. McGuigan" as the owner of the car.[11] Mrs. McGuigan testified at trial, however, that she was the owner of the car and that while the telephone number listed in the report was hers, the address given was not.[12]

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§4.5. * By Nelson G. Apjohn, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

1 1979 Mass. Adv. Sh. 2573, 397 N.E.2d 1105 (1979).

2 *Id.* at 2573, 397 N.E.2d at 1106. The defendant was also indicted on three charges of operating a motor vehicle and leaving after causing injury to a person and on one charge of operating an automobile to endanger the lives and safety of the public. *Id.*

3 *Id.* at 2574, 397 N.E.2d at 1106.

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.* G.L. c. 233, § 78, provides in relevant part:

> An entry in an account kept in a book or by a card system or by any other system of keeping accounts, or a writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall not be inadmissible in any civil or criminal proceeding as evidence of the facts therein stated because it is transcribed or because it is hearsay or self-serving, if the court finds that the entry, writing or record was made in good faith in the regular course of business and before the beginning of the civil or criminal proceeding aforesaid and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. For the purposes hereof, the word "business," in addition to its ordinary meaning, shall include profession, occupation and calling of every kind . . . .

8 1979 Mass. Adv. Sh. at 2577, 397 N.E.2d at 1108.

9 *Id.*

10 *Id.* There was evidence introduced at trial that the incident occurred in Dorchester before 9:31 p.m. *Id.*

11 *Id.*

12 *Id.*

Furthermore, Mrs. McGuigan stated that the defendant was renting the car from her and that he had possession of the car during July 1976.[13] Finally, she testified that she did not call the police and report that her car was stolen.[14] On the basis of this evidence, the prosecutor requested the jury to infer that the defendant had called the police and reported the car stolen in an effort to cover up his involvement in the crimes charged.[15] The defendant was subsequently convicted by the jury on those charges and appealed to the Appeals Court.[16] The Supreme Judicial Court, on its own motion, transferred the case to its docket.[17]

On appeal, the defendant assigned as error, *inter alia*, the admission into evidence of the police report.[18] The defendant argued that the statements made by the unidentified caller to the police cadet who completed the report were inadmissible "second level" or "totem-pole" hearsay.[19] He supported his contention that a police report containing "second level" hearsay is inadmissible by citing the case of *Kelly v. O'Neil*.[20] In *Kelly*, the Appeals Court held that a police report summarizing interviews of witnesses to an automobile accident was not admissible under the business record exception to the hearsay rule.[21] The court noted that there were two levels of hearsay contained in the report.[22] The first level consisted of the out-of-court statements of the police officer as to what he observed with his own senses during the investigation of the accident.[23] The second level of hearsay consisted of:

> the statements made to the officer by other persons during the course of his investigation and as to which he would not be competent to testify at trial *unless the statements so made to him should not be offered for the truth of the matters contained therein* (in which case the hearsay rule would not apply) or unless they could be fitted into some other exception to the hearsay rule . . . .[24]

The court accepted the position of "[t]he better reasoned cases from other jurisdictions" [25] that the second level of hearsay found in police

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[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.* at 2573-74, 397 N.E.2d at 1106.
[17] *Id.* at 2574, 397 N.E.2d at 1106.
[18] *Id.* at 2574, 2577-78, 397 N.E.2d at 1106, 1108.
[19] *Id.* at 2577, 397 N.E.2d at 1108.
[20] 1 Mass. App. 313, 296 N.E.2d 223 (1973).
[21] *Id.* at 317, 296 N.E.2d at 226.
[22] *Id.* at 316, 296 N.E.2d at 225.
[23] *Id.*
[24] *Id.* (emphasis supplied).
[25] *Id.*

reports (not falling independently within an exception to the hearsay rule) is not admissible hearsay under the business records exception.[26]

The Supreme Judicial Court in *Walker* found no difficulty in rejecting the defendant's assignment of error without disturbing the *Kelly* decision. With respect to the first level of hearsay, the Court noted that the police cadet who wrote the report had personal knowledge that the statements contained therein were made by a caller.[27] This level of hearsay in the report presumably falls within the scope of chapter 233, section 78. The statements made to the cadet by the unidentified caller, the alleged "second level" of hearsay, were not offered for the truth of the matters asserted and, therefore, were not hearsay.[28] Furthermore, the Court found that a proper foundation was laid under chapter 233, section 78, for admission of the record and that there was no abuse of discretion by the trial judge in admitting the record.[29] The Court, therefore, held that the police record of the stolen car report was properly admitted at defendant's trial.[30]

Commonwealth v. Garabedian,[31] decided by the Appeals Court, was the second business records case decided during the *Survey* year. The defendant in *Garabedian,* a lawyer, was indicted for failing to file his Massachusetts income tax returns for the years 1973 through 1976.[32] The defendant's secretary testified at trial that she remembered mailing both the 1974 and the 1975 return to the Boston office of the Department of Revenue.[33] The keeper of records of the Department of Revenue testified that he had searched the Department's computer records of tax returns and had failed to discover any record of defendant's tax returns for 1974 and 1975.[34] The defendant was acquitted of the charges relating to 1973 and 1976, but was convicted of the charges relating to 1974 and 1975.[35]

On appeal, the defendant argued that the trial court's admission into evidence of the testimony of the keeper of records of the Department

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[26] *Id.* at 316-17, 296 N.E.2d at 225-26. *See generally* C. MCCORMICK, EVIDENCE § 310 (2d ed. 1972).

[27] 1979 Mass. Adv. Sh. at 2577, 397 N.E.2d at 1108.

[28] *Id.* at 2578, 397 N.E.2d at 1108. The report was not offered to establish that the car was stolen or that "Mr. McGuigan" owned the car. The report was offered instead to support the prosecutor's claim that the defendant had made the call in an attempted cover-up.

[29] *Id.*

[30] *Id.*

[31] 1979 Mass. App. Ct. Adv. Sh. 1972, 395 N.E.2d 467 (1979).

[32] *Id.* at 1972, 395 N.E.2d at 468.

[33] *Id.* at 1973, 395 N.E.2d at 468.

[34] *Id.* at 1974, 395 N.E.2d at 468.

[35] *Id.* at 1973, 395 N.E.2d at 468.

of Revenue was reversible error.[36] The defendant contended that evidence establishing that the Department of Revenue had no record of his 1974 and 1975 returns was not admissible to prove that he had not filed those returns.[37] The Appeals Court, however, ruled against the defendant and held that the admission of the testimony of the keeper of records was not error.[38]

In reaching its decision, the court first noted that the testimony of the keeper of records was based on a business record.[39] The court then referred to official records and observed that "[e]vidence that no file or entry is found to exist in official records is admissible to show that the records contain no such file or entry."[40] In sustaining this position, the court cited chapter 223A, section 14, which allows the admission of evidence of failure to find an entry to prove the absence of such entry in an official record.[41]

The court found additional support for its holding in *Commonwealth v. Torrealba*,[42] in which the defendant was convicted of shoplifting.[43] The managers of the stores involved were allowed to testify that the cash register record was examined on the day in question and that no record of sale was found for any of the articles alleged to have been stolen.[44] The Supreme Judicial Court held that this testimony was admissible to show the absence of any record of sale.[45]

Finally, in further support of its decision, the court cited *United States v. Farris*,[46] another tax evasion case. In *Farris*, a statement by the Di-

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[36] *Id.* at 1975, 395 N.E.2d at 469.

[37] *Id.*

[38] *Id.*

[39] *Id.* It should be noted that G.L. c. 233, § 78, quoted in note 7 *supra*, applies only to the admission of affirmative entries and not to the absence of entries. G.L. c. 223A, § 14, MASS. R. CIV. P. 44(b), and MASS. R. CRIM. P. 40(b) all deal specifically with proving the absence of an entry in a record. See notes 41, 51, & 56 *infra*.

[40] *Id.*

[41] *Id.* G.L. c. 223A, § 14 states:

> A written statement that after diligent search no record of entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in [c. 223A, § 12] in the case of a domestic record, or complying with the requirements of [c. 223A, § 13] for a summary in the case of a record in a foreign country, shall be admissible as evidence that the records contain no such record or entry.

In regard to criminal actions, *see* MASS. R. CRIM. P. 40(b).

[42] 316 Mass. 24, 54 N.E.2d 939 (1944), *cited at* 1979 Mass. App. Ct. Adv. Sh. 1975, 395 N.E.2d at 469.

[43] 316 Mass. at 25, 26, 54 N.E.2d at 940, 941.

[44] *Id.* at 30, 54 N.E.2d at 942-43.

[45] *Id.* at 30, 54 N.E.2d at 943.

[46] 517 F.2d 226 (7th Cir.), *cert. denied*, 423 U.S. 892 (1975), *cited at* 1979 Mass. App. Ct. Adv. Sh. at 1976, 395 N.E.2d at 469.

rector of the National Computing Center of the Treasury Department was offered into evidence at trial.[47] The statement was to the effect that the center's computer records had been searched and that no record of defendant's tax return had been found.[48] The United States Court of Appeals for the Seventh Circuit held that the evidence was admissible.[49] The *Farris* holding rested, in part, on Rule 27 of the Federal Rules of Criminal Procedure, which incorporates by reference the provisions of Rule 44 of the Federal Rules of Civil Procedure (which provides the method of proving official records and entry or lack of entry therein).[50]

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[47] 517 F.2d at 227.

[48] *Id.* at 227-28. An attachment to the statement consisting of computer printouts indicated that no returns were filed for the years in question. *Id.*

[49] *Id.* at 228-29. The actual holding of *Farris* is that officially certified computer data compilations are self-authenticating. *Id.* at 227 & n.1, 228-29.

[50] *Id.* at 227-28. FED. R. CRIM. P. 27 provides: "An official record or an entry therein or the lack of such a record or entry may be proved in the same manner as in civil actions." This procedure is accomplished in civil actions under FED. R. CIV. P. 44 which states:

(a) Authentication.

(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

(2)Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary or embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records of his office, designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

The Appeals Court of Massachusetts in *Garabedian* noted that Rule 44(b) of the Federal Rules of Civil Procedure is identical to Rule 40(b) of the Massachusetts Rules of Criminal Procedure (which provides the method of proving the absence of a record or entry in official records in criminal actions).[51] Although Rule 40(b) was not in effect at the time of defendant's trial, the court found that the rule gave formal recognition to previous Massachusetts practice.[52] The court, therefore, concluded that Rule 40(b) of the Massachusetts Rules of Criminal Procedure, combined with the *Farris* case, also supported its holding with respect to the admissibility of the testimony of the keeper of records of the Department of Revenue.

Upon examination, the Appeals Court's rationale is tenuous. The court's initial reliance on section 78 of chapter 233 of the General Laws is questionable because it failed to note that this statute applies by its terms only to the admission of affirmative entries.[53] Moreover, the court confused two separate questions: first, whether the absence of an entry in a business record may be offered to prove the nonoccurrence or nonexistence of a matter; and second, what evidence is admissible to prove that the records in question do not contain an entry or file. The defendant's contention in *Garabedian* was that evidence establishing that the Department of Revenue did not have records of his returns for 1974 and 1975 was not admissible to prove he did not file a return in those years.[54] The court did not address contrary Massachusetts decisions which have held that a party's business entries or books of account may not be admitted on his behalf to prove the nonoccurrence or nonexistence of a matter by showing the absence of affirmative entries.[55] The court's rationale, for the most part, simply supports the proposition that the absence of an entry or file in official records may be proved by a

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(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

[51] 1979 Mass. App. Ct. Adv. Sh. at 1976, 395 N.E.2d at 469. Rule 40(b) provides in relevant part: "A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement . . . is admissible as evidence that the records contain no such record or entry." *See* FED. R. CIV. P. 44(b), *quoted in* note 50 *supra*. Rule 40(b) is also substantially identical to G.L. c. 223A, § 14. See text and note at note 41 *supra*.

[52] 1979 Mass. App. Ct. Adv. Sh. at 1976, 395 N.E.2d at 469.

[53] See note 39 *supra*.

[54] *Id.* at 1975, 395 N.E.2d at 469.

[55] Mackintosh v. Cioppa, 245 Mass. 152, 155, 139 N.E. 445, 446 (1923); Riley v. Boehm, 167 Mass. 183, 187, 45 N.E. 84 (1896); Sanborn v. Fireman's Ins. Co., 82 Mass. (16 Gray) 448, 455 (1860); Morse v. Potter, 70 Mass. (4 Gray) 292, 293 (1855); K. HUGHES, 19 MASSACHUSETTS PRACTICE, EVIDENCE § 594 n.20 (1961). This rule has been followed only where a party seeks to introduce his own business records. *See* Cohen v. Boston Edison Co., 322 Mass. 239, 76 N.E.2d 766 (1948).

written statement that such entry or file was not found after diligent search.[56]

Nevertheless, the court's holding, while not supported by existing Massachusetts law,[57] does not lack general authority in its support. It appears that a majority of courts admit evidence of the absence of an entry in a business record relating to a transaction to prove the non-occurrence of that transaction.[58] The Federal Rules of Evidence and the Uniform Rules of Evidence explicitly provide for such a rule with qualifications.[59] In addition, a prominent authority on evidence argues in support of such a rule and finds the contrary attitude by some courts distressing.[60] The court's holding in *Garabedian,* therefore, should result in an eventual reexamination of prior Massachusetts precedent on this issue. Such re-examination may lead to a rule which reflects more closely the position of modern authority on this question.

§4.6. Hearsay—Hospital Records Exception.* Massachusetts General Laws chapter 233, section 79, provides an exception to the hearsay rule whereby hospital records may be introduced at trial to prove the truth of the information recorded. The statute covers all records kept by hospitals, dispensaries or clinics, and sanatoria that are licensed by the Department of Public Health or supported in whole or in part by the commonwealth, as well as records of similar facilities located in other states.[1] An important qualification to the admissibility of these records is made in the statute: the information sought to be introduced must pertain to the *treatment* and *history* of *patients.*[2] No portion of a hospital record referring to the issue of *liability* may be admitted under section 79.[3]

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[56] *See* G.L. c. 223A, § 14, *quoted in* note 41 *supra,* for statutory recognition of this proposition. *See also* MASS. R. CIV. P. 44(b). *See* MASS. R. CRIM. P. 40(b), *quoted in* note 51 *supra,* for recognition of this proposition in criminal practice. "This subdivision [subdivision (b) of Rule 40] permits the written statement of a custodial officer that no particular record can be found . . . to suffice *as proof that no such record exists.*" Reporters' Notes to Rule 40, MASS. ANN. LAWS, Rules of Criminal Procedure, 582 (Law. Co-op. 1979) (emphasis supplied).

[57] *See* cases cited in note 55 *supra.*

[58] C. MCCORMICK, EVIDENCE § 307 (2d ed. 1972).

[59] FED. R. EVID. 803(7); Uniform Rule 803(7). Both rules state that such evidence is inadmissible where "the sources of information or other circumstances indicate lack of trustworthiness."

[60] 5 J. WIGMORE, EVIDENCE § 1531 (Chadbourn rev. ed. 1974).

§4.6. * By Barbara Jane Levine, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

[1] G.L. c. 233, § 79 (1979). The admissibility of records from facilities in other states is subject to the court's discretion. *Id.*

[2] *Id.*

[3] *Id.*

During the *Survey* year, the Supreme Judicial Court, in *Bouchie v. Murray*,[4] attempted to guide trial judges in determining whether, or what portion of, a particular hospital record is admissible under the statute. Plaintiff Robert Bouchie was involved in an automobile accident in which he sustained head injuries.[5] In an action against the other driver for negligence, Bouchie introduced testimony from a doctor who had examined him after the accident for possible brain damage. As a part of his testimony, the doctor read portions of the hospital record of Bouchie's examinations that revealed information relating both to Bouchie's physical condition and his personal history.[6] On cross-examination, over Bouchie's objection, the defense introduced the *entire* record, which included a consultation report by a psychiatrist. This report in turn included statements made to the psychiatrist by Bouchie's wife concerning her opinion as to why Bouchie had the accident.[7]

Reviewing Bouchie's objection on direct appeal and ultimately reversing the judgment to allow a new trial, the Supreme Judicial Court set forth a four-part analysis to be employed in determining whether Mrs. Bouchie's statements were admissible. First, the Court wrote, "[T]he document must be the type of record contemplated by [the statute]."[8] The statute was designed to relieve hospital staff of the cost and inconvenience of leaving work to testify in court about the very facts which could be found in hospital records.[9] At the same time, however, the statute was not designed to allow admission of all hospital records. To come within the hearsay exception the information in the records must be of the type which aids the hospital staff in the care and treatment of patients. Although the person who prepared the record cannot be cross-examined by the opposing counsel and the preparer's demeanor cannot be observed by the fact-finder, the information contained in the records as to a patient's treatment is presumed by the statute to be reliable and trustworthy[10] because false or inaccurate information could seriously interfere with the hospital staff's work.

The second part of the Court's analysis focused in greater depth on the subject matter of the records. The Court recognized that difficulty

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[4] 1978 Mass. Adv. Sh. 2727, 381 N.E.2d 1295.

[5] *Id* at 2728, 381 N.E.2d at 1297.

[6] *Id.* at 2728-29, 381 N.E.2d at 1297.

[7] *Id.* at 2729, 381 N.E.2d at 1297. The statements objected to were: "Wife says it occurred when [Bouchi] enraged and out of control. . . . [S]he felt he was going to have a nervous breakdown, but had the accident instead." *Id.*

[8] *Id.* at 2735-36, 381 N.E.2d 1300.

[9] Leonard v. Boston Elevated Ry., 234 Mass. 480, 482, 125 N.E. 593, 593 (1920).

[10] *See* Globe Indem. Co. of N.Y. v. Reinhart, 152 Md. 439, 446-47, 137 A. 43, 46 (1927).

may be encountered in determining whether information relates to treatment and medical history or to liability. Indeed, a portion of a hospital record may be viewed as relating to both. For example, in two cases decided in 1920[11] and 1930,[12] the notation "odor of alcohol on breath," while found to be a reference to the patient's physical condition, was also found to relate to the patient's liability for driving a car under the influence of alcohol.[13] Nonetheless, in both cases it was determined that the possibility that liability could be inferred from the notation did not negate the notation's value for treatment purposes and hence did not require its exclusion.[14] A distinction thus is made between facts which relate solely to liability and do not aid the hospital in rendering treatment and those which relate to the incident which brought the patient to the hospital but which may be pertinent to the patient's treatment.[15] The former is excluded from evidence while the latter is admissible. If improper use is made of the admitted record during the trial, the judge should instruct the jury as to the record's proper limitations.[16] The Court also indicated that the presumption of reliability upon which section 79 is based is inapplicable to recorded statements that are not the kind relied on by a hospital staff in the course of their work, thus rendering them outside the reach of section 79.[17] Therefore, the Court ruled that the objection to the admission of the statements in the psychiatrist's report as to Mrs. Bouchie's opinion concerning the cause of the accident was proper.[18]

A third factor considered by the Court was the source of the recorded information. Information relating to medical treatment must be that obtained from the recorder's personal knowledge, from the patient's statements regarding medical history made to aid the doctor in the treatment, or from a compilation of the personal knowledge of someone obligated in the course of his employment to transmit medical information to the recorder.[19] If the information does not fall within any of

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[11] Leonard v. Boston Elevated Ry., 234 Mass. 480, 125 N.E. 593 (1920).

[12] Clark v. Beacon Oil Co., 271 Mass. 27, 170 N.E. 836 (1930).

[13] Leonard v. Boston Elevated Ry., 234 Mass. at 483, 125 N.E. at 594 (unable to say as a matter of law that notation unrelated to medical history); Clark v. Beacon Oil Co., 271 Mass. at 28-29, 170 N.E. at 837.

[14] Leonard v. Boston Elevated Ry., 234 Mass. at 483, 125 N.E. at 593-94; Clark v. Beacon Oil Co., 271 Mass. at 28-9, 170 N.E. at 837.

[15] Clark v. Beacon Oil Co., 271 Mass. at 30, 170 N.E. at 837. *See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(4) [01], at 130 (1979).

[16] 1978 Mass. Adv. Sh. at 2735, 381 N.E.2d at 1300. *Cf.* Clark v. Beacon Oil Co., 271 Mass. 27, 170 N.E. 836 (1930) (instructions not always necessary).

[17] 1978 Mass. Adv. Sh. at 2733, 381 N.E.2d at 1298.

[18] *Id.* at 2733-34, 381 N.E.2d at 1299.

[19] *Id.* at 2736, 381 N.E.2d at 1300. The emphasis is on "the regular course of someone's business"—in this case in the course of a patient's treatment. *See* Note, *Revised Business Entry Statutes: Theory and Practice*, 48 COLUM. L. REV. 920,

these categories it does not come within the purview of section 79. In this regard, the Court determined that the statements in the testifying doctor's record concerning what he observed when examining Bouchie, as well as what the psychiatrist himself observed, were admissible.[20] The Court, however, was unsure whether Mrs. Bouchie's statement concerning her husband's mental state before the accident was made to aid the psychiatrist in his diagnosis and treatment of Bouchie. The Court, therefore, directed the trial judge on retrial to make such a determination.[21] If the judge determined that the statement was made to assist in diagnosis, it should be admissible even though made by a third person —as long as the third person had knowledge of the patient's medical history which was gained from an intimate relationship with the patient.[22] Thus, the Court ruled that it is within the trial judge's discretion to decide whether the relationship between the declarant, in this case the defendant's spouse, and the patient is close enough to warrant a presumption of reliability.[23]

The last part of the analysis concerns statements that are not related to treatment, history, *or* liability or statements that were made voluntarily or casually and are not to be relied upon by a doctor. Bypassing section 79, the inquiry looks to whether the statements to be introduced as evidence come within any other exception to the hearsay rule or whether they are being introduced for reasons other than to prove the truth of the statements contained therein.[24]

924-25 (1948). Thus, when the information in the record was recorded from the personal knowledge of someone in no way obligated to supply the information, it is excluded not because it is hearsay but because it was not recorded pursuant to regular hospital routine. *See* Standard Oil Co. of Cal. v. Moore, 251 F.2d 188, 213-14 (9th Cir. 1957), *cert. denied*, 356 U.S. 975 (1958).

[20] *See* 1978 Mass. Adv. Sh. at 2735, 381 N.E.2d at 1298-99.

[21] *Id. See* 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(4) [01], at 127 (1979).

[22] 1978 Mass. Adv. Sh. at 2735, 381 N.E.2d at 1299. 4 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 803(4) [01], at 127 (1979).

[23] 1978 Mass. Adv. Sh. at 2734-35, 381 N.E.2d at 1299. The concurring judge was unwilling to compare the hospital records exception with the more general business records exception. *See* G.L. c. 233, § 78. He appeared to read into the majority's opinion a requirement that the facts in hospital records which do pertain to treatment and medical history must also fit within some other exception to the hearsay rule as well. *Id.* at 2737, 381 N.E.2d at 1300 (Braucher, J.). This is not really what the majority wrote. Rather, the majority purported to explain briefly the applicability of the hospital records exception and in so doing was forced to view the requirements of section 79 as similar to the requirements of the business records exception, G.L. c. 233, § 78. *See id.* at 2731-33, 381 N.E.2d at 1298-99. Although section 79 was enacted in substantially different form from section 78, the two exceptions serve similar purposes and are based on similar concepts of inherent accuracy and reliability. *See* 5 J. WIGMORE, EVIDENCE §§ 1420, 1422, 1423 (Chadbourn rev. ed. 1974).

[24] 1978 Mass. Adv. Sh. at 2736, 381 N.E.2d at 1300.

Two Appeals Court cases involving the scope of section 79 decided after *Bouchie* illustrate that problems continue to arise concerning factual determinations, despite *Bouchie*'s clear analysis. *Commonwealth v. DiSanto* [25] and *Commonwealth v. Underwood* [26] considered the difficulties trial judges face in determining whether the information refers to treatment and history or to liability and whether the record arose from an obligation to record information concerning a patient.

In *DiSanto,* the defendant objected to the admission of a portion of his hospital record that estimated the time of his injury. The defendant claimed the estimate related to liability.[27] Although the evidence at trial revealed that one of the persons who participated in the armed robbery had been struck by the police detective's car and had limped toward the getaway car,[28] the court determined that the notations in the defendant's hospital record made no reference to any cause of the injury or to any question of liability. Noting nothing to the contrary in *Bouchie v. Murray,* the court commented that if the estimation of time of injury related to liability, it did so only incidentally.[29] In addition, the defendant claimed that the estimates were made by the doctor pursuant to a police request, although he did not support this claim with any evidence.[30] The court responded by stating that it was within the trial judge's discretion to determine the reliability of the information contained in the record.[31]

In *Underwood,* the defendant attempted to introduce his hospital record into evidence to show that he was incapable of holding a gun in his hand as the police officer testified.[32] The trial judge admitted most of the record, including notations that Underwood had "poor grasp" [33] and "no active extension of wrist or fingers," [34] but he excluded the "Discharge Summary" because it was made twenty-eight days after the date of the arrest.[35] The Appeals Court disagreed that the issue of the time gap was relevant under these circumstances.[36] Citing *Bouchie* and making an analogy to situations which are covered by the more general

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[25] 1979 Mass. App. Ct. Adv. Sh. 2291, 2300-01, 397 N.E.2d 672, 677-78.

[26] 1979 Mass. App. Ct. Adv. Sh. 303, 386 N.E.2d 762. Although both cases were criminal prosecutions, section 79 does not violate the defendant's constitutional right to confrontation. *See* Commonwealth v. Franks, 359 Mass. 577, 270 N.E.2d 837 (1971).

[27] 1979 Mass. App. Ct. Adv. Sh. at 2300, 397 N.E.2d at 677.

[28] *Id.* at 2299, 397 N.E.2d at 677.

[29] *Id.* at 2330, 397 N.E.2d at 678.

[30] *Id.*

[31] 1979 Mass. App. Ct. Adv. Sh. at 304, 386 N.E.2d at 763.

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.* at 305, 386 N.E.2d at 763.

hearsay exception for business records,[37] the court stated that as long as the contents of the "Discharge Summary" were relevant to the material issue of the case, the fact that the information was simply a summary of information obtained from other records does not render them inadmissible as evidence.[38]

These three cases present recent judicial interpretations of section 79. In particular, the Supreme Judicial Court's opinion in *Bouchie v. Murray* articulates guidelines which should be used by trial courts in their determination of what information can be admitted under chapter 23, section 79. The Appeals Court decisions, on the other hand, illustrate that the practical application of these guidelines is not always easy.

§4.7. Doctrine of Verbal Completeness and Use of Tape Recordings.* The doctrine of "verbal completeness" stated simply, requires that a verbal utterance be taken as a whole.[1] Specifically, it requires that when a portion of a conversation or statement is offered into evidence, the trier of fact must be allowed to consider that portion within the context of the whole conversation or statement.[2] This requirement is necessary if the actual meaning of the utterance is not to be distorted. As was recognized in an early Massachusetts decision, "[t]he force and effect of particular expressions may be, and often are, greatly modified or affected by the connection in which they are uttered."[3] Nevertheless, a trial court should not be required by the doctrine of verbal completeness to admit evidence which is otherwise irrelevant and inadmissible.[4] In *Commonwealth v. Watson*,[5] the Supreme Judicial Court resolved the competing concerns of completeness and relevance by defining, in light of its prior decisions, a limited rule of verbal completeness.

The defendant in *Watson* was charged with murder in the first degree.[6] The murder occurred at approximately 3:00 p.m. on November 20, 1975.[7] The defendant was arrested on December 2, 1975, and after being given the required *Miranda*[8] warnings, was questioned by a police sergeant.[9]

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[37] *Id.* at 305, 386 N.E.2d at 763-64. *Cf.* note 23 *supra.*

[38] *Id.*, 386 N.E.2d at 764.

§4.7. * By Nelson G. Apjohn, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

[1] *See* 7 J. WIGMORE, EVIDENCE 604 (Chadbourn rev. ed. 1978) [hereinafter cited as WIGMORE].

[2] *See* C. MCCORMICK, THE LAW OF EVIDENCE 130-31 (2d ed. 1972) [hereinafter cited as MCCORMICK].

[3] Commonwealth v. Goddard, 80 Mass. (14 Gray) 402, 404 (1860).

[4] MCCORMICK, *supra* note 2, at 130.

[5] 1979 Mass. Adv. Sh. 1037, 388 N.E.2d 680 (1979).

[6] *Id.* at 1037, 388 N.E.2d at 682.

[7] *Id.* at 1049, 388 N.E.2d at 686.

[8] Miranda v. Arizona, 384 U.S. 436 (1966).

[9] 1979 Mass. Adv. Sh. at 1049, 388 N.E.2d at 686.

The interrogation, lasting only ten minutes, was tape recorded in its entirety and was later transcribed.[10]

At trial, during a voir dire examination, the prosecutor stated that she intended to introduce testimony by the police sergeant who had questioned the defendant concerning a portion of the defendant's interrogation.[11] The section of the interrogation included a question by the sergeant about the defendant's whereabouts at the time of the murder[12] and the defendant's response that he was cashing his paycheck and paying a bill.[13] The prosecutor stated that she had another witness who was prepared to testify that the defendant had actually cashed the check in question much earlier in the day.[14] Over the defendant's objection, the judge permitted the sergeant to read to the jury that portion of the transcript dealing with the whereabouts of the defendant at the time of the homicide.[15] The judge then denied the defendant's request to admit into evidence the tape of the entire interrogation and to allow the tape to be played to the jury.[16] The defendant was subsequently convicted of first degree murder.[17]

On appeal to the Supreme Judicial Court,[18] the defendant assigned as error, *inter alia,* the trial court's refusal to admit into evidence the entire transcript of his interrogation by the police.[19] The defendant contended that the doctrine of verbal completeness compelled the admission of the

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[10] *Id.*

[11] *Id.* The portion of the interrogation the prosecutor sought to offer consisted of the following:

> Q. [Sergeant]: "Now, I want to talk to you about back to Thursday, November 20, 1975, about two-thirty or three o'clock in the afternoon." A. [Watson]: "Yes." Q.: "Where were you at that time, Joe?" A.: "At that time I cashed my check at the First National Bank at Huntington Avenue. I went over to Shawmut Avenue to pay a bill there." Q.: "I understand. Then where did you go?" A.: "I went to [my girl friend's] house." Q.: ". . . Where does she live?" The same place I was around today?" A.: "Right, and I was drinking with her. I came back to my house about eight o'clock."

Id. at 1049 n.10, 388 N.E.2d at 686 n.10.

[12] *Id.* at 1050, 388 N.E.2d at 686.

[13] *Id.*

[14] *Id.* Subsequently, it was stipulated that the check was cashed at 9:12 a.m. on November 20, 1975. *Id.* at 1050, 388 N.E.2d at 686-87.

[15] *Id.* at 1050, 388 N.E.2d at 687.

[16] *Id.*

[17] *Id.* at 1037, 388 N.E.2d at 682.

[18] Subsequent to the appeal to the Supreme Judicial Court, the defendant filed a motion for a new trial pursuant to G.L. c. 278, § 29 (repealed by Acts of 1979, c. 344, § 46). This motion was remitted to the superior court for hearing and determination pursuant to G.L. c. 278, § 33E. The superior court, after an evidentiary hearing, denied the motion. The defendant's appeal from this determination by the superior court was consolidated by the Supreme Judicial Court with his then pending appeal from conviction. *Id.* at 1037-38, 388 N.E.2d at 682.

[19] *Id.* at 1038, 388 N.E.2d at 682.

transcript.[20] The Court in *Watson,* however, rejected the defendant's contention and held that the doctrine of verbal completeness requires that when a portion of a party's statement is put into evidence by his adversary, the former party may introduce into evidence *only* those additional portions of the statement said at the same time and upon the same subject.[21]

In rejecting the defendant's contention, the *Watson* Court observed that the defendant relied, to a large extent, upon the broad statement of the doctrine as contained in the case of *Commonwealth v. Goddard.*[22] The *Goddard* Court had stated that:

> if one party puts in evidence a part of the admissions or conversations of the other [party], the latter is entitled to produce, or draw out by cross-examination, testimony concerning all that was said upon the occasion referred to. . . . [A]ll that was said at any interview bearing upon the subject of inquiry, of which only detached parts have been given in evidence, may be proved in behalf of those against whom the part only has been produced.[23]

The *Watson* Court recognized that defendant's reliance on this broad statement was not without support.[24] The Court noted, however, that the doctrine of verbal completeness as stated in other decisions was of a narrower dimension.[25]

Citing *Commonwealth v. Keyes*[26] as an example of one of these decisions, the Court quoted from *Keyes* as follows: "It is undoubtedly the general rule that whenever the statements, declarations or admissions of a party are made subjects of proof, *all that was said by him at the same time and upon the same subject is admissible in his favor,* and the whole should be taken and considered together."[27] The Court observed

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[20] *Id.* at 1050-51, 388 N.E.2d at 687.

[21] *Id.* at 1052-54, 1058-59, 388 N.E.2d at 687-88, 690.

[22] 80 Mass. (14 Gray) 402 (1860). It should be noted that the Court in *Goddard* did not refer to the "doctrine of verbal completeness." Nevertheless, the principle laid out in the *Goddard* case is commonly referred to as the doctrine of verbal completeness or the rule of verbal completeness.

[23] *Id.* at 404.

[24] In Farley v. Rodocanachi, 100 Mass. 427 (1868), the Court stated the rule as follows: "[W]hen a part of a conversation or admission is introduced, the other side may prove all that was said." *Id.* at 429, *quoted in Watson,* 1979 Mass. Adv. Sh. at 1051-52, 388 N.E.2d at 687.

[25] *See, e.g.,* Commonwealth v. Schnackenberg, 356 Mass. 65, 70-71, 248 N.E.2d 273, 277 (1969); Commonwealth v. Trefethen, 157 Mass. 180, 197, 31 N.E. 961, 967-68 (1892); Commonwealth v. Campbell, 155 Mass. 537, 538-39, 30 N.E. 72, 74 (1892); Commonwealth v. Keyes, 77 Mass. (11 Gray) 323, 324 (1858).

[26] 77 Mass. (11 Gray) 323 (1858).

[27] 1979 Mass. Adv. Sh. at 1052, 388 N.E.2d at 687 (quoting *Keyes,* 77 Mass. (11 Gray) at 324) (emphasis supplied by the *Watson* Court).

that it had restated the *Keyes* rule limiting admission to statements made at the same time and upon the same subject in the more recent decision of *Commonwealth v. Schnackenberg*.[28] Thus, on the basis of its prior decisions, the Court reaffirmed the limited rule of verbal completeness and applied it to the facts in *Watson*.[29]

In applying the limited rule of verbal completeness, the Court rejected the defendant's contention that evidence of his entire interrogation should have been admitted.[30] The Court noted that the section of the interrogation presented by the prosecution at trial concerned only questions and answers relating to the defendant's whereabouts at the time of the homicide and that everything in the transcript relating to the defendant's whereabouts had been admitted into evidence by the trial judge.[31] Although the excluded portions of the interrogation [32] may have been relevant to other issues presented at trial, the Court ruled that the doctrine of verbal completeness did not compel admission of those segments of the interrogation not related to the defendant's whereabouts.[33] Hence,

[28] 356 Mass. 65, 70-71, 248 N.E.2d 273, 277 (1969).

[29] 1979 Mass. Adv. Sh. at 1052-53, 1058, 388 N.E.2d at 687-88, 690. The Court also conducted an extensive examination of secondary authority on the doctrine of verbal completeness. *Id.* at 1054-58, 388 N.E.2d at 688-90. The Court found that this authority also supported the limited scope of the doctrine as enunciated in *Keyes*. *See, e.g.*, W.B. LEACH & P.J. LIACOS, MASSACHUSETTS EVIDENCE 320 (4th ed. 1967); MCCORMICK, *supra* note 2, at 130; WIGMORE, *supra* note 1, at 653-60. For example, the Court observed that a limitation of the doctrine of verbal completeness asserted by Wigmore was that "[n]*o more of the remainder of the utterance than concerns the same subject, and is explanatory of the first part, is receivable.*" 1979 Mass. Adv. Sh. at 1056, 388 N.E.2d at 689 (quoting WIGMORE, *supra* note 1, at 657) (emphasis contained in the original text). Moreover, the Court noted that other jurisdictions also applied a limited rule of verbal completeness. 1979 Mass. Adv. Sh. at 1057, 388 N.E.2d at 689. In particular, the Court directed its attention to the second circuit where the United States Court of Appeals had stated it was "well settled that only those parts of a document which throw light upon the parts already admitted become competent upon its introduction." United States v. Dennis, 183 F.2d 201, 230 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951), *quoted at* 1979 Mass. Adv. Sh. at 1057, 388 N.E.2d at 689. *See also* Camps v. New York City Transit Auth., 261 F.2d 320, 322 (2d Cir. 1958); United States v. Corrigan, 168 F.2d 641, 645 (2d Cir. 1948).

[30] 1979 Mass. Adv. Sh. at 1060-62, 388 N.E.2d at 691.

[31] *Id.* at 1059-60, 388 N.E.2d at 690.

[32] The Court summarized the excluded portions of the interrogation as follows:

> (a) he learned from a friend that the police were looking for him in connection with the shooting of [the victim], (b) he did not know [the victim], and because he did not know him he never saw or talked to him, (c) he formerly lived with Charlotte Crawford, she told him she was going to testify against him, he never told her that he had shot [the victim], he is the father of two of her children, she now hates him because he complained to the welfare department about her, and that she put her daughter Laverne up to testifying against him, and (d) he did not own a gun, he never told Laverne that he owned a gun and never showed her a gun, and he never told her that he was going to shoot [the victim].

Id. at 1060, 388 N.E.2d at 690-91.

[33] *Id.* at 1060-61, 388 N.E.2d at 691.

under the *Watson* Court's interpretation of the doctrine of verbal completeness, the defendant could offer only those statements made at the time of his interrogation and upon the subject of his whereabouts at the time of the homicide.

The defendant's appeal in *Watson* did not depend solely on the doctrine of verbal completeness, but also rested on the separate ground that the trial court erred in refusing to admit the tape recording of his interrogation.[34] The defendant contended that the recording was necessary to demonstrate to the jury that he spoke with a heavy Spanish accent, that he was intoxicated at the time of the interrogation, and that he could not comprehend the questions he was asked at the interrogation.[35] This evidence was relevant in part because there were witnesses present at the homicide who testified that they had not noticed an accent in the assailant's speech.[36] The defendant denied that the recording would have been offered to prove the truth of what he had said.[37]

The Court rejected the defendant's argument that the tape recording should have been admitted. It observed that there was no set rule of law of the commonwealth either requiring or prohibiting the admission of a tape recording into evidence.[38] Nevertheless, the Court found that authority from other jurisdictions appeared to support the rule that the decision to admit a relevant tape recording rested within the sound discretion of the trial court.[39] The Court noted that to allow the tape recording to be admitted into evidence would permit the defendant to bring in the same information which the Court held was properly excluded by the trial judge in applying the doctrine of verbal completeness.[40] Moreover, the Court found that a limiting instruction could not eliminate the risk that the jury would consider the evidence for the truth of the statements which it contained.[41] The Court held, therefore, that the trial judge's refusal to admit the tape recording was not an abuse of discretion in the circumstances presented.[42] In reaching this holding, the Court implicitly accepted the position taken by other jurisdictions that it is within the sound discretion of the trial judge to determine the admissibility of a relevant tape recording.

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[34] *Id.* at 1038, 388 N.E.2d at 682.
[35] *Id.* at 1062, 388 N.E.2d at 691.
[36] *Id.* at 1041, 388 N.E.2d at 683.
[37] *Id.* at 1065, 388 N.E.2d at 692.
[38] *Id.* at 1062, 388 N.E.2d at 691.
[39] *Id.* at 1062-63, 388 N.E.2d at 691. The Court cited United States v. Dimuro, 540 F.2d 503, 512 (1st Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977); Gorin v. United States, 313 F.2d 641, 652 (1st Cir. 1963), *cert. denied,* 379 U.S. 971 (1965).
[40] 1979 Mass. Adv. Sh. at 1065, 388 N.E.2d at 692.
[41] *Id.*
[42] *Id.*

It should be noted that the Court did not demonstrate any general hostility towards the use of tape recordings as evidence. The Court acknowledged that a number of jurisdictions recognized the value of such evidence in resolving questions of fact.[43] Nevertheless, because the trial judge is in the best position to determine the impact of a tape recording on the jury, his or her decision should not be set aside unless there is an abuse of discretion.[44] The determination of what circumstances will constitute an abuse of the trial court's discretion must be resolved on a case by case basis.

§4.8. Corroborative Evidence of Immunized Witness.* In 1970 the legislature adopted a measure authorizing immunity for witnesses under certain conditions.[1] As part of the act, the legislature enacted chapter 233, section 20I, which provides that no criminal defendant may be convicted *solely* on the testimony of an immunized witness.[2] Since its adoption, the courts have narrowly construed section 20I. In *Commonwealth v. DeBrosky*,[3] the first case decided under the statute, the Court determined that section 20I does not require corroborating testimony to identify the defendant as a participant in the crime.[4] Instead, the Court held that section 20I merely requires some evidence in support of the immunized witness's testimony on at least one element of proof essential to convict the defendant.[5] The *DeBrosky* Court thus established the rule that evidence corroborating the immunized witness's testimony concerning commission of the crime would satisfy section 20I even if there were no other evidence linking the defendant to the crime.[6]

A case decided during the *Survey* year continued the Court's restrictive interpretation of section 20I. In *Commonwealth v. Jacobs*,[7] the defendant was convicted of assault and battery and unlawful carrying

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[43] *See, e.g.*, Sanders v. State, 237 Miss. 772, 776, 115 So. 2d 145, 146 (1959); State v. Porter, 125 Mont. 503, 513, 242 P.2d 984, 989 (1952); People v. Harding, 44 App. Div. 2d 800, 801, 355 N.Y.S.2d 394, 397 (1974); Williams v. State, 93 Okla. Crim. 260, 270-71, 226 P.2d 989, 995 (1951); State v. Reyes, 209 Or. 595, 636, 308 P.2d 182, 196 (1957).

[44] *See* United States v. Bastone, 526 F.2d 971, 978 (7th Cir. 1975), *cert. denied*, 425 U.S. 973 (1976).

§4.8. * By Barry J. Palmer, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

[1] Acts of 1970, c. 408.

[2] The full text of G.L. c. 233, § 20I, is as follows: "No defendant in any criminal proceeding shall be convicted solely on the testimony of, or the evidence produced by, a person granted immunity under the provisions of Section twenty E."

[3] 363 Mass. 718, 297 N.E.2d 496 (1973).

[4] *Id.* at 729-30, 297 N.E.2d at 504-05.

[5] *Id.* at 730, 297 N.E.2d at 505.

[6] *Id.*

[7] 1978 Mass. App. Ct. Adv. Sh. 997, 381 N.E.2d 1109.

of a firearm.[8] The principal witnesses for the prosecution, Trioli (the victim of the assault and battery) and Johnson (his companion), testified as immunized witnesses. Trioli and Johnson testified that the defendant instigated a scuffle in a barroom.[9] When Trioli and Johnson attempted to escape, Jacobs allegedly followed them outside, drew a pistol, and fired several shots, wounding Trioli in both legs.[10] The police encountered Trioli and Johnson shortly afterwards and, after sending them to the hospital, searched the area. The police found a pistol located under a car in the parking lot.[11] The only corroborative evidence offered against the defendant was the discovery of the gun near the scene of the shooting, police ballistic testimony that tended to prove the gun found in the parking lot had been fired whereas a gun found on Trioli had not, and the hospital record which confirmed Trioli's wounds and corroborated Trioli and Johnson's testimony that Trioli had been shot from behind.[12] No testimony, other than that of the immunized witnesses, connected the defendant to the crime.[13]

The Supreme Judicial Court concluded that there was sufficient corroboration to satisfy section 20I.[14] The Court noted that, while other "corroboration" statutes in Massachusetts and elsewhere specifically require that the corroborating evidence link the defendant to the crime,[15] the language in section 20I is less explicit.[16] The purpose of the statute, the Court observed, is to insure the credibility of the testimony given by immunized witnesses.[17] This goal can be accomplished, the Court noted, by requiring corroborative evidence on at least one element of proof essential to convict the defendant.[18] Following the standard established in *DeBrosky*, the Court held that the corroborated element need not be the defendant's commission of the crime, but rather could be merely the manner in which the crime was committed.[19] In the present case, the Court noted that the other evidence introduced—the hospital record indicating that Trioli had been shot from behind and the police testimony that the weapon found had been fired—tended to corroborate the testimony of the immunized witnesses that an assault

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[8] *Id.* at 997, 381 N.E.2d at 1110.
[9] *Id.* at 998, 381 N.E.2d at 1111.
[10] *Id.* at 998-99, 381 N.E.2d at 1111.
[11] *Id.* at 999, 381 N.E.2d at 1111.
[12] *Id.* at 1001, 381 N.E.2d at 1112.
[13] *Id.*
[14] *Id.* at 1003, 381 N.E.2d at 1113.
[15] *See, e.g.*, G.L. c. 264, § 4, concerning convictions for treason, and c. 272, § 11, relating to abductions of women for illicit purposes.
[16] 1978 Mass. App. Ct. Adv. Sh. at 1001, 381 N.E.2d at 1112.
[17] *Id.*
[18] *Id.* at 1001-02, 381 N.E. 2d at 1112.
[19] *Id.* at 1002, 381 N.E.2d at 1112.

and battery had been committed.[20] As for the count of unlawful possession of a firearm, the Court stated that the evidence that Trioli had been shot established the required element of knowing possession of a firearm.[21] Therefore, the Court concluded that corroborative evidence had been introduced on at least one element of each indictment.[22] The defendant's appeal was thus denied.

The significance of *Jacobs* is not that it establishes new law, but rather lies in the message that *Jacobs* makes painfully clear to the practical litigant—the protection afforded the defendant by section 20I is illusory. Indeed, a review of all reported decisions under section 20I does not reveal a single instance in which a defendant successfully raised the protection of section 20I.[23] In view of the *DeBrosky* standard and its application to a factual pattern such as *Jacobs,* it is difficult to conceive of a situation in which section 20I could be successfully invoked. In most of the cases arising to date, the immunized witness is an accomplice[24] and is consequently aware of the circumstances surrounding the commission of the crime. The prosecution can corroborate the witness merely by introducing extrinsic evidence showing the details of how the crime was committed.[25] Similarly, if the witness is the victim, as in *Jacobs,* he will be aware of the details of the crime, and any evidence showing how the crime was committed, which substantiates the witness's version, will suffice. Even in the extreme case where the immunized witness's story is a complete fabrication, section 20I offers little protection: if a crime has been committed and the witness is

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[20] *Id.* at 1003, 381 N.E.2d at 1112-13.

[21] *Id.* at 1003, 381 N.E.2d at 1113.

[22] *Id.*

[23] In addition to the *DeBrosky* and *Jacobs* cases, defendants have unsuccessfully sought protection under § 20I in the following cases: Commonwealth v. Stewart, 1978 Mass. Adv. Sh. 1521, 377 N.E.2d 693; Commonwealth v. Scanlon, 373 Mass. 11, 364 N.E.2d 1196 (1977); Commonwealth v. Doyle, 5 Mass. App. Ct. 544, 364 N.E.2d 1283 (1977); Commonwealth v. Turner, 371 Mass. 803, 359 N.E.2d 626 (1977); Commonwealth v. Donahue, 369 Mass. 943, 344 N.E.2d 886 (1976), *cert. denied,* 429 U.S. 833. There is, of course, the possibility that defendants have been successful in unreported trial court decisions on motions for a directed verdict due to a lack of corroborating evidence.

[24] In all of the cases listed in note 23 *supra* the immunized witness was an accomplice who participated to some extent in the commission of the crime.

[25] For example, in Commonwealth v. Doyle, 5 Mass. App. Ct. 544, 364 N.E.2d 1283 (1977), the defendant was convicted of procuring the burning of buildings. The immunized witness testified that the defendant solicited him to burn several buildings. The witness testified as to the dates and places of numerous fires he had started at the defendant's request. In addition, he testified that he used dura flame logs to start the fires. The court noted that the fire chief's testimony concerning the dates, locations, times, and in some instances the cause of the fire (the chief testified that pieces of dura flame logs were found at some of the fires) was sufficient corroborative testimony to meet the requirements of § 20I. *Id.* at 928, 364 N.E.2d at 1287.

aware of the circumstances, any evidence corroborating the witness's version of how the crime occurred would satisfy the requirements of section 20I.

§4.9. **Admissibility of Confession of a Co-defendant at a Joint Trial.*** In *Bruton v. United States*,[1] the United States Supreme Court held that the confession of a co-defendant inculpating his fellow defendant was inadmissible in a joint trial.[2] To reach this conclusion, the Court reasoned that as against the non-confessing defendant, the co-defendant's statement was inadmissible hearsay.[3] The Court determined that the defendant's sixth amendment rights to confrontation were violated by introduction of such unreliable information not subject to cross-examination.[4] Additionally, the Court noted that a trial judge's instructions were insufficient to dissipate the prejudicial effect on jurors' minds which necessarily resulted from the co-defendant's confession.[5] The Court reasoned that despite instructions to the contrary, jurors would continue to look to the incriminating extrajudicial statement when determining the defendant's guilt.[6] Therefore, the Court concluded that the confession was inadmissible.[7] This rule has been only slightly modified since its adoption in *Bruton*. The Supreme Court has since held that a co-defendant's confession is admissible at a joint trial in violation of the *Bruton* standard if the resulting error is harmless.[8]

The *Bruton* rule focuses on the tension between the rights of the individual defendant and the state's interest in the swift and uncom-

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§4.9. * By John D. Donovan, Jr., staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

1 391 U.S. 123 (1968).

2 *Id.* at 126. *See also* 82 HARV. L. REV. 231 (1968).

3 *Id.* at 125. *Cf.* FED. R. EVID. 802.

4 *Id.* at 126. The sixth amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to be confronted with the witnesses against him." The hearsay rule, FED. R. EVID. 802, is similarly premised on the introduction of unreliable testimony.

5 391 U.S. at 129.

6 *Id.* at 130 n.4. *See also* Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 753-55 (1959) [hereinafter cited as Broeder].

7 391 U.S. at 137, *Bruton* overruled Della Paoli v. United States, 352 U.S. 232 (1957). In *Della Paoli*, the Court held that it was "reasonably possible for the jury to follow sufficiently clear instructions to disregard the confessors' statement incriminating the defendant." 352 U.S. at 239. *Della Paoli's* premise, however, had been effectively repudiated, albeit not expressly overruled, in Jackson v. Denno, 378 U.S. 368 (1964). *Denno* rejected the proposition that jurors could ignore a confessor's statement of guilt in determining liability if it first found that the confession was involuntary. As the *Bruton* Court later noted, *Denno* relied heavily on the dissenting opinion of Justice Frankfurter in *Della Paoli*.

8 Harrington v. California, 395 U.S. 250 (1969). *See also* Chapman v. California, 386 U.S. 18, 23-24 (1967) (establishing harmless error rule for constitutional violations).

plicated administration of justice.[9] In the joint trial situation unique to American jurisprudence,[10] these tensions become most acute, because the potential danger of admitting testimony against only one defendant and causing juror confusion is great.[11] In *Bruton,* the Supreme Court balanced this danger against the state's desire to conduct a joint trial of the defendants to the same crime. The Court noted that admitting the hearsay testimony of the co-defendant encroached on the sixth amendment right of confrontation [12] without a compensating means of preventing the jury's reliance on such incriminating, but unreliable, testimony.[13] The Court observed that the historical assumption that jury instructions to disregard hearsay statements as to one defendant cured the danger of their admission had been effectively repudiated.[14] Admonitions to ignore the confessor's statement, the Court noted, were "intrinsically ineffective" [15] and could not erase the effect of the extra-judicial declaration from the minds of the jurors.[16] The Court therefore concluded that, in the joint trial situation, exclusion of such confessions was required.[17] The Court thus insisted that prosecutors and trial judges either devote particular solicitude to the rights of the accused in a joint trial or provide a separate trial. The Court indicated, however, that its concern for protecting defendant's rights to confrontation in this context was limited to the joint trial.[18] The Court emphasized that the admission of hearsay testimony did not, by itself, require reversal of convictions on sixth amendment grounds.[19] Rather, the Court suggested that only in the joint trial situation, when the inadmissible hearsay testimony directed the jury's attention inescapably at the defendant, was reversal absolutely necessary.[20]

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[9] *See* 391 U.S. at 134.

[10] *See* Kotteakos v. United States, 328 U.S. 750, 773 (1946).

[11] *See* People v. Aranda, 63 Cal. 2d 518, 528-29, 407 P.2d 265, 271-72 (1965). The Supreme Court noted the *Aranda* case in *Bruton.* 391 U.S. at 130-31.

[12] 391 U.S. at 126.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 129.

[16] *Id.*

[17] *Id.* at 136-37.

[18] *See* 391 U.S. at 128 n.3.

[19] The Court noted:

> We emphasize that the hearsay statement inculpating petitioner was clearly inadmissable against him under traditional rules of evidence, . . . the problem arising only because the statement was . . . admissible against . . . [the co-defendant]. . . . There is not before us, therefore, any recognized exception to the hearsay rule insofar as petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause.

Id.

[20] *Id.* at 137.

During the *Survey* year, the Massachusetts Supreme Judicial Court had an opportunity to reconsider the *Bruton* rule.[21] In *Commonwealth v. Horton,*[22] the Court examined the *Bruton* rationale of excluding unreliable testimony in order to protect sixth amendment rights and the likely failure of curative instructions to jurors.[23] The Court also considered the post–*Bruton* introduction of the harmless error doctrine.[24]

In *Horton,* the *Bruton* rule was raised on an appeal of the conviction of three co-defendants for armed robbery and murder in the first degree.[25] The three co-defendants had been arrested following the robbery of a gas station during which the station attendant was fatally stabbed.[26] At the police station, having been advised of his *Miranda* rights, each defendant gave a statement.[27] The statements were made in the presence of the other defendants and the police officers conducting the interrogation.[28] Although the substance of the statements differed,[29] each defendant admitted some involvement in the overall criminal enterprise.[30] At trial, none of the three co-defendants testified.[31] Police officers, however, were permitted to testify about the statements made

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[21] The Supreme Judicial Court of Massachusetts has considered the *Bruton* Rule several times since its adoption. *See, e.g.,* Commonwealth v. Carita, 356 Mass. 132, 249 N.E.2d 5 (1969); Commonwealth v. Scott, 355 Mass. 471, 245 N.E.2d 415 (1969); Commonwealth v. Lussier, 359 Mass. 393, 269 N.E.2d 647 (1971); Commonwealth v. Sarro, 356 Mass. 100, 248 N.E.2d 286 (1969); Commonwealth v. Graves, 363 Mass. 863, 299 N.E.2d 711 (1973); Commonwealth v. LeBlanc, 364 Mass. 1, 299 N.E.2d 719 (1973); Commonwealth v. Devlin, 365 Mass. 149, 310 N.E.2d 353 (1974); Commonwealth v. McLaughlin, 364 Mass. 211, 303 N.E.2d 338 (1973). *See also* 30 MASSACHUSETTS PRACTICE, SMITH, CRIMINAL PRACTICE & PROCEDURE, §§ 1021-1024 (1970) (Supp. 1979).

[22] 1978 Mass. Adv. Sh. 2548, 380 N.E.2d 687.

[23] *Id.* at 2557-59, 380 N.E.2d at 693-94.

[24] *Id.* at 2558, 380 N.E.2d at 694.

[25] *Id.* at 2556-57, 380 N.E.2d at 693. Defendants Horton, Pickett, and Wideman were convicted by a jury in the superior court, Essex County. Appeals were perfected and presented to the Supreme Judicial Court pursuant to G.L. c. 278, §§ 33A-33G. 1978 Mass. Adv. Sh. at 2548, 380 N.E.2d at 690.

[26] 1978 Mass. Adv. Sh. at 2551-52, 380 N.E.2d at 691.

[27] *Id.* at 2552-54, 380 N.E.2d at 691-92.

[28] *Id.* at 2552, 380 N.E.2d at 691.

[29] Defendant Horton admitted in his statement that he had stayed in the car while defendants Pickett and Wideman went into the station to rob the attendant. Defendant Pickett's statement averred that he (Pickett) had remained in the car while Horton and Wideman robbed the service station. Defendant Wideman essentially repeated Pickett's version. 1978 Mass. Adv. Sh. at 2552-54, 380 N.E.2d at 691-92.

[30] 1978 Mass. Adv. Sh. at 2552-54, 380 N.E.2d at 691-92. Under the doctrines of felony-murder and joint enterprise, the statements referred to in note 29 *supra* would be sufficient to convict each of the defendants for murder in the first degree if properly admitted into evidence. G.L. c. 265, § 1. *See also* Commonwealth v. Connolly, 356 Mass. 617, 255 N.E.2d 191 (1970); Commonwealth v. Balliro, 349 Mass. 505, 209 N.E.2d 308 (1965).

[31] 1978 Mass. Adv. Sh. at 2557, 380 N.E.2d at 693.

by the co-defendants during interrogation.[32] The motions of defendants' counsel to strike such testimony, and, alternatively, to sever the cases and conduct separate trials were denied.[33] The jury was instructed on the doctrines of joint enterprise and felony murder [34] and returned guilty verdicts against all defendants.[35] On appeal, among other issues,[36] the defendants argued that the trial court's refusal to sever the cases while admitting the police officers' testimony about their confessions was reversible error under the *Bruton* rule.[37] The Supreme Judicial Court disagreed,[38] however, and affirmed the defendant's convictions.[39]

On the issue of severing the trials, the Massachusetts Court initially examined the underlying premise of the *Bruton* standard. The Court realized that the principal focus of the Supreme Court's decision in *Bruton* was to prevent unfair and unreliable testimony from being used by the jury.[40] The Supreme Judicial Court thus determined that an inquiry into the effect on the jurors' minds of the *Horton* defendants' statements must be made.[41] Examining the *Horton* facts, the Court observed that the three co-defendants had all offered statements to the police admitting some involvement in the robbery of the service station and the murder of the station attendant.[42] The Court recognized that

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[32] *Id.*

[33] *Id.* at 2556, 380 N.E.2d at 693.

[34] *Id.* at 2557-58, 380 N.E.2d at 694. See note 30 *supra.*

[35] *Id.* at 2555, 380 N.E.2d at 693.

[36] The three defendants collectively raised 591 exceptions at trial, and 135 exceptions at a postconviction hearing on motions for new trials. A total of 127 of these exceptions were presented to the Court in the assignment of errors, although only seven were actually argued. 1978 Mass. Adv. Sh. at 2556, 380 N.E.2d at 693. The Court treated the assignments of error not argued as waived pursuant to MASS. R.A.P. 16, 367 Mass. 921 (1975); S.J.C. RULE 1:13, 366 Mass. 853 (1974). 1978 Mass. Adv. Sh. at 2556, 380 N.E.2d at 693. The Court expressed its displeasure as well with the assignment of error and argument of defendant Horton, noting that his brief was "void of anything that can properly be called argument." 1978 Mass. Adv. Sh. at 2556 n.4, 380 N.E.2d at 693 n.4. The Court noted, however, that any valid contentions of Horton's were adequately addressed in the appropriate assignments and arguments of Horton's co-defendants. *Id.* Among the other issues presented to the Court on appeal were (1) the means of examining prospective jurors, 1978 Mass. Adv. Sh. at 2560-66, 380 N.E.2d at 695-97; (2) admission of evidence of bloodstains not established as of human origin, *id.* at 2566-68, 380 N.E.2d at 697-98; (3) admission of photographs of the deceased, *id.* at 2568-70, 380 N.E.2d at 698-99; (4) failure to permit recross examination of a witness, *id.* at 2570-71, 380 N.E.2d at 699-700; (5) sufficiency of the evidence, *id.* at 2572, 380 N.E.2d at 700; and (6) motions for new trials on allegedly newly discovered evidence, *id.* at 2572, 380 N.E.2d at 700.

[37] 1978 Mass. Adv. Sh. at 2557, 380 N.E.2d at 693.

[38] *Id.* at 2558-59, 380 N.E.2d at 694.

[39] *Id.* at 2574, 380 N.E.2d at 701.

[40] *Id.* at 2558, 380 N.E.2d at 694.

[41] *Id.*

[42] *Id.* at 2557, 380 N.E.2d at 694.

under the doctrines of felony murder and joint enterprise, upon which the jury had been instructed, the substantive inconsistencies of the three confessions were irrelevant.[43] Since some involvement in the overall criminal act was admitted by each defendant, each statement served as an effective confession to the entire crime. The degree of each defendant's culpability was unaffected by the inconsistent substantive aspect of his statement.[44] The Court thus concluded that since each defendant had admitted to participation in the crime, the jury would not improperly use one defendant's statement against another.[45]

Having determined that juror prejudice would not result from admission of the separate confessions, the Court looked to the incriminating nature of each defendant's statement. The *Bruton* standard is violated, the Court pointed out, when the extrajudicial confession of a co-defendant is offered to inculpate his fellow defendant.[46] The Court noted that in the *Horton* case, however, the confessions were not directly inculpatory.[47] The Court observed that none of the confessions of the defendants had any greater incriminating effect on the co-defendants than the statements already made by those co-defendants.[48] That is, the confessions merely served to corroborate independent evidence of criminal responsibility which the jury had received from the individual statements. The Court thus concluded that since the extrajudicial statements of the co-defendants did not substantially implicate any defendant in a greater respect than each had already admitted, no violation of *Bruton* occurred.[49]

Finally, the Court examined the cumulative effect of the admission of the confessions of the co-defendants upon each other. Once again, the Court noted that the incriminating effect of the statements' admission served only to corroborate the inculpating admissions already made by each defendant.[50] Thus, the Court determined that even if the confessions were admitted erroneously under the *Bruton* standard, the error was harmless.[51] Since each defendant would have been convicted upon the strength of his own statement alone, no prejudicial effect resulted from the admittance of the corroborative evidence.[52] Accordingly, the

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[43] *Id.*
[44] *Id.* at 2558, 380 N.E.2d at 694. See note 30 *supra.*
[45] *Id. See also* Commonwealth v. Scott, 355 Mass. 471, 477-78, 245 N.E.2d 415, 420 (1969).
[46] 1978 Mass. Adv. Sh. at 2558, 380 N.E.2d at 694.
[47] *Id.*
[48] *Id. See also* Schneble v. Florida, 405 U.S. 427, 431-32 (1972).
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.* See note 30 *supra.*

Court held that any constitutional error committed by permitting the police officers to testify in violation of *Bruton* was harmless beyond a reasonable doubt.[53]

The result reached by the Court in *Horton* is correct in its application of the *Bruton* rule. Unlike the *Bruton* defendants, the co-defendants in *Horton* each admitted some involvement in the robbery and killing of the station attendant. Their criminal responsibility thus established under the doctrines of joint enterprise and felony murder, the admission of the police officers' testimony did not violate confrontation rights secured by the sixth amendment. The danger perceived by the Supreme Court in *Bruton* was thus not apparent in the *Horton* case. Similarly, even if a violation of *Bruton* was made out, the Supreme Judicial Court correctly applied the harmless error doctrine. Since the admitted testimony merely corroborated confessions already made, the error of their admission was truly harmless. The risk that even a single juror might have changed his mind absent the arguably tainted evidence was extremely remote.

While the Court thus applied the *Bruton* and harmless error rules correctly, it must be careful to scrutinize the facts of future cases when applying the doctrine again. In *Horton*, for example, had one of the co-defendants not made a statement during interrogation, or had one not admitted to some participation, the confessions would have been inadmissable under the *Bruton* doctrine. The solicitude which courts must accord criminal defendants in the joint trial situation demands that rights to confrontation and cross-examination be preserved. Under the fact pattern suggested above, admission of such testimony would violate the *Bruton* rule's insistence on such rights. Thus, as the Supreme Judicial Court observed in a similar context, prosecutors must carefully consider whether to introduce evidence of a co-defendant's confession or refrain from doing so or to conduct separate trials; failure to do so might make joint trials futile.[54] Similarly, close examination of testimony admitted under *Bruton* is required for application of the harmless error doctrine. While the *Horton* Court correctly viewed the co-defendants' statements as mere corroboration of each defendant's own confession, corroborative evidence may not always be harmless. Too much reliance on cumulative evidence subtly alters the quantum of proof required for criminal convictions. It is dangerous to apply a constitutional standard such as *Bruton* solely on the strength of the prosecution's case. To do so would transform the "beyond a reasonable doubt" standard to one of "overwhelming evidence." This is not the intent of the Supreme Judicial Court in *Horton*.

[53] *Id.*

[54] Commonwealth v. Scott, 355 Mass. 471, 478, 245 N.E.2d 415, 419 (1969).

§4.10. Competence of a Witness—Court Ordered Mental Examination—Evidence Required.* In Massachusetts, the legislature has given the trial courts the discretionary authority to order a psychiatric examination of a witness in order to determine his or her competency to testify.[1] The relevant statute provides that a judge may request the Department of Mental Health to appoint a psychiatrist to perform the examination.[2] In a case decided during the *Survey* year,[3] the Supreme Judicial Court limited that discretion by stating that before he may order such an examination, a judge must have evidence of incompetency and further that evidence of mental illness is not necessarily evidence of a witness's incompetency.[4] Furthermore, the Court ruled that if the judge decides that the evidence presented is sufficient to warrant ordering an involuntary psychiatric examination, he must specify to the psychiatrist the purpose and scope of the examination in order to limit the invasion of the witness's privacy.[5]

In *Commonwealth v. Gibbons*,[6] the trial court ordered a rape victim to submit to a psychiatric examination before testifying. The defendant had moved for a psychiatric examination of the complainant pursuant to chapter 123, section 19 of the General Laws.[7] In support of the motion, the defense counsel asserted that the complainant had a history of mental illness, that she had been under the care of a psychiatrist for two years, and that she might be likely to "make up things."[8] He added that the defendant's probable cause hearings had been delayed due to the complainant's mental problems and that cross-examination at the probable cause hearings had been curtailed for the same reason.[9] The commonwealth acknowledged that the complainant witness had a history of mental illness and offered to make her medical records available to the defense if the judge thought it warranted.[10] The commonwealth claimed, however, that the cross-examination of the complainant

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§4.10. * By Louise M. Gessel, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

1 G.L. c. 123, § 19. The statute reads: "In order to determine the mental condition of any party or witness before any court of the commonwealth, the presiding judge may, in his discretion, request the department [of Mental Health] to assign a qualified physician, who, if assigned shall make such examinations as the judge may deem necessary." *Id.*

2 *Id.*

3 Commonwealth v. Gibbons, 1979 Mass. Adv. Sh. 2168, 393 N.E.2d 400.

4 *Id.* at 2173, 393 N.E.2d at 403.

5 *Id.* at 2176, 393 N.E.2d at 405.

6 1979 Mass. Adv. Sh. 2168, 393 N.E.2d 400.

7 *Id.* at 2169, 393 N.E.2d at 402. See note 1 *supra*, for the test of G.L. c. 123, § 19.

8 1979 Mass. Adv. Sh. at 2169, 393 N.E.2d at 402.

9 *Id.*

10 *Id.* at 2169-70, 393 N.E.2d at 402.

at the probable cause hearings had been halted not because the witness was suffering from mental or emotional problems but because the defense counsel was harassing the witness.[11]

The trial judge decided, on the basis of the defense counsel's assertions, that a psychiatric examination of the witness was warranted and asked the defendant to recommend a psychiatrist.[12] The defendant agreed to submit names of psychiatrists to the judge, who "guessed" it was "appropriate" to have the defendant select the psychiatrist, thinking this method would ensure the selection of an "independent" psychiatrist.[13] After the complainant declined to submit to an examination by a psychiatrist selected by the defendant, the judge dismissed the indictment.[14]

The Supreme Judicial Court, reversed the decision of the lower court dismissing the indictment,[15] finding that the trial judge's request that the defendant, rather than the Department of Mental Health, select the psychiatrist was a clear error of law.[16] The Court also found that there was no evidentiary basis to justify the trial court's order that the witness submit to an involuntary psychiatric examination on the issue of competency.[17] The Court concluded that some evidence of incompetency is required before a judge may order an involuntary psychiatric examination. If the judge himself has doubts about a witness's competency, the Court suggested that the judge hold a voir dire examination of the witness, examine the witness's medical records, or procure statements from the witness's psychiatrist before ordering a section 19 examination.[18] When conflicting statements or unsupported allegations are offered in support of a motion for an involuntary psychiatric examination, the Court stated that an evidentiary hearing should be held to determine if there is a compelling need for such an examination.[19] The Court also noted that when a court-ordered psychiatric examination is warranted, the language of section 19 requires that the judge guide the Department

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[11] *Id.* at 2170, 393 N.E.2d at 402. At a hearing on the defendant's motion to dismiss the indictment on the grounds that the district court judge improperly restricted cross examination of the complainant at the probable cause hearings, a superior court judge ruled that there had been no error and that cross examination had been limited because the "defense counsel was engaged in harassment of the witness." *Id.* at n.4.

[12] *Id.* at 2170, 393 N.E.2d at 402.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 2169, 393 N.E.2d at 402.

[16] *Id.* at 2171, 393 N.E.2d at 403. *See* G.L. c. 123, § 19, *supra* note 1. The statute states that a judge may "request the department to assign a qualified physician." *Id.* Section 1 of chapter 23 defines "department" as the Department of Mental Health. G.L. c. 123, § 1.

[17] 1979 Mass. Adv. Sh. at 2172-73, 393 N.E.2d at 403.

[18] *Id.* at 2173-74, 393 N.E.2d at 404.

[19] *Id.* at 2175, 393 N.E.2d at 404-05.

of Mental Health by specifying the scope and purpose of the examination.[20]

In reaching its conclusion, the *Gibbons* Court reviewed the standard governing the competence of a witness. The Court noted that earlier Massachusetts cases had stated that competence depends not on sanity [21] but on the awareness of a duty to tell the truth,[22] personal knowledge of the facts, and an ability to perceive, remember, and recount the facts.[23] Under this standard, there was no evidence in *Gibbons* to show that the witness was not competent to testify.[24]

The Court emphasized that the decision to order a psychiatric examination of a witness must be based on informed discretion, which implies an "absence of arbitrary determination, capricious disposition, or whimsical thinking." [25] The Court appeared to propose a balancing test to determine whether there is a compelling need for a psychiatric examination.[26] Factors to be weighed against the need for a psychiatric examination include the invasion of privacy and the possibility of harassment of a witness subjected to an involuntary psychiatric examination [27] as well as the likelihood that such an examination actually would produce substantial evidence bearing on the witness's testimonial capacity.[28]

The *Gibbons* Court specifically noted that in a case of rape, such as this one, the trauma of a rape may be increased by subjection to an involuntary psychiatric examination.[29] The Court also made it clear that

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[20] *Id.* at 2176, 393 N.E.2d at 405. The language referred to is "such examinations as the judge may deem necessary." G.L. c. 123, § 19.

[21] 1979 Mass. Adv. Sh. at 2173, 393 N.E.2d at 403. *See* Commonwealth v. Zelenski, 287 Mass. 125, 129, 191 N.E. 355, 357 (1934).

[22] 1979 Mass. Adv. Sh. at 2172, 393 N.E.2d at 403. *See* Commonwealth v. Welcome, 348 Mass. 68, 70, 201 N.E.2d 827, 828 (1964).

[23] 1979 Mass. Adv. Sh. at 2172, 393 N.E.2d at 403. *See generally* W. LEACH & P. LIACOS, MASSACHUSETTS EVIDENCE 135 (4th ed. 1967); C. MCCORMICK, EVIDENCE § 62, at 140 (2d ed. 1972).

[24] 1979 Mass. Adv. Sh. at 2172-73, 393 N.E.2d at 403.

[25] 1979 Mass. Adv. Sh. at 2174, 383 N.E.2nd at 404 (quoting Davis v. Boston Elevated Ry., 235 Mass. 482, 496, 126 N.E. 841, 844 (1920)).

[26] *See* 1979 Mass. Adv. Sh. at 2176, 383 N.E.2d at 405.

[27] *Id.*

[28] *Id. See* Ballard v. Superior Court, 64 Cal. 2d 159, 174-75 n.10, 410 P.2d 838, 848 n.10, 49 Cal. Rptr. 302, 312 n.10 (1966) (discussing problems involved in judging a witness's competence through psychiatric examinations); Note, 67 COLUM. L. REV. 1137, 1143 (1967). The *Gibbons* Court also acknowledged that an uncooperative patient cannot be satisfactorily examined by a psychiatrist. 1979 Mass. Adv. Sh. at 2171, 383 N.E.2d at 402.

[29] *Id.* at 2176, 393 N.E.2d at 405 ("[T]he trauma that attends the role of complainant to sex offense charges is sharply increased by the indignity of a psychiatric examination; the examination itself could serve as a tool of harassment.") (quoting United States v. Benn, 476 F.2d 1127, 1131 (D.C. Cir. 1973)).

in Massachusetts, contrary to the argument of the defense counsel in this case, involuntary psychiatric examinations are not more appropriate in rape cases than in other criminal cases.[30]

The Court's decision in *Gibbons* is based on an awareness that a court-ordered psychiatric examination constitutes an invasion of privacy that should not be undertaken without a showing of compelling need. Although earlier Massachusetts decisions have established that sanity is not the test of competence to testify, the *Gibbons* decision is the first to articulate the requirements of actual evidence of incompetence—a showing of an inability to understand the duty to tell the truth and to remember and recount facts—before a court may order a witness to submit to an involuntary psychiatric examination on that issue.

§4.11. Admissibility of Photographs of Homicide Victims.* One issue in homicide trials which continues to plague the Supreme Judicial Court is the admissibility of potentially inflammatory photographs of the murder victim. It is a well-established rule in Massachusetts that "[t]he fact that photographs may be inflammatory does not render them inadmissible if they possess evidential value on a material matter."[1] The determination of admissibility remains an issue almost solely within the sound discretion of the trial court judge.[2]

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[30] 1979 Mass. Adv. Sh. at 2177, 393 N.E.2d at 405. This decision is apparently in contrast to the traditional view that all rape complainants should be subjected to psychiatric scrutiny before appearing before a jury. *See* 3A J. WIGMORE, EVIDENCE § 924a (1970), which states: "No judge should ever let a sex offense charge go to the jury unless the female complainant's social history and mental make up have been examined and testified to by a qualified physician." *Id.* at 737. This is necessary, Wigmore says, because the female "unchaste . . . mentality" often finds expression in the narration of imaginary sex incidents, and "[t]he real victim . . . too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale." *Id.* at 736. Although this statement appears in the most recent edition of Wigmore, jurisdictions that have recently addressed the issue have declined to follow this policy. *See, e.g.*, Ballard v. Superior Court, 64 Cal. 2d 159, 175, 410 P.2d 838, 849, 49 Cal. Rptr. 302, 313 (1966). *See generally* O'Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Prosecution—Or How Many Times Must a Woman Be Raped?*, 18 SANTA CLARA L. REV. 119 (1978).

§4.11. * By Daniel E. Wright, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

[1] Commonwealth v. Horton, 1978 Mass. Adv. Sh. 2548, 2568-69, 380 N.E.2d 687, 698 (quoting Commonwealth v. Stewart, 1978 Mass. Adv. Sh. 1521, 1526, 377 N.E.2d 693, 697). *See also* Commonwealth v. Lamoureux, 348 Mass. 390, 392-93, 204 N.E.2d 115, 117 (1965); Commonwealth v. McGarty, 323 Mass. 435, 438, 82 N.E.2d 603, 606 (1948).

[2] Commonwealth v. Sperrazza, 1979 Mass. Adv. Sh. 2423, 2427, 396 N.E.2d 449, 452; Commonwealth v. Stewart, 1978 Mass. Adv. Sh. 1521, 1526, 377 N.E.2d 693, 697-98; Commonwealth v. Jones, 373 Mass. 423, 426, 367 N.E.2d 631, 633 (1977); Commonwealth v. Bys, 370 Mass. 350, 357-61, 348 N.E.2d 431, 436-39 (1976).

The cases decided by the Court prior to the *Survey* year addressed the scope of the trial judge's discretion to admit gruesome photographs.[3] In *Commonwealth v. Bys*,[4] a homicide case in which an intended rape victim was beaten about the head and face with a tire iron,[5] the defendant contended that the photographs and slides admitted by the trial court were extremely graphic and gruesome portrayals of death which could only trigger "an unwarranted sense of rebellion . . . and prevent a dispassionate and even tempered review by a jury."[6] The Court wholly rejected the defendant's contention. It noted that through a long line of decisions it has held that if photographs and slides depicting murders of extreme atrocity or cruelty are otherwise admissible, they will not be rendered "inadmissible solely because they are gruesome or may have an inflammatory effect on the jury."[7] The *Bys* Court therefore held that the trial court judge did not abuse his discretion by admitting the photographs and slides since they had probative value on the issues in the case.[8] The Court further stated that a defendant who claims an abuse of discretion by the trial judge in admitting photographs assumes a heavy burden:

> On appellate review of a claim of an abuse of discretion by a trial judge, "[t]he question is not whether we . . . should have made an opposite decision from that made by the trial judge. To sustain . . . the claim it is necessary to decide that no conscientious judge, acting intelligently, could honestly have taken the view expressed by him."[9]

Thus, the *Bys* Court apparently sought to limit the number of appeals on this issue.

A few months after the *Bys* decision, in an unusual case, the Court reversed a lower court conviction for murder where the trial judge admitted gruesome photographs. In *Commonwealth v. Richmond*[10] the photographs allowed into evidence showed severe mutilation of the victim's face which was not inflicted by the defendant. In that case, the corpse had been left in a snow bank for five days prior to its discovery.[11] The face of the corpse was severely mutilated by dogs before

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[3] Commonwealth v. Richmond, 371 Mass. 563, 358 N.E.2d 999 (1976); Commonwealth v. Bys, 370 Mass. 350, 348 N.E.2d 431 (1976). *See* Dushman, *Evidence*, 1977 ANN. SURV. MASS. LAW § 7.3, at 137-38.

[4] 370 Mass. 350, 348 N.E.2d 431 (1976).

[5] *Id.* at 353 & 355-56, 348 N.E.2d at 434 & 435-36.

[6] *Id.* at 357, 348 N.E.2d at 437.

[7] *Id.* at 358, 348 N.E.2d at 437.

[8] *Id.* at 358 & 361, 348 N.E.2d at 437 & 439.

[9] *Id.* at 361, 348 N.E.2d at 439.

[10] 371 Mass. 563, 358 N.E.2d 999 (1976).

[11] *Id.* at 563, 358 N.E.2d at 1000.

it was retrieved by state authorities.[12] Over the objection of defense counsel, the trial judge admitted the photographs showing the post-mortem mutilation.[13] The Supreme Judicial Court reversed the lower court conviction because "the evidential value of the photographs which went to the jury was overwhelmed by the prejudicial effect."[14] The Court, however, was quick to emphasize that unusual circumstances must exist for it to find an abuse of discretion in the trial court's decision to admit photographs of homicide victims.[15]

During the *Survey* year, three cases decided by the Supreme Judicial Court further elucidate the standard for determining which photographs will be admissible in homicide trials. In *Commonwealth v. Horton*,[16] the defendant was convicted of the first-degree murder of a service station attendant who had been stabbed in the neck, chest, and other areas of the body and then placed in an office trash can.[17] The police moved the body from the trash can to the office floor in an effort to locate a pulse in the victim.[18] The photograph admitted by the trial court "depicted the body, the general area of the office, loose change on the floor, and blood at the victim's head and feet, and on the office wall."[19] On appeal, the defendant argued that movement of the body by the police weakened the probative value of the photograph since the positioning of the victim's body on the office floor was not an act of the defendant.[20]

The Court rejected the argument. The Court distinguished the *Richmond* case, which had found error in admitting photographs of post-mortem injuries not inflicted by the defendant.[21] In *Horton*, the post-mortem movement of the victim's body did not inflict any injury to the corpse which might have been prejudicial. Although the movement of the victim in *Horton* may have slightly changed the murder scene depicted in the photographs, it was within the trial judge's discretion to admit the photographs if they still appeared to be helpful for the jury.[22]

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[12] *Id.* at 563-64, 358 N.E.2d at 1000.

[13] *Id.* at 565, 358 N.E.2d at 1000.

[14] *Id.* at 565, 358 N.E.2d at 1001.

[15] *Id.* at 566, 358 N.E.2d at 1001. The Court cautioned:

> . . . we have never, so far as we know, upset a verdict on this type of error, and this opinion is not to be taken to indicate that we are likely to do so again, but there are limits to the employment of judicial discretion and those limits were exceeded in this instance.

Id.

[16] 1978 Mass. Adv. Sh. 2548, 380 N.E.2d 687.

[17] *Id.* at 2549 & 2568, 380 N.E.2d at 690 & 698.

[18] *Id.* at 2568, 380 N.E.2d at 698.

[19] *Id.*

[20] *Id.*

[21] *Id.* at 2569-70, 380 N.E.2d at 699.

[22] *Id.* at 2569, 380 N.E.2d at 699. "The fact that the body was moved from its 'slumped' and 'contorted' position in the trash can onto the floor in order to take a

In *Commonwealth v. Allen*,[23] reversed on other grounds, the Court in dicta suggested that photographs which depict post-mortem decomposition which might cause jury speculation about possible sexual overtones of the crime should be carefully examined by the trial judge for potential prejudice.[24] The photographs admitted by the trial court in *Allen* depicited not only head injuries caused by the defendant's assault but also bloody staining around the crotch which resulted entirely from natural post mortem decomposition.[25] The commonwealth's evidence showed that the homicide resulted solely from the defendant beating the victim about the head with a hammer.[26] The woman's body was in a state of moderately advanced decomposition two days after the killing when her body was discovered and photographed as evidence.[27] The Court declined to reverse the trial court's decision to admit the photographs, because it found that they had evidential value in showing the nature of the victim's wounds, even though they also depicted some post-mortem deterioration.[28] Despite its failure to reverse on this issue, the Court strongly suggested that the photographs of the victim's bloody crotch were of questionable value. "[W]e do suggest that on retrial the judge scrutinize such photographs carefully to determine whether the possess evidentiary value of sufficient magnitude to outweigh their inherently inflammatory nature."[29] In a concurring opinion, Justice Wilkins stated that the admission of these photographs was reversible error in any event.[30]

Like the *Allen* case, *Commonwealth v. Sperrazza*[31] involved the admissibility of photographs depicting both injury inflicted by the defendant and post-mortem decomposition. In contrast to *Allen*, however, the Supreme Judicial Court in *Sperrazza* affirmed without discussion the trial court's decision to admit the photographs depicting evidence of both the

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pulse and that the picture was taken in this latter position does not defeat the photograph's probative value." *Id.*

[23] 1979 Mass. Adv. Sh. 863, 387 N.E.2d 553

[24] *Id.* at 871, 387 N.E.2d at 557.

[25] *Id.* at 869, 387 N.E.2d at 556.

[26] *Id.* at 864, 387 N.E.2d at 555.

[27] *Id.* at 869, 387 N.E.2d at 556.

[28] *Id.* at 870, 387 N.E.2d at 557. The Court noted: "All of the injuries inflicted on the victim were head injuries; there was no suggestion by the Commonwealth that the defendant committed any sexual acts or any violent acts other than the blows to the head of the victim." *Id.* at 869, 387 N.E.2d at 556.

[29] *Id.* at 871, 387 N.E.2d at 557.

[30] *Id.* at 873, 387 N.E.2d at 558. Justice Wilkins stated:

> . . . the admission of some of the photographs calls for a new trial in any event. Prosecutors should exercise restraint in offering inflammatory photographs of minimum relevance or, as here, of no relevance at all. If such restraint is not employed, judges should exercise their discretion to exclude such photographs.

Id.

[31] 1979 Mass. Adv. Sh. 2423, 396 N.E.2d 449.

murder and ordinary decomposition of the bodies.[32] In *Sperrazza,* the bodies of the murder victims had been buried in a shallow grave for two and one-half years before they were discovered.[33] Although the opinion does not specifically state that the pictures of the victims depicted both evidence of the murder and post-mortem decomposition, the Court's use of the word "remains" in reference to the victims' bodies certainly implies that the photographs showed the corpses in an advanced state of decomposition.[34] The type of decomposition involved in the *Allen* case, unlike that in *Sperrazza,* could have caused unjustified and prejudical speculation by the jury that the bloody crotch resulted from an act by the defendant. Apparently the Court did not find that the decomposition involved in *Sperrazza* presented an *Allen* type of situation where the photographed decomposition could have misled the jury into prejudicial speculation.

These cases delineate the parameters of trial court discretion in the admission of homicide victim's photographs. By its one sentence affirmance in *Sperrazza,* the Supreme Judicial Court apparently has indicated that it considers this issue well settled. The *Bys* and *Horton* cases represent the most recent statements by the Court that the admissibility of photographs and slides of the murder victim will remain within the sound discretion of the trial court judge and that a plaintiff who attempts to overturn a conviction upon the claim of abuse of discretion assumes a heavy burden. *Richmond* and *Allen* articulate the circumstances in which admission of murder victim photographs should be denied. A trial judge abuses his discretion when he permits the admission of a photograph which depicts (a) an injury for which the defendant was not responsible or (b) a condition which creates a clearly prejudicial effect upon the jury or suggests to the jury a crime which did not occur. Thus, reversal for improper admission of photographs of murder victims will not likely be granted in any but the clearest case of abuse of judicial discretion as carefully delineated by the Court in the *Richmond* and *Allen* cases.

§4.12. Privileges—Husband-Wife and Attorney-Client Communications.* During the 1979 *Survey* year, the Supreme Judicial Court in

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[32] The entire extent of the discussion of the admissibility of the murder photographs in *Sperrazza* was as follows: "c. The admission in evidence of photographs of the victims' bodies rests in the sound discretion of the judge." *Id.* at 2427, 396 N.E.2d at 452.

[33] *Id.* at 2424, 396 N.E.2d at 451.

[34] *Id.* The Court stated "[M]ore than two and one-half years after they disappeared, their remains were found buried in a wooded area . . . ." *Id.*

§4.12. * By Clover M. Drinkwater-Lunn, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

Commonwealth v. O'Brien[1] addressed two questions concerning the admissibility of privileged conversations. In *O'Brien* the defendant fatally shot his wife at the office of his attorney, Ralph Champa.[2] The shooting occurred during a heated discussion concerning a separation agreement and a divorce.[3] The defendant did not deny that he shot his wife but asserted that he was not criminally responsible for his act.[4]

At trial, over the defendant's objections, attorney Champa was permitted to testify to certain conversations which took place in his office both before and after the shooting.[5] Champa recounted the conversation between defendant and his wife which occurred immediately before the shooting.[6] He testified that there had been an argument, during which the defendant had said to his wife, "You're not leaving here alive."[7] He further testified that defendant then pulled a gun from his pocket and said, "You're dead, Lorraine."[8] In order to show the defendant's state of mind, attorney Champa was also permitted to testify that several minutes after the shooting, the defendant asked him, "Will you be my lawyer?"[9] A jury subsequently found defendant guilty of first degree murder.[10]

On appeal defendant argued that both of these items of testimony should have been excluded. He claimed that Champa's testimony concerning the conversation between himself and his wife was privileged under G.L. c. 233, § 20,[11] as a private conversation between husband and wife.[12] Defendant further argued that the attorney's testimony as to defendant's request for legal representation was inadmissible as a priviliged communication between client and attorney.[13] The Supreme Judicial Court concluded that neither of these conversations was covered by the privileges asserted by the defendant.[14]

In addressing the issue of the conversation between the defendant and his wife, the Supreme Judicial Court first noted that the spousal privilege

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1 1979 Mass. Adv. Sh. 985, 388 N.E.2d 658.
2 *Id.* at 985, 388 N.E.2d at 660.
3 *Id.*
4 *Id.*
5 *Id.* at 987, 388 N.E.2d at 661.
6 *Id.* at 986, 388 N.E.2d at 661.
7 *Id.* at 996, 388 N.E.2d at 665.
8 *Id.*
9 *Id.* at 987, 388 N.E.2d at 661.
10 *Id.* at 985, 388 N.E.2d at 660.
11 G.L. c. 233, § 20. The statute provided that except in actions for enforcement of support and actions for desertion and nonsupport "neither husband nor wife shall testify as to private conversations with the other." *Id.*
12 1979 Mass. Adv. Sh. at 986, 388 N.E.2d at 661.
13 *Id.* at 987, 388 N.E.2d at 661.
14 *Id.* at 986, 988, 388 N.E.2d at 661.

did not apply because the conversation took place in the presence of a third party.[15] A discussion between husband and wife that occurs in the presence of a third party is not private.[16] The Court found Champa to be a third party and held that his status as defendant's attorney did not change the situation.[17] Secondly, the Court ruled that the discussion, which involved abuse and threats, was not the type of private conversation which the spousal privilege statute aimed to protect.[18] Finally, the Court noted that the statute[19] bars only a husband and a wife from testifying as to private conversations.[20] This prohibition does not extend to testimony by a third party with respect to such conversations.[21] Thus, the Court concluded that defendant's remarks to his wife did not fall within the scope of the statutory private conversation disqualification.[22]

After holding that there was no error in admitting the attorney's testimony concerning the defendant's conversation with his wife, the Court considered whether the trial court erred in permitting Champa to testify as to defendant's request for legal representation.[23] The Court acknowledged at the outset that the attorney-client privilege may extend to preliminary conversations concerning representation even if representation is never undertaken.[24] The Court noted, however, that since the privilege runs contrary to the interest in full disclosure of relevant information, the privilege should be narrowly construed.[25] If a request for representation is confidential, testimony concerning such a request may be excluded. Confidentiality in such situations will not be presumed, however, but must be determined from the circumstances.[26] The Court agreed that where the seeking of legal representation could be construed as evidence of consciousness of guilt, the mere fact of a request for representation could be found to be confidential.[27] Under such circumstances, the fact of the request might be protected.[28] The Court found that in the present case the defendant's need for legal representation was obvious from the circumstances, as the defendant's arrest was im-

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15 *Id.* at 986-87, 388 N.E.2d at 661.
16 *Id.* at 987, 388 N.E.2d at 661.
17 *Id.*
18 *Id.*
19 See note 11 *supra.*
20 1979 Mass. Adv. Sh. at 987, 388 N.E.2d at 661.
21 *Id.*
22 *Id.* at 986, 388 N.E.2d at 661.
23 *Id.* at 987, 388 N.E.2d at 661. Prosecution sought admission of the statement as evidence of defendant's state of mind. *Id.*
24 *Id.*
25 *Id.*
26 *Id.* at 988, 388 N.E.2d at 661.
27 *Id.*
28 *Id.*

minent.[29] It reasoned, therefore, that the defendant's request for representation could not have been intended as confidential.[30] The Court concluded that since no confidentiality was intended, this particular communication between defendant and his attorney was not privileged.[31] Thus, the Court held that there was no error in admitting the attorney's testimony.[32]

The Court's ruling on the evidentiary issues in *O'Brien* is consistent with the Court's prior decisions with respect to both spousal and attorney-client privileges. In its interpretations of G.L. c. 233, § 20, the Supreme Judicial Court consistently has held that to come within the ambit of the privilege, a conversation between husband and wife must be private. A spousal conversation held in the presence of a third party or overheard by a third party is not considered to be private.[33] For instance, a conversation between spouses in the presence of children is not private if the children are old enough to pay attention and comprehend what is said.[34] Furthermore, even conversations between husband and wife while physically alone have been held admissible when overheard by the occupants of a neighboring apartment.[35] In *O'Brien* the conversation clearly was not private because a third party, the defendant's attorney, was present.[36] In addition, Champa's status as an attorney could not alter the situation because he was not representing both parties.[37] Furthermore, it was not the spouse who was testifying but the third party, and the statute in question is concerned only with testimony by a spouse.[38] Thus, it is not unexpected that the Court on these grounds found that the privilege did not apply.

In addition to declining to apply the husband-wife privilege because a third party was present, the Supreme Judicial Court has also previously declined to apply the privilege where the remarks from one spouse to another were abusive or threatening. In *Commonwealth v. Gillis*,[39] the trial of a husband for assault with intent to murder, the Court upheld the admission of wife's testimony that husband had said to her, "I am

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] Commonwealth v. Stokes, 1978 Mass. Adv. Sh. 610, 625, 374 N.E.2d 87, 95; Martin v. Martin, 267 Mass. 157, 159, 166 N.E. 820, 820 (1929); Freeman v. Freeman, 238 Mass. 150, 161, 130 N.E. 220, 222 (1921).
[34] 1978 Mass. Adv. Sh. at 625, 374 N.E.2d at 95; 238 Mass. at 161, 130 N.E. at 222.
[35] 267 Mass. at 159, 166 N.E. at 820.
[36] 1979 Mass. Adv. Sh. at 986-87, 338 N.E.2d at 661.
[37] 8 J. WIGMORE, EVIDENCE § 2312 (McNaughton rev. ed. 1961).
[38] G.L. c. 233, § 20. See note 11 *supra*.
[39] 358 Mass. 215, 263 N.E.2d 437 (1970).

going to kill you," after she had told him she wanted a divorce.[40] The Court reasoned that the policy concerns underlying the statutory exclusion of private marital conversations would not extend to words constituting abuse and threats.[41] It concluded that threatening words do not have any confidential aspect within the purpose of the protection.[42] *O'Brien* presented a situation very similar to that in *Gillis*. In this case, the defendant threatened to kill his wife and in fact did so almost simultaneously with the threats. Therefore, in upholding admission of the attorney's testimony as to defendant's remarks to his wife, the Court reaffirmed its holding in *Gillis*.

Similarly, the *O'Brien* Court's decision that there was no attorney-client privilege is consistent with prior Massachusetts decisions. Reasoning along lines analagous to those employed in assessing the application of the husband-wife privilege, the Supreme Judicial Court had held, prior to *O'Brien*, that the attorney-client privilege extends only to communications intended to be confidential. The Court has ruled that communications made between attorney and client with the understanding that they would be conveyed to third parties are not confidential and therefore not privileged.[43] In *Peters v. Wallach*,[44] a suit in equity to enforce an agreement to settle a prior suit, the Court approved admission of counsel's testimony that he had been authorized by his client to settle the case.[45] It found the circumstances indicated that this information was clearly intended to be communicated to others and as such was not privileged.[46] In *Commonwealth v. Michel*,[47] the Court, on the same reasoning, upheld the admission of a witness's testimony that he had been told by his attorney of the prosecutor's offer not to prosecute further the indictments against him in return for certain testimony.[48] The Court pointed out that the offer was necessarily already known to one third party, the prosecutor, and would likely become part of the court record.[49] In keeping with these decisions, the *O'Brien* Court found confidentiality lacking when the defendant asked Champa to represent him. It reasoned that he could not have intended his need for legal representation to be kept confidential, since it was obvious from the circumstances. Thus, the *O'Brien* Court, in holding that lack of confidentiality in attorney-client

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[40] *Id.* at 215, 263 N.E.2d at 438.
[41] *Id.* at 218, 263 N.E.2d at 440.
[42] *Id.*
[43] Commonwealth v. Michel, 367 Mass. 454, 460, 327 N.E.2d 720, 724 (1975).
[44] 366 Mass. 622, 321 N.E.2d 806 (1975).
[45] *Id.* at 627, 321 N.E.2d at 809.
[46] *Id.*
[47] 367 Mass. 454, 327 N.E.2d 720 (1975).
[48] *Id.* at 460, 327 N.E.2d at 724.
[49] *Id.* at 461, 327 N.E.2d at 724.

communications could be inferred from the circumstances under which the communications were made, followed its earlier decisions.

While the evidentiary rulings of *O'Brien* and prior decisions do constitute limitations on the applicability of the spousal and attorney-client privileges, these limitations are consistent with the policies which underlie these privileges. In both cases the goal of the privileges is the protection of special relationships.[50] The rationale behind affording protection to private marital conversations is the need to encourage marital confidences, which confidences in turn promote marital harmony.[51] The attorney-client privilege is based on the view that an attorney can act effectively on behalf of a client only if fully advised by his client of all pertinent facts and that the privilege is necessary to encourage such disclosure.[52] Permitting disclosure of one spouse's threat to kill the other in no way impairs the preservation of marital harmony, since marital harmony clearly is lacking to begin with. Likewise, allowing an attorney in the circumstances of the *O'Brien* case to testify that immediately following shooting his wife the defendant asked the attorney to represent him should not inhibit clients in the future from making full disclosure to their attorneys. Thus, in neither instance should the limitations imposed by *O'Brien* on the application of the spousal and attorney-client privileges defeat the ultimate goals which these privileges are designed to advance.

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[50] Wigmore identifies four factors which should be at the foundation of any privileged communication: (1) The communications originate in confidence. (2) The confidence is essential to the relation. (3) The relation is a proper object of encouragement by the law. And (4) the injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of the truth. 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. ed. 1961).

[51] C. MCCORMICK, EVIDENCE § 86 (2d ed. 1972).

[52] *Id.* at § 87.