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Chapter 9: Evidence

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CHAPTER 9

Evidence

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§9.1. Sexually dangerous person: Sufficient evidence. Since its enactment in 1958, chapter 123A of the General Laws, the Sexually Dangerous Persons Act, has been the subject of frequent challenges and much discussion.[1] This Survey year has been no exception. In *Commonwealth v. Jarvis*,[2] the Appeals Court held that evidence of only one incident of sexual misconduct that does not manifest compulsive behavior is not sufficient to warrant a finding that the defendant was a sexually dangerous person under the statutory definition.[3]

The proceedings under chapter 123A were begun after defendant was sentenced to M.C.I. Concord on October 27, 1970, having pleaded guilty to charges of assault to rape, an unnatural act, assault and battery with a dangerous weapon, and furnishing liquor to a minor. On May 13, 1971, a petition for defendant's commitment to

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§9.1. [1] See, e.g., Gomes v. Gaughan, 471 F.2d 794 (1st Cir. 1973) (double jeopardy); Peterson v. Gaughan, 404 F.2d 1375 (1st Cir. 1968) (vagueness and equal protection); Commonwealth v. Gomes, 355 Mass. 479, 245 N.E.2d 429 (1969) (due process, double jeopardy, equal protection); Commonwealth v. McGruder, 348 Mass. 712, 205 N.E.2d 726 (1965), cert. denied, 383 U.S. 972, rehearing denied, 384 U.S. 947 (1966) (right of confrontation); McGarry & Cotton, A Study in Civil Commitment: The Massachusetts Sexually Dangerous Persons Act, 6 Harv. J. Leg. 263 (1969); Tenney, Sex, Sanity and Stupidity in Massachusetts, 42 B.U.L. Rev. 1 (1962); O'Reilly, Constitutional Law, 1968 Ann. Surv. Mass. Law § 7.2, at 190; Monaghan, Criminal Law and Procedure, 1965 Ann. Surv. Mass. Law §§ 12.5, at 154, 12.9, at 163; O'Reilly, Constitutional Law, 1964 Ann. Surv. Mass. Law § 11.3, at 122; Fox, Criminal Law, Procedure and Administration, 1961 Ann. Surv. Mass. Law § 11.2, at 113; Fox, Criminal Law, Procedure and Administration, 1959 Ann. Surv. Mass. Law § 10.3, at 95.

[2] 1974 Mass. App. Ct. Adv. Sh. 193, 307 N.E.2d 844.

[3] Id. at 196, 307 N.E.2d at 846. G.L. c. 123A, § 1 defines a sexually dangerous person as:

> [a]ny person whose misconduct in sexual matters indicates a general lack of power to control his sexual impulses, as evidenced by repetitive or compulsive behavior and either violence, or aggression by an adult against a victim under the age of sixteen years, and who as a result is likely to attack or otherwise inflict injury on the objects of his uncontrolled or uncontrollable desires.

the treatment center at Bridgewater for the care, custody, treatment and rehabilitation of sexually dangerous persons was filed by the district attorney. At the hearing on the petition in superior court, two psychiatric experts testified for the Commonwealth that the defendant was a sexually dangerous person. A court-appointed psychiatric expert testified to the contrary. The defendant and his former wife testified on his behalf. The defendant's criminal record was also introduced into evidence. The superior court found the defendant to be a sexually dangerous person and committed him to Bridgewater for from one day to life.[4]

The Appeals Court, in dismissing the petition, followed the case of *Peterson, petitioner*,[5] in which the Supreme Judicial Court determined that the elements of proof required by the statutory definition of a sexually dangerous person include: (1) repetitive or compulsive behavior, (2) violence or aggression by an adult against a person under the age of sixteen, and (3) a likelihood that injury will be afflicted.[6] Applying the statutory requirements and their interpretation in *Peterson* to the facts of the *Jarvis* case, the Appeals Court required concrete evidence of either repetitive and violent, or compulsive and violent, sexual misbehavior to sustain defendant's commitment as a sexually dangerous person.[7] Since defendant's criminal record produced no evidence of past sexual misconduct other than the one incident resulting in his present incarceration, and since the testimony of the psychiatric experts did not show that the incident manifested compulsive conduct, the court concluded that the evidence was not sufficient to authorize defendant's commitment as a sexually dangerous person. The court indicated that "a single act of sexual misconduct may be so bizarre and irrational as to permit the inference by a trier of fact that it was uncontrollable, and thus provide the basis for a determination that it was compulsive behavior."[8] However, the psychiatrists testifying at the commitment hearing apparently expressed no opinion as to whether the single incident which resulted in defendant's conviction for assault with intent to rape and performance of an unnatural act was the result of compulsive behavior.[9]

The evidence in a proceeding for the commitment of a sexually dangerous person, whether it be expert psychiatric opinion testimony

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[4] 1974 Mass. App. Ct. Adv. Sh. at 193, 307 N.E.2d at 845.

[5] 354 Mass. 110, 236 N.E.2d 82 (1968).

[6] Id. at 117, 236 N.E.2d at 86.

[7] 1974 Mass. App. Ct. Adv. Sh. at 196-97, 307 N.E.2d at 846-47.

[8] Id. at 197, 307 N.E.2d at 847.

[9] The court summarized the testimony of the psychiatrists and then observed:

> Perhaps the failure of the Commonwealth psychiatrists to concern themselves with the statutory requirements may have been the result of an erroneous view in this case by the staff of the treatment center that the statute does not require a finding of repetitive or compulsive conduct, but that these are merely relevant factors.

Id. at 197 n.6, 307 N.E.2d at 847 n.6.

or prior conviction records, must satisfy the elements of proof as set out in chapter 123A, section 1.[10] The statutory delineation of compulsive and violent or repetitive and violent behavior is not a mere elucidation of relevant factors, but is a conclusive limitation on what findings in fact will substantiate a determination of uncontrollable, and imminently dangerous, sexual misconduct. Such evidence is requisite to the constitutional validity of commitment based on a probable propensity to engage in criminal actions.[11]

§9.2. Privilege: Psychotherapist-patient. In *Commonwealth v. Lamb*,[1] the Supreme Judicial Court upheld the Appeals Court's determination that the psychotherapist-patient privilege created by chapter 233, section 20B of the General Laws[2] applies to any communications made by a patient to a court-appointed psychotherapist in the case of a court-ordered examination during commitment proceedings under the Sexually Dangerous Persons Act,[3] absent a showing that the patient was informed that the communication would not be privileged.[4] Without such notice, any communications made during the court-ordered psychiatric examination would be inadmissible at the hearing on the petition for commitment as a sexually dangerous person.

In accordance with section 6 of chapter 123A, the Sexually Dangerous Persons Act,[5] defendant Charles Lamb had been committed by order of the superior court to the treatment center for the care, custody, treatment and rehabilitation of sexually dangerous persons for a sixty-day period of examination and diagnosis.[6] At the hearing on the petition for commitment for the indeterminate statutory period,[7] the

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[10] G.L. c. 123A, §1.

[11] See Peterson, petitioner, 354 Mass. 110, 236 N.E.2d 82 (1968). See also Minnesota ex rel. Pearson v. Probate Court, 309 U.S. 270 (1940); Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969).

§9.2. [1] 1974 Mass. Adv. Sh. 713, 311 N.E.2d 47, aff'g 1973 Mass. App. Ct. Adv. Sh. 635, 303 N.E.2d 122.

[2] G.L. c. 233, § 20B was inserted by Acts of 1968, c. 418. The statute provides in relevant part:

> Except as hereinafter provided, in any court proceeding and in any proceeding preliminary thereto and in legislative and administrative proceedings, a patient shall have the privilege of refusing to disclose, and of preventing a witness from disclosing, any communication, wherever made, between said patient and a psychotherapist relative to the diagnosis or treatment of the patient's mental or emotional condition.

See generally McLaughlin, Evidence, 1968 Ann. Surv. Mass. Law § 18.1, at 431.

[3] G.L. c. 123A, § 6, as amended by Acts of 1969, c. 838, § 58.

[4] 1974 Mass. Adv. Sh. at 718, 311 N.E.2d at 51.

[5] G.L. c. 123A, § 6.

[6] The court order was pursuant to the procedures established under G.L. c. 123A, § 4.

[7] The indeterminate period is one day to life. G.L. c. 123A, § 6.

psychiatrist who by order of the court had interviewed the defendant at the treatment center was permitted to testify over the objections of the defendant. The psychiatrist testified to the contents of certain police reports made available to him and to conversations with the defendant while at the treatment center. Defendant had admitted during the conversations that he had used alcohol and drugs, an admission the Appeals Court found to have contributed to the psychiatrist's diagnosis of the defendant as a sexually dangerous person.[8] The Appeals Court sustained defendant's exceptions to the admission of prejudicial hearsay in the police reports,[9] and to the denial of his right to invoke the psychotherapist-patient privilege.[10] The Supreme Judicial Court sustained the latter exception after granting review limited to the applicability *vel non* of the psychotherapist privilege.[11]

Both parties had agreed that the admission fell within the protection of the section 20B privilege, but they disagreed as to whether one or more of the exceptions to the privilege applied.[12] Defendant Lamb argued that only exception (*b*) of section 20B, which provides that if a judge finds that the patient has been warned that the communications would not be privileged, the psychotherapist can testify as to communications made to him in the course of a court-ordered psychiatric examination, applied.[13] No such notice was given to the defendant. The Commonwealth argued that both exception (*a*), which provides

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[8] 1973 Mass. App. Ct. Adv. Sh. at 638, 303 N.E.2d at 124. At the commencement of the commitment proceedings, defendant was serving concurrent sentences of from five to seven years following convictions in 1968 of assault and battery with a dangerous weapon and mayhem. Id. at 637 n.4, 303 N.E.2d at 124 n.4. The police reports indicated that the crimes were convicted with gross sexual overtones, and stated that defendant had stayed with a homosexual, had previously been placed on probation for three years for the abuse of a female child, and had also served a six-month sentence for fathering an illegitimate child. Id. at 637, 303 N.E.2d at 124.

[9] 1973 Mass. App. Ct. Adv. Sh. at 637, 303 N.E.2d at 124, citing Commonwealth v. Bladsa, 1972 Mass. Adv. Sh. 1675, 288 N.E.2d 813.

[10] 1973 Mass. App. Ct. Adv. Sh. at 640, 303 N.E.2d at 126.

[11] 1974 Mass. Adv. Sh. at 713, 311 N.E.2d at 48.

[12] G.L. c. 233, § 20B provides, in pertinent part, that the privilege will not apply:

(*a*) If a psychotherapist, in the course of his diagnosis or treatment of the patient, determines that the patient is in need of treatment in a hospital for mental or emotional illness or that there is a threat of imminently dangerous activity by the patient against himself or another person, and on the basis of such determination discloses such communication either for the purpose of placing or retaining the patient in such hospital, provided however that the provisions of this section shall continue in effect after the patient is in said hospital, or placing the patient under arrest or under the supervision of law enforcement authorities.

(*b*) If a judge finds that the patient, after having been informed that the communications would not be privileged, has made communications to a psychotherapist in the course of a psychiatric examination ordered by the court, provided that such communications shall be admissible only on issues involving the patient's mental or emotional condition but not as a confession or admission of guilt.

[13] See G.L. c. 233, § 20B.

that the psychotherapist can disclose the communication in a hearing held to commit the patient to a hospital or retain him there if the psychotherapist concludes that the patient is in need of treatment or there is a threat of imminently dangerous activity by the patient against himself or others, and exception (*b*) were applicable.[14] If both exceptions were applicable, no express waiver under (*b*) need be shown if the standards set forth by the legislature in subsection (*a*) were met.[15]

The Appeals Court held that exception (*a*) did not apply, reasoning that the statutory language "or placing the patient under arrest or under the supervision of law enforcement officers" in exception (*a*) did not reach a prisoner already under sentence and supervision, and that the treatment center was not a "hospital" within the meaning of the statute.[16] Since there was no evidence that the defendant had been warned that his communications would not be privileged, his exception to the admission of such communications was sustained.[17]

The Supreme Judicial Court, while passing over the question of whether the term "hospital" in exception (*a*) of section 20B included the treatment center, agreed with the Appeals Court that exception (*a*) was not applicable where the patient is already in the custody of state officials and where a judicially-supervised commitment proceeding has commenced.[18] The Court construed the legislative intent, as shown by the language of exception (*a*), to deny the privilege only "when there is an imminent threat that a person who should be in custody will instead be at large."[19] On the other hand, the policy of exception (*b*) was to permit expert psychiatric evidence through court-ordered examination only by affording the procedural safeguard of notice to the patient. The Court noted that in holding that exception (*b*) must govern exclusively under the circumstances of this case, *i.e.*, where a court-appointed psychotherapist undertakes a court-ordered examination to determine whether a patient is a sexually dangerous person, it was carrying out the policy objectives of the statute while avoiding a construction of the statute that might infringe upon the defendant's rights of due process guaranteed by the Fourteenth Amendment to the United States Constitution.

The *Lamb* decision balances the need for full information upon which a court must make its decision with the need for procedural due process upon which the patient depends if he is to be treated fairly. The fact that the commitment proceeding under chapter 123A

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[14] 1974 Mass. Adv. Sh. at 715, 311 N.E.2d at 49-50.
[15] See note 8 supra.
[16] 1973 Mass. App. Ct. Adv. Sh. at 639-40, 303 N.E.2d at 125-26.
[17] Id. at 640, 303 N.E.2d at 126.
[18] 1974 Mass. Adv. Sh. at 716, 311 N.E.2d at 50.
[19] Id.

is civil and not criminal, remedial and not punitive, does not mean that the defendant is not entitled to the minimal standards of due process to be accorded the individual.[20] The prospect of preventive detention via an indeterminate sentence of commitment to a treatment center would appear to demand at least the minimum procedural safeguard of notice that the psychotherapist-patient privilege will be unavailable, especially where the individual is already in the custody of the state and the subject of a full judicial proceeding. The expert psychiatric evidence that may be critical to a court's determination under a chapter 123A commitment hearing will be available as long as the defendant-patient has been informed that his statements to the court-appointed psychiatrist will not be privileged.

§9.3. Privilege: Clergyman-penitent. Although it is doubtful that any clergyman-penitent privilege existed at common law,[1] most states have enacted statutes protecting confessions made to a clergyman in his professional character or communications made to him in the course of his professional duties by a person seeking religious advice or comfort.[2] The Massachusetts legislature codified the clergyman-penitent privilege in 1962 in section 20A of chapter 233 of the General Laws.[3] The Supreme Judicial Court interpreted the scope of that statutory privilege during the Survey year in *Commonwealth v. Zezima*,[4] and held that the "communication" made to a clergyman that was accorded a testimonial privilege by the statute "is not limited to conversation and includes other acts by which ideas may be transmitted from one person to another."[5]

The defendant appealed from convictions of murder in the second

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[20] See Gomes v. Gaughan, 471 F.2d 794, 799-801 (1st Cir. 1973); Commonwealth v. Gomes, 355 Mass. 479, 245 N.E.2d 429 (1969).

§9.3. [1] See 8 J. Wigmore, Communications Between Priest and Penitent, Evidence § 2394, at 869 (McNaughton rev. ed. 1961). See also Commonwealth v. Drake, 15 Mass. 161 (1818); Commonwealth v. Gallo, 275 Mass. 320, 175 N.E. 718 (1931).

[2] See 8 J. Wigmore, Communications Between Priest and Penitent, Evidence § 2395, at 873 (McNaughton rev. ed. 1961, Supp. 1972); Reese, Confidential Communications to the Clergy, 24 Ohio St. L.J. 55 (1963).

[3] G.L. c. 233, § 20A, added by Acts of 1962, c. 372. See generally McDermott, Evidence, 1962 Ann. Surv. Mass. Law § 21.7, at 291. The statute provides:

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

[4] 1974 Mass. Adv. Sh. 683, 310 N.E.2d 590.

[5] Id. at 686, 310 N.E.2d at 592.

degree, assault with intent to murder, and unlawfully carrying a firearm on the ground that the admission into evidence of certain testimony by a clergyman violated the clergyman-penitent privilege secured by section 20A. The defendant had testified during the trial that he had never owned or possessed a gun. The prosecutor offered rebuttal evidence to impeach defendant's testimony that he had never possessed a gun. One of the rebuttal witnesses was a clergyman. After the clergyman had testified that he was acquainted with the defendant and was with him on a certain occasion in 1972, counsel for the defense requested a voir dire concerning the Massachusetts clergyman-penitent privilege. At the ensuing bench conference, the prosecutor informed the trial judge that the clergyman would be asked if he had seen a gun in the defendant's possession; the prosecutor also stipulated that the purpose of the meeting in question between the clergyman and the defendant "was 'in accord with [section 20A].' "[6] The voir dire was denied, however, and the trial judge instructed the clergyman to testify only as to what he observed and not as to any conversations or communications. The clergyman then testified that on a particular occasion about two months before the murder he saw a gun in defendant's possession.

In construing the term "communication" in the clergyman-penitent privilege statute, the Supreme Judicial Court reasoned that this statutory privilege should be co-extensive with the scope of the attorney-client privilege, which has not been limited to conversations.[7] The Court found particularly persuasive the juxtaposition of the term "conversations" in section 20 of chapter 233 (which provides testimonial disqualification of a spouse as to "private conversations")[8] with the term "communications" in section 20A, the next section of the chapter. The Court reasoned that since the term "conversations" has been construed to exclude written communications,[9] the use of the term "communications" in section 20A manifests an intent by the legislature "to include more than conversations in the privilege concerning testimony of a clergyman."[10]

After construing the statute, the Court held that the request for a voir dire should have been granted since defendant's act of displaying the gun to the clergyman could have been a privileged communication to him as part of a quest for religious or spiritual advice or comfort.[11] The factual determination of whether a communication

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[6] Id. at 685, 310 N.E.2d at 591.

[7] Id. at 686, 310 N.E.2d at 592. See 8 J. Wigmore, Communications Between Attorney and Client, Evidence § 2306, at 588 (McNaughton rev. ed. 1961); Vigoda v. Barton, 348 Mass. 478, 204 N.E.2d 441 (1965); Klefbeck v. Dous, 302 Mass. 383, 19 N.E.2d 308 (1939).

[8] G.L. c. 233, § 20.

[9] Commonwealth v. Caponi, 155 Mass. 534, 30 N.E. 82 (1892).

[10] 1974 Mass. Adv. Sh. at 686, 310 N.E.2d at 592.

[11] Id. at 686-87, 310 N.E.2d at 592.

privileged under section 20A did occur must be made by the trial judge, aided by the clergyman's statements concerning the circumstances surrounding the communication. However, the Court did not reverse the defendant's convictions since the clergyman's testimony was only cumulative to the testimony of other rebuttal witnesses and thus its admission was not prejudicial.[12]

§9.4. Privilege: Government-informer. Although the privilege of the government to prevent disclosure of the identity of informers who have provided information concerning violations of law has long been recognized as an aid to law enforcement,[1] this privilege is subject to two important qualifications.[2] The Supreme Judicial Court recognized the first exception in 1928 in *Commonwealth v. Congdon*,[3] stating that the government-informer privilege "does not apply when the informer is known or when the communication has been divulged."[4] This Survey year presented, in *Commonwealth v. Ennis*,[5] the first occasion for a Massachusetts appellate court to rule on the other generally recognized exception to the privilege: when evidence of the identity of the informer becomes important to the establishment of the defense in a criminal prosecution.[6] In *Ennis*, the Appeals Court held that the privilege does not apply where the informer was the only other witness present at the allegedly illegal transaction between the defendant and a police officer and the fundamental issue was whether the officer or the defendant and his alibi-witnesses were telling the truth.[7]

Ennis had been convicted of selling marijuana. A police officer tes-

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[12] Id. at 687, 310 N.E.2d at 592.

§9.4. [1] In Worthington v. Scribner, 109 Mass. 487 (1872), the Supreme Judicial Court determined that such "secrets of state" were privileged to the extent that the government so desired. Id. at 488. It was in the absolute discretion of the government, and not the courts, to decide when the public interest called for disclosure. See also Pihl v. Morris, 319 Mass. 577, 66 N.E.2d 804 (1946); Commonwealth v. Congdon, 265 Mass. 166, 165 N.E. 467 (1928).

[2] See Roviaro v. United States, 353 U.S. 53, 60-61 (1957); 8 J. Wigmore, State Secrets and Official Documents, Evidence § 2374, at 761 (McNaughton rev. ed. 1961); Annot., 76 A.L.R.2d 262 (1961).

[3] 265 Mass. 166, 165 N.E. 467 (1928).

[4] Id. at 175, 165 N.E. at 470.

[5] 1973 Mass. App. Ct. Adv. Sh. 595, 301 N.E.2d 589.

[6] See Roviaro v. United States, 353 U.S. 53, 60-61 (1957). The Appeals Court in *Ennis* noted "that 'the *trial court may compel disclosure* if it appears necessary in order to avoid the risk of false testimony or in order to secure useful testimony. For example, disclosure will be compelled if the informer is a material witness on the issue of guilt.' " 1973 Mass. App. Ct. Adv. Sh. at 597, 301 N.E.2d at 590, quoting 8 J. Wigmore, State Secrets and Official Documents, Evidence § 2374, at 768 (McNaughton rev. ed. 1961). The court noted that this exception has been characterized as reflecting "fundamental requirements of fairness," citing *Roviaro*, supra, at 60-61, and as being "essential to assure a fair determination of the issues," citing Am. Law Inst., Model Code of Evidence, Rule 230. 1973 Mass. App. Ct. Adv. Sh. at 597, 301 N.E.2d at 590.

[7] 1973 Mass. App. Ct. Adv. Sh. at 598, 301 N.E.2d at 591.

tified for the Commonwealth that he had purchased the marijuana from the defendant while in the company of the informer, who had previously arranged the sale. The defendant denied that the sale had taken place and offered an alibi which was corroborated by the defendant's father and a friend. When the police officer was called to testify by the defense, the trial court sustained the prosecution's objection to disclosure of the name and address of the informer on the basis of privilege.

In finding that an exception to the privilege was necessary under these facts, the Appeals Court distinguished the rule that the identity of an informer need not be disclosed where the issue is the suppression of illegally obtained evidence on the ground that a motion to suppress is usually collateral to the main issue of guilt or innocence.[8] The court rejected the distinction offered by the prosecution between an informer who participates in the crime and one who is merely a witness on the ground that disclosure of the informer's identity in either situation would be important for a fair determination of the case.[9] The court also rejected the prosecution's contention that the failure to recognize the exception was not prejudicial because the effect of disclosure could only be conjecture.[10]

While acknowledging the validity of limitations on the government-informer privilege, the Appeals Court nevertheless limited its recognition of the exception to the specific facts of *Ennis*. The court did, however, set forth standards which should be followed in future incursions into the government-informer privilege: the informer's testimony must be crucial to the accused's defense; the main purpose for which disclosure is sought must relate to the guilt or innocence of the accused, *i.e.*, trial of the criminal charge itself; and the informer's identity must be important to a fair determination of the case.[11] When these standards are met a Massachusetts court should order disclosure of the informer's identity. Although the purpose of the government-informer privilege is the promotion and protection of the public interest in effective law enforcement, the limitations on this privilege

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[8] Id.

[9] Id.

[10] Id. at 599, 301 N.E.2d at 592. The court referred to Commonwealth v. Balliro, 349 Mass. 505, 209 N.E.2d 308 (1965), in which a similar right to interview a witness was denied to the defendant. Id. at 515-18, 209 N.E.2d at 314-16. The court noted that defense counsel may have elicited contradictions and inconsistencies in the informer's testimony, or even an exculpatory statement. 1973 Mass. App. Ct. Adv. Sh. at 599-600, 301 N.E.2d at 592. In Roviaro v. United States, 353 U.S. 53 (1957), the Supreme Court reversed a narcotics conviction for refusal to require disclosure of an informer's identity, pointing out that the informer might have testified to an entrapment, cast doubt on the identity of the accused or the package, testified as to the accused's lack of knowledge of the contents, or contradicted the government's version of an important conversation. Id. at 63-64.

[11] 1973 Mass. App. Ct. Adv. Sh. at 597-99, 301 N.E.2d at 590-91.

acknowledged in *Ennis* are equally necessary to the promotion of justice. The Appeals Court has now established that in Massachusetts the availability of evidence necessary to a determination of one's innocence must be the predominant concern when in conflict with the preservation of an informer's anonymity.[12]

§9.5. Privilege of a criminal defendant not to offer any evidence at a preliminary hearing or lower court trial. In *Commonwealth v. Morrison*,[1] an appeal from a conviction of armed robbery, the Appeals Court rejected a narrow construction of section 23 of chapter 278 of the General Laws, which provides:

> At the trial of a criminal case in the superior court, upon indictment or appeal, the fact that the defendant did not testify at the preliminary hearing or trial in the lower court, or that at such hearing or trial he waived examination or did not offer any evidence in his own defence, shall not be used as evidence against him, nor be referred to or commented upon by the prosecuting officer.[2]

The prosecution's cross-examination of defendant's witnesses at the trial produced testimony from each witness that at the probable cause hearing on the same matter which was held before a judge the witness had not testified and had not told the judge about certain matters testified to at the superior court trial.[3] Although the alleged violation of section 23 was not properly before the Appeals Court because defendant's objection was not timely made, the court nevertheless addressed the issue to clarify it for retrial.[4] In dictum, the court refuted the contentions of the Commonwealth that section 23 (1) proscribes only disclosure of the fact that defendant himself did not testify in his own behalf, and (2) should not prohibit the prosecution from impeaching witnesses for the defense by disclosing that the witnesses were present at defendant's preliminary hearing but did not testify although evidence was taken at the hearing which the witnesses presumably could contradict.[5]

The plain language of section 23 denies the prosecution, *inter alia*, the right to show that the defendant at the preliminary hearing or lower court trial "did not offer any evidence in his own defence."[6]

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[12] See 8 J. Wigmore, State Secrets and Official Documents, Evidence § 2374, at 761 (McNaughton rev. ed. 1961).

§9.5. [1] 1973 Mass. App. Ct. Adv. Sh. 749, 305 N.E.2d 518.

[2] G.L. c. 278, § 23.

[3] Id. at 752, 305 N.E.2d at 520.

[4] Id. at 753 n.3, 305 N.E.2d at 521 n.3. The Commonwealth had argued that the line of questioning was proper and thus the issue was likely to arise again at retrial. Id. at 753, 305 N.E.2d at 521.

[5] Id. at 753-54, 305 N.E.2d at 521.

[6] G.L. c. 278, § 23. See text at note 2 supra.

The logical application of these words refers to all the evidence presented on defendant's behalf and not merely to his own personal testimony. Thus, the statute also precludes disclosure of the fact that the defendant waived examination of any witness. Section 23 protects the de novo rights of the Massachusetts criminal defendant by prohibiting disclosure at the trial in superior court by the prosecution of evidence presented or omitted by defendant at any prior hearing. Therefore, the method of impeachment attempted by the prosecution in *Morrison* violated section 23 of chapter 278.

The Appeals Court by its statement of views in *Morrison* has effectively precluded circumvention of the mandate of section 23. The prosecution may not be conducted in any way that would allow the jury in a superior court trial to infer what section 23 was intended to remove entirely from its consideration.

§9.6. Sixth Amendment right of confrontation: Admissible hearsay and the *Bruton* rule. In a joint trial, limiting instructions to the jury are not a sufficient substitute for the defendant's constitutional right of cross-examination so as to permit the admission in evidence of the confessions or admissions of a codefendant who does not take the stand when the confessions or admissions implicate the defendant. The United States Supreme Court held in 1968 in *Bruton v. United States*[1] that the admission in evidence of such confessions or admissions violates the defendant's rights secured by the Confrontation Clause of the Sixth Amendment[2] because of the substantial risk that the jury might consider the incriminating extrajudicial statements in determining the defendant's guilt, despite instructions to the contrary.[3]

In *Bruton*, admissions made by a codefendant that incriminated the defendant Bruton in their joint trial for armed postal robbery were introduced through the testimony of a postal inspector who had interrogated the codefendant. The trial court gave strict instructions to the jury that the confession was admissible against the codefendant but was inadmissible hearsay with respect to Bruton and should not be considered in determining Bruton's guilt. Both defendants were convicted. The Supreme Court reversed Bruton's conviction.[4]

During the Survey year, in *Commonwealth v. McLaughlin*,[5] the Supreme Judicial Court, on an appeal from the denial of a motion for a

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§9.6. [1] 391 U.S. 123 (1968).

[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI. The Sixth Amendment right of confrontation was held applicable to the states in Pointer v. Texas, 380 U.S. 400 (1965).

[3] 391 U.S. at 126. For a discussion of the *Bruton* decision, see Note, The Supreme Court, 1967 Term, 82 Harv. L. Rev. 95, 231-38 (1968); Kramer, Criminal Law and Procedure, 1970 Ann. Surv. Mass. Law § 15.10, at 395.

[4] 391 U.S. at 137.

[5] 1973 Mass. Adv. Sh. 1351, 303 N.E.2d 338.

new trial, faced the question of whether the defendant's rights under the rule established in *Bruton* were violated. Although the Court had affirmed McLaughlin's conviction in 1967,[6] the United States Supreme Court had ruled in 1968 that *Bruton* applied retroactively[7] and it was on the basis of this ruling that the motion for a new trial was made.[8] Defendant McLaughlin had been found guilty of murder in the first degree in a joint trial; three codefendants had been found guilty of being accessories after the fact. Three witnesses called by the Commonwealth at the joint trial had testified that on the evening the murder took place, immediately after they heard a loud noise, they saw one of the codefendants run into the apartment where they were and heard her make a statement to the effect that the defendant had shot someone. The first witness to so testify described the codefendant as shaken up and nervous and heard her say " 'George [the defendant] shot someone.' "[9] Defendant's counsel objected to the testimony of the first witness on the ground that the defendant was not present when the statement was made and asked for an instruction that it was not admissible against the defendant. The trial judge refused the limiting instruction, saying " '[t]his is all part of the res gestae.' "[10] After the second witness testified to the same statement, describing the codefendant as hysterical, counsel for McLaughlin requested that it be struck as to the defendant. The trial judge, however, allowed it de bene and the defendant excepted. When the third witness was asked to testify about the same statement by the codefendant, both the prosecutor and defendant's counsel asked that the testimony be admitted only against the codefendant. The judge so instructed the jury. Moreover, during his charge to the jury, the judge limited the admissibility of the testimony about the statement to the codefendant only as an admission by her.[11]

In analyzing the defendant's contention that his constitutional rights under the *Bruton* rule were abridged, the Supreme Judicial Court pointed out that the rule "does not purport to hold that a defendant's right of cross-examination . . . is violated whenever hearsay evidence is

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[6] Commonwealth v. McLaughlin, 352 Mass. 218, 224 N.E.2d 444, cert. denied, 389 U.S. 916 (1967).

[7] Roberts v. Russell, 392 U.S. 293 (1968). The *Bruton* rule was applied retroactively in Kiley v. Commonwealth, 358 Mass. 800, 263 N.E.2d 463 (1970); Commonwealth v. McKenna, 355 Mass. 313, 244 N.E.2d 560 (1969).

[8] 1973 Mass. Adv. Sh. at 1351-52, 303 N.E.2d at 341.

[9] Id. at 1354, 303 N.E.2d at 342.

[10] Id. at 1355, 303 N.E.2d at 342.

[11] In charging the jury, the judge called attention to the evidence of the statement by the codefendant and said " 'I admitted it only against [her] and it can be considered only in the indictment against her. . . . The other defendants were not present when . . . [she] made that statement.' " Id. at 1356 n.1, 303 N.E.2d at 343 n.1. The Court noted that these instructions were substantially similar to the limiting instructions held constitutionally inadequate in *Bruton*. Id. at 1358, 303 N.E.2d at 344.

admitted against him and he is not able to cross-examine the person to whom the hearsay statement is attributed."[12] The Court, after examining the language of *Bruton*[13] and subsequent cases involving claimed violations of the *Bruton* rule,[14] found that two questions were involved: (1) whether the codefendant's statement would have been admissible against the defendant as an exception to the hearsay rule if the indictments against him had been tried separately, and (2) whether the statement was properly admitted against him in the joint trial when offered through the testimony of the three witnesses.[15] Since the codefendant's statement would have been admissible in a separate trial of the defendant under the spontaneous utterance exception to the hearsay rule,[16] the Court concluded that there was no violation of the *Bruton* rule or defendant's constitutional rights.[17]

The Court's interpretation of the *Bruton* rule in *McLaughlin* implicitly recognizes that the Confrontation Clause and the hearsay evidence rules are coextensive in their protection of the criminal defendant. According to Dean Wigmore, "[t]he right to subject opposing testimony to cross-examination is the right to have the Hearsay rule enforced; for the Hearsay rule is the rule requiring cross-examination . . . ."[18] The hearsay rule rejects assertions offered for the truth of what is stated therein "which have not been in some way subjected to the test of Cross-examination."[19] Exceptions to the hearsay rule have been recognized when the statements offered are considered

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[12] Id. at 1359, 303 N.E.2d at 345.

[13] The Supreme Court had stated in a footnote:

> We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence, . . . the problem arising only because the statement was (but for the violation of [Miranda v. Arizona, 384 U.S. 436 (1966), and Westover v. United States, 384 U.S. 436 (1966)]) admissible against the declarant [codefendant]. . . . 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.

391 U.S. at 128 n.3.

[14] United States v. Weber, 437 F.2d 327 (3d Cir. 1970), cert. denied, 402 U.S. 932 (1971); McGregor v. United States, 422 F.2d 925 (5th Cir. 1970); Kay v. United States, 421 F.2d 1007 (9th Cir. 1970); Campbell v. United States, 415 F.2d 356 (6th Cir. 1969); Migliore v. United States, 409 F.2d 786 (5th Cir. 1969); United States v. Zentgraf, 310 F. Supp. 268 (N.D. Cal. 1970); Howell v. United States, 300 F. Supp. 1017 (N.D. Ill. 1969); Commonwealth v. Beneficial Fin. Co., 1971 Mass. Adv. Sh. 1367, 275 N.E.2d 33.

[15] 1973 Mass. Adv. Sh. at 1357, 303 N.E.2d at 344.

[16] The Court referred to the test of admissibility as formulated in Rocco v. Boston-Leader, Inc., 340 Mass. 195, 196-97, 163 N.E.2d 157, 158-59 (1960). 1973 Mass. Adv. Sh. at 1362-63, 303 N.E.2d at 347.

[17] 1973 Mass. Adv. Sh. at 1365, 303 N.E.2d at 347-48.

[18] 5 J. Wigmore, The Hearsay Rule Satisfied By Confrontation, Evidence § 1397(2), at 130 (3d ed. 1940).

[19] Id. § 1362, at 3 (emphasis deleted).

trustworthy.[20] It is only when there is a question concerning the accuracy of the assertion by the witness that the right of cross-examination remains indispensable. Thus, if the statement comes under an hearsay exception, it already has been judicially determined to be admissible into evidence for whatever value it is worth. What is necessary, therefore, as noted by the Court in *McLaughlin*, is that the judge first determine whether the statement properly falls into one of the admissible hearsay categories. Once facts sufficient to make this ruling have been established, the evidence may come in as admissible hearsay without any violation of the *Bruton* rule.

§9.7. Expert opinion testimony: Piercing the "general acceptance" smokescreen. In *Commonwealth v. Devlin,*[1] the Supreme Judicial Court considered, *inter alia*, whether the superior court had committed error in admitting into evidence the expert opinion testimony of a radiologist who identified a homicide victim based upon a comparison of the X-rays previously taken of a particular individual with the X-rays of the victim's remains.

Defendant Devlin appealed from a conviction of manslaughter of John James Rooney, Jr. The body of the victim was not susceptible to the normal procedures for identification because of mutilation.[2] To establish the *corpus delicti* of its case, the Commonwealth had offered expert opinion evidence in the form of testimony by Dr. John Leland Sosman, an experienced radiologist and specialist in the comparative analysis of X-rays of bones and joints.[3] Dr. Sosman testified that,

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[20] For a discussion of the exceptions to the hearsay rule, see id. §§ 1420 et. seq., at 202 et. seq.

§9.7. [1] 1974 Mass. Adv. Sh. 583, 310 N.E.2d 353.

[2] The human remains had been discovered in Patton's Cove, Dorchester, on June 9, 1971. The traditional means of identification of human remains—fingerprints, dental X-rays or personal identification—were of no avail since the victim's hands and head were missing and the body was significantly decomposed. The Associate Medical Examiner for Suffolk County had X-rays taken of the remains (the post-mortem X-rays). After a check of local hospitals based upon a general determination that the deceased was a male ranging in age from the late teens to about forty, it was discovered that one John James Rooney, Jr. was believed to have been killed on March 17, 1971, and that X-rays had been taken of Rooney's spine (September 1970) and right shoulder (March 9, 1971) (the ante-mortem X-rays). Id. at 584, 310 N.E.2d at 354-55.

[3] The Commonwealth had attempted to play down the significance of Dr. Sosman's testimony since it only tended to establish the *corpus delicti*. Brief for Commonwealth at 46, Commonwealth v. Devlin, 1974 Mass. Adv. Sh. 583, 310 N.E.2d 353. "[T]he full import of Dr. Sosman's testimony, if believed, was that John Rooney was dead." Id. However, as both the defendant and the Court pointed out, this element was vital to the proof of the Commonwealth's case against Devlin since the death certificate stating that the torso was Rooney's and the associate medical examiner's statement that he based his conclusion on Dr. Sosman's opinion would have been inadmissible. Therefore, the testimony of Dr. Sosman was not to be considered as merely going to a collateral issue. 1974 Mass. Adv. Sh. at 585 n.2, 310 N.E.2d at 355 n.2; Brief for Defendant at 32, Commonwealth v. Devlin, supra.

based upon his experience, knowledge, and reading on this subject, no two adult humans have identical bone structures.[4] He further testified that, based upon his examination of the X-rays of the remains of the victim taken in June 1971 and X-rays taken of John James Rooney, Jr. in September 1970 and March 1971 before his disappearance,[5] the two sets of X-rays were of the same person. This testimony was admitted over defendant's objection.

The defendant argued on appeal that the admission of the expert opinion testimony of Dr. Sosman constituted prejudicial error on two grounds: (1) Dr. Sosman lacked the necessary qualifications to justify admission of his testimony that the bone configuration of every adult is unique,[6] and (2) the Commonwealth failed to establish that Dr. Sosman's opinions had received "a general acceptance by the community of scientists involved" required for the admission of scientific evidence.[7]

The Court, applying the standard of abuse of discretion or error of law for reversal on appeal,[8] held that no error had been committed in exposing the jury to Dr. Sosman's testimony.[9] The Court pointed out the large number of X-ray comparisons that Dr. Sosman had made

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[4] At the trial, Dr. Sosman was asked whether "any two human beings have the exact same bone configuration," whereupon he replied: "[N]ot as far as I know. In all my experience I have never seen two—and in other work that's been published on this. The bone structure is said to be unique even in identical twins." Brief for Robert Michael Wilson at 27, Commonwealth v. Devlin, 1974 Mass. Adv. Sh. 583, 310 N.E.2d 353, quoting 3 Transcript of Trial in Superior Court, 293-94. Dr. Sosman testified that he had used X-rays in other situations to identify unknown human remains but that he had never before testified in a criminal case as to the identification of unknown remains, and, as far as he knew, no one else ever had. 1974 Mass. Adv. Sh. at 587, 310 N.E.2d at 356.

[5] See note 2 supra.

[6] The essence of this argument was that (a) Dr. Sosman may have been an expert in some matters, but not in the area about which he was called to testify; and (b) the record was devoid of any indication that Dr. Sosman had ever made any *spinal* comparisons prior to this case. See Brief for Defendant at 28, 29, 32, Commonwealth v. Devlin, 1974 Mass. Adv. Sh. 583, 310 N.E.2d 353. As for the necessity that a witness testify only regarding that area in which he has some particular expertise, see Commonwealth v. Bellino, 320 Mass. 635, 71 N.E.2d 411 (1947) (specialist in surgery held qualified to express opinion regarding gunshot wound which did not penetrate victim's clothing, even though defendant objected on grounds that expert not qualified since he had never seen wound from bullet that had not passed through clothing).

[7] Commonwealth v. Fatalo, 346 Mass. 266, 269, 191 N.E.2d 479, 481 (1963) (polygraph results inadmissible since both techniques employed in administration of tests and premises upon which theory rests not supported by substantial authority establishing scientific reliability). Polygraph test results may now be admitted where certain conditions are met. See Commonwealth v. A Juvenile (No. 1), 1974 Mass. Adv. Sh. 907, 313 N.E.2d 120, discussed in §9.10 infra.

[8] See Commonwealth v. Bellino, 320 Mass. 635, 71 N.E.2d 411 (1947); Commonwealth v. Capalbo, 308 Mass. 376, 32 N.E.2d 225 (1941).

[9] 1974 Mass. Adv. Sh. at 585, 310 N.E.2d at 355.

during his career, a "double blind study" that tested his ability to match X-rays of the same person, and the procedure followed in the case at hand.[10] The Court concluded that Dr. Sosman's education, training, and experience more than met the minimum necessary qualifications to permit his expert opinion testimony.[11] In regard to defendant's second contention, the Court concluded that *Devlin* did not involve an unproven or disputed scientific instrument or product of scientific theory.[12] Although *Devlin* presented the first instance of admitting testimony relating to the "comparative X-ray identification" technique in a criminal trial,[13] the Court characterized the testimony as a "medical opinion" that was "the product of years of experience viewing tens of thousands of X-rays."[14] Thus, the Commonwealth was not required to show "a general acceptance by the community of scientists involved," a precondition to the admissibility of an opinion based on the results of a scientific instrument or theory.[15]

The question of the admissibility of "comparative X-ray analysis identification" testimony was again presented in *Commonwealth v. Gilbert.*[16] In *Gilbert*, the defendant was convicted of murder in the second degree of his wife, whose remains were discovered in a plastic bag in the ocean approximately nine months after her death.[17] Dr. Sosman again testified as to the identity of the remains on the basis of comparative X-ray analysis and gave his opinion that every individual is unique in his or her bone structure. The defendant argued on appeal that Dr. Sosman's testimony should not have been admitted because its premise had not yet received "general acceptance." The Su-

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[10] Id. at 586-87, 310 N.E.2d at 356. In the "double blind study," "[o]ne hundred ten X-rays of the chest had been given Dr. Sosman as if they were of known persons. One hundred ten other chest X-rays, unmarked and treated as unknown, had also been given to him. Only 100 X-rays in each group were of a person whose X-ray was in the other group." Id. at 587 n.4, 310 N.E.2d at 356 n.4.

[11] Id. at 586, 310 N.E.2d at 356.

[12] As the Court stated, "[c]ertainly the use and reading of X-rays and the comparison of X-rays is a generally recognized medical practice." Id. at 588, 310 N.E.2d at 357.

[13] Id. at 587, 310 N.E.2d at 356. See note 4 supra.

[14] Id. at 588, 310 N.E.2d at 357.

[15] See note 7 supra. The Court in *Fatalo* followed Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), the first case involving the admissibility of the results of a "lie-detector" examination. *Frye* distinguished scientific evidence from other expert testimony and set out the test for admissibility: "While courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, *the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.*" 293 F. at 1014 (emphasis added). See generally Boyce, Judicial Recognition of Scientific Evidence in Criminal Cases, 8 Utah L. Rev. 313 (1964); Strong, Questions Affecting the Admissibility of Scientific Evidence, 1970 U. Ill. L.F. 1.

[16] 1974 Mass. Adv. Sh. 1185, 314 N.E.2d 111.

[17] The remains consisted of two feet, two lower legs, a mid-portion of the trunk from the thoracic vertebra to the fourth lumbar vertebra, with several ribs still attached, and decomposed tissue. Id. at 1190, 314 N.E.2d at 115.

preme Judicial Court rejected this argument on the basis of its holding in *Devlin*, stating that "we gave approval [in *Devlin*] to this mode of identification when applied by a qualified expert."[18] The Court also held proper the admission of testimony by an expert in physical anthropology which corroborated Dr. Sosman's conclusion, despite the defendant's objection that the testimony was hearsay, because the corroborating "testimony was worthwhile cumulative evidence on the reliability of a novel scientific identification technique, and, as such, was properly admitted."[19]

For over fifty years the smokescreen of "general acceptance" (sometimes referred to as "scientific reliability")[20] has obstructed the search for probative evidence in the science and science-related fields.[21] The "general acceptance" test has been criticized for its narrow approach to the admissibility of practically any information grounded in scientific principles.[22] The Supreme Judicial Court in *Devlin* and *Gilbert* has

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[18] Id. at 1191, 314 N.E.2d at 115. *Gilbert* injected the further element of corroborative testimony by an expert in physical anthropology. Dr. Wilton M. Krogman, a professor of anatomy with a Ph.D in physical anthropology, had compared the X-rays of the remains with those of the supposed victim and verified on a random basis the conclusions of Dr. Sosman. This evidence was admitted over defendant's objections that it constituted hearsay. Id.

[19] Id.

[20] E.g., Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963) (polygraph tests properly excluded due to controversy in scientific circles); Commonwealth v. D'Avella, 339 Mass. 642, 162 N.E.2d 19 (1959) (reliability of blood tests to prove nonpaternity an established scientific fact); Commonwealth v. Stappen, 336 Mass. 174, 143 N.E.2d 221 (1957) (substantial authority supports scientific reliability of blood grouping tests to prove biologically the impossibility of paternity).

[21] See, e.g., United States v. Stifel, 433 F.2d 431 (6th Cir.), cert. denied, 401 U.S. 994 (1970) (neutron activation analysis had gained general acceptance); McClard v. United States, 386 F.2d 495 (8th Cir. 1967) (analysis of boot prints admissible); Lewis v. United States, 382 F.2d 817 (D.C. Cir. 1967) (handwriting analysis admissible); Goodall v. United States, 180 F.2d 397 (D.C. Cir.), cert. denied, 339 U.S. 987 (1950) (ballistics test admissible); Medley v. United States, 155 F.2d 857 (D.C. Cir.), cert. denied, 328 U.S. 873 (1946) (spectroscopy had gained general acceptance); United States v. Ridling, 350 F. Supp. 90 (E.D. Mich. 1972) (mem.) (polygraph results admissible under certain conditions); United States v. Raymond, 337 F. Supp. 641 (D.D.C. 1972) (voiceprint analysis); People v. Davidson, 5 Misc. 2d 699, 152 N.Y.S.2d 762 (Monroe County Ct. 1956) (drunkometer).

[22] See, e.g., Boyce, Judicial Recognition of Scientific Evidence in Criminal Cases, 8 Utah L. Rev. 313 (1964); Strong, Questions Affecting the Admissibility of Scientific Evidence, 1970 U. Ill. L.F. 1. Boyce states that:

> It is time that the *Frye* doctrine was rejected and scientific evidence received where otherwise material or relevant. . . . [T]he *Frye* rule is, to the extent that it is based upon wide recognition and acceptance, impracticable. Scientific advancement is occurring at an ever-increasing rate. Theoretical knowledge of a reliable nature is, in some areas, currently moving swiftly ahead of application. . . . It is, therefore, appropriate for courts to adopt a more realistic approach to the use of scientific evidence in criminal cases.

Id. at 327.

permitted the admission of expert opinion testimony on a "novel scientific identification technique,"[23] comparative X-ray analysis, without requiring proof of "general acceptance by the community of scientists involved."

The Court's opinion in *Devlin*, indirectly reaffirmed in *Gilbert*, may have placed the aging and infirm platitude of "general acceptance" in its proper perspective.[24] The policy reasons for requiring the "general acceptance" standard for scientific evidence as established in *Commonwealth v. Fatalo*[25] was that "a trial could descend into a battle of experts on the probative value of the polygraph test rather than a determination of the guilt or innocence of a defendant. The end result, in all likelihood, would be confusion instead of enlightenment."[26] These policy reasons did not apply in *Devlin*,[27] and the Court reaffirmed in *Gilbert* the probative value of "comparative X-ray analysis identification" evidence.

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[23] 1974 Mass. Adv. Sh. at 1190, 314 N.E.2d at 115. Despite the Court's characterization of the X-ray comparison technique as "novel" in *Gilbert*, it has been utilized for some time by criminologists, although the instances are admittedly rare. See Kade, Meyers & Wahlke, Identification of Skeletonized Remains by X-Ray Comparison, 58 J. Crim. L.C. & P.S. 261 (1967).

[24] In United States v. Stifel, 433 F.2d 431 (6th Cir.), cert. denied, 401 U.S. 994 (1970), the Court of Appeals for the Sixth Circuit rejected the "general acceptance" standard as a basis for denying admission of testimony regarding "neutron activation analysis." The court admitted the testimony based upon two propositions, both of which could arguably apply to *Devlin*: (1) after the trial judge, in the exercise of his discretion, decides that the state of technology in a given field renders opinion testimony admissible, disputes over technique employed by the witness go to the *quality* of the evidence (a traditional jury consideration); and (2) "neither newness nor lack of absolute certainty in a test suffices to render it inadmissible in court. Every useful new development must have its first day in court." Id. at 438.

[25] 346 Mass. 266, 191 N.E.2d 479 (1963). See note 7 supra.

[26] 346 Mass. at 269, 191 N.E.2d at 481.

[27] The Supreme Judicial Court was faced with an impressive array of factors which considered together argue conclusively for the admissibility of the opinion testimony: first, the testimony, though crucial, did not in fact tend to implicate Devlin on the issue of guilt or innocence; second, there was other testimony to the effect that the skin samples from the remains indicated that the deceased had a tattoo on his left arm and Rooney was shown to have had a tattoo on that arm; third, though the defense had ample time to seek out and introduce conflicting testimony or evidence, they failed to do so; fourth, Dr. Sosman's testimony as to his findings and technique were explained to the jury through the use of a model of the human vertebrae, enlargements of X-rays, and the superimposition of one slide over another to show that the bones in question were identical; and fifth, the superior court judge had delivered an excellent limiting instruction which focused the jury's attention on the purpose of and weight to be given to the expert opinion. Brief for the Commonwealth at 37, 38, 46, Commonwealth v. Devlin, 1974 Mass. Adv. Sh. 583, 310 N.E.2d 353. Additionally, at the trial it was pointed out that police scientists use this method of identification without hesitation when traditional means fail, and that X-ray identification has been used in many civil cases, e.g., will contests and insurance claim suits after large-scale catastrophes. Id. at 35, 43.

§9.8. Witnesses' statements: Necessity for hearing of voluntariness by trial judge. After the Supreme Judicial Court affirmed his conviction for manslaughter in 1972 in *Commonwealth v. LaFrance*,[1] Peter LaFrance brought a petition for habeas corpus in the United States District Court for the District of Massachusetts in *LaFrance v. Bohlinger*,[2] alleging denial of his right of confrontation and right to due process. This petition presented an evidentiary question of first impression in Massachusetts.

Both LaFrance and one Brown had been involved in a hit and run death in 1971. Within a few days of the incident, police officers succeeded in obtaining a statement from Brown which clearly inculpated LaFrance. At LaFrance's trial, however, Brown testified that he and LaFrance had spent the entire night in question at a friend's apartment. With the court's permission, and over the objections of the defense, the prosecution used Brown's prior inconsistent statement to the police as a source of leading questions upon direct examination. While admitting that he had signed the statement, Brown explained the inconsistency by revealing that his prior account to the police had not been rendered voluntarily.[3] Nevertheless, the typed statement was allowed into evidence ostensibly to impeach Brown's testimony at trial which tended to exculpate LaFrance. The trial judge instructed the jury that the impeachment evidence should be considered in weighing Brown's credibility but not as evidence of LaFrance's guilt. In his petition to the federal district court, LaFrance claimed the admission of Brown's out-of-court statement, the truth of which was denied at trial, deprived him of his right to be confronted by the witnesses against him and violated his right to due process since the trial judge failed to make a preliminary determination of the voluntariness of the statement.

The district court directed that a writ of habeas corpus issue on the ground that LaFrance's right to due process under the Fourteenth Amendment had been violated.[4] The court dismissed LaFrance's confrontation argument since Brown, the out-of-court declarant, was

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§9.8. [1] 1972 Mass Adv. Sh. 177, 278 N.E.2d 394. The defendant was also convicted of leaving the scene of an accident after causing personal injury, operating a motor vehicle without a license and so as to endanger. LaFrance v. Bohlinger, 365 F. Supp. 198, 199-200 (D. Mass. 1973), aff'd, 499 F.2d 29 (1st Cir. 1974).

[2] 365 F. Supp. 198 (D. Mass. 1973), aff'd, 499 F.2d (1st Cir. 1974).

[3] The elements of Brown's testimony which tended to support this explanation were that threats were made to him by a certain officer at various times during his interrogation; Brown claimed he was suffering withdrawal from the use of drugs at the time of the interrogation; numerous promises and suggestions were alleged to have been made by the police in return for and in solicitation of favorable responses from Brown; Brown had endured about seven hours of questioning before "breaking down;" and, throughout his witness-stand testimony, Brown emphatically denied the truth of his prior statement. 365 F. Supp. at 202, 207.

[4] Id. at 200-01.

available at trial for full and effective cross-examination.[5] The court then discussed LaFrance's due process argument. Citing *Jackson v. Denno*,[6] in which the Supreme Court approved the Massachusetts procedure of requiring a preliminary determination by the trial judge of the voluntariness of a defendant's confession,[7] Judge Tauro reasoned that it would be "illogical" to permit the coerced statement of a witness to serve substantially the same function denied to the coerced statement of a defendant.[8] Such statements fail the traditional testimonial benchmarks of trustworthiness and reliability and, in addition, their use *in any manner*[9] is offensive to the concepts of "fair play" and a "fair trial."[10] The court thus held that the trial judge was mandated to undertake an independent determination as to the voluntariness of a witness's prior statement before it could be heard by the jury. Furthermore, the court concluded that the trial judge must instruct the jury to consider the question of voluntariness of the statement before considering it for impeachment purposes.[11]

The Commonwealth appealed the federal district court's decision,[12] claiming that it engendered an unwarranted extension of the *Jackson* confession rule[13] to allegedly coerced prior statements of a witness. The Court of Appeals for the First Circuit upheld the district court's insistence upon a prior evidentiary hearing—out of the jury's presence—on the question of voluntariness, but found no constitutional requirement for further submission of this issue to the jury.[14] The First Circuit interpreted *Jackson* as forbidding the use of an involuntary confession not only because of its unreliability but also due

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[5] Id. at 205. In Bruton v. United States, 391 U.S. 123 (1968), and Douglas v. Alabama, 380 U.S. 415 (1965), cited by petitioner in support of his confrontation argument, the witness whose prior statement was at issue could not be cross-examined at trial.

[6] 378 U.S. 368 (1964).

[7] Id. at 378-79.

[8] 365 F. Supp. at 205.

[9] "The fact that Brown's statement was admitted for impeachment purposes only, and not as substantive evidence, . . . does not permit a different conclusion." 365 F. Supp. at 207.

[10] Id. at 205-06. In combining a consideration of traditional standards (trustworthiness, reliability) with new concepts (fair play, due process right to fair trial), the court was merely following the trend of recent cases in other jurisdictions. See, e.g., United States v. Wolfe, 307 F.2d 798, 801 (7th Cir. 1962) (dicta); People v. Underwood, 61 Cal. 2d 113, 124, 37 Cal. Rptr. 313, 319, 389 P.2d 937, 943 (1964); People v. Newman, 30 Ill. 2d 419, 197 N.E.2d 12 (1964); People v. Tate, 30 Ill. 2d 400, 197 N.E.2d 26 (1964). Cf. Hoover v. Beto, 467 F.2d 516, 533 (5th Cir.), cert. denied, 409 U.S. 1086 (1972). See also Comment, The Right of a Criminal Defendant to Object to the Use of Testimony Coerced From a Witness, 57 Nw. U.L. Rev. 549 (1962); Note, 58 Geo. L.J. 621 (1970).

[11] 365 F. Supp. at 207.

[12] LaFrance v. Bohlinger, 499 F.2d 29 (1st Cir. 1974).

[13] See text at note 5 supra.

[14] 499 F.2d at 32.

to its fundamental unfairness.[15] Although the same rationale was not completely analogous to impeaching statements of witnesses,[16] the exclusionary rule should be applied in *LaFrance* "because there is a substantial claim by the defendant that the impeaching statement offered by the government was obtained by police threats and other blatant forms of physical duress. Where such a claim is made and supported by sworn testimony, the court has a duty to conduct its own inquiry and to exclude the statement if found to have been unconstitutionally coerced."[17] Although the district court had reversed LaFrance's conviction and ordered him released,[18] the First Circuit remanded the case to the district court for a hearing on the issue of coercion.[19]

The Commonwealth is now faced with the opportunity to improve upon the touted "Massachusetts procedure" approved in *Jackson v. Denno*.[20] The evolution of evidentiary considerations with regard to any and all coerced utterances—whether from the accused or from a third person—has stretched the bounds of traditional standards[21] to the bursting point. If the Massachusetts courts recognize, as did both federal courts in *LaFrance*, that preventing the "sacrifice of important human values"[22] is the paramount exclusionary consideration, an irresistible strain will be placed upon the tolerance of those bounds.

§9.9. Polygraph results: Admissibility. The posture of the Supreme Judicial Court regarding the admissibility of polygraph test results in criminal trials underwent a startling and abrupt about-face during the Survey year. In February 1974, in *Commonwealth v.*

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[15] Id. at 34.

[16] The Court of Appeals distinguished impeaching statements of witnesses from confessions on the following grounds: (1) an impeaching statement is not substantive evidence of guilt; (2) exclusion of involuntary impeaching statements is not a principle rooted in the common law; (3) there is no absolute parallel between affirmative evidence and impeaching statements; (4) there is absent the accused's dilemma of remaining silent or taking the stand and exposing himself to cross-examination and impeachment; (5) extension of exclusionary rules tends to further complicate trials; and (6) there is the problem of third-party standing. Id. at 33-34.

[17] Id. at 35.

[18] A new trial was no longer inevitable since the question of voluntariness did not have to be submitted to the jury. Id. at 36.

[19] Id.

[20] 378 U.S. 368 (1964). Pursuant to this procedure (with regard to confessions), the jury passes on the voluntariness of statements only after the trial judge has fully and independently resolved that issue against the accused. The jury is then called upon to consider the allegations of coercion andmay disregard the judge's prior determination if it feels this action warranted by the facts. 378 U.S. at 378 n.8. One problem with this procedure is that there is no "feedback," i.e., no way of knowing how much or how little weight the prior determination of voluntariness had on the jury's decision. In addition, allowing the jury in effect to reconsider the voluntariness allegations may simply confuse them and complicate their crucial deliberations on guilt or innocence.

[21] That is, the trustworthiness and reliability of the assertions contained in an out of court statement.

[22] 499 F.2d at 32.

Corcione,[1] the Court stated that "lie detector evidence is incompetent in Massachusetts."[2] Despite the defendant's failure to object in that case when a witness was questioned as to the defendant's polygraph test results, the Court indicated that "the better course" would have been for the trial judge to exclude such testimony.[3] The *Corcione* holding was founded upon the feared prejudicial effect that the mere mention of polygraph results might have on a jury's reasoning.[4]

Four months after the *Corcione* decision, in *Commonwealth v. A Juvenile (No. 1)*,[5] the Court noted that "substantial advances [had] been made in the field of polygraphy since [its admissibility was last ruled on by the Supreme Judicial Court]."[6] In *A Juvenile* the Court held, over the strong dissent of three justices,[7] that polygraph test results are admissible if a defendant had agreed in advance to their admission regardless of their outcome.[8] The Court directed trial judges to preface the admission of polygraph results with "a close and searching inquiry" into the examiner's qualifications,[9] the defendant's fitness for the examination, the test methods used, as well as assurance that the defendant's constitutional rights are fully protected.[10] The Court expressly declined to overrule *Commonwealth v. Fatalo*[11] and permit polygraph test results to be generally admissible in evidence in criminal trials. Instead, the Court delineated four situations in which polygraph results would be admissible within the discretion of the trial judge:

> (1) where the defendant moves that he be allowed to submit to an examination conducted by an examiner of his own choosing; (2) where the defendant moves that he be allowed to submit to an examination administered by an expert chosen by the Commonwealth; (3) where the defendant moves to be allowed to submit to an examination conducted by a jointly selected examiner, or by examiners designated by the defendant and by the Common-

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§9.9. [1] 1974 Mass. Adv. Sh. 151, 307 N.E.2d 321.

[2] Id. at 160, 307 N.E.2d at 327.

[3] Id. at 161, 307 N.E.2d at 327.

[4] Id. at 160-61, 307 N.E.2d at 327. See Commonwealth v. Fatalo, 346 Mass. 266, 191 N.E.2d 479 (1963).

[5] 1974 Mass. Adv. Sh. 907, 313 N.E.2d 120.

[6] Id. at 908, 313 N.E.2d at 122.

[7] Justices Quirico, Reardon and Kaplan dissented, in opinions written by Justice Quirico, id. at 926, 313 N.E.2d at 132, and Justice Kaplan, id. at 937, 313 N.E.2d at 138. All three joined in each dissenting opinion.

[8] Id. at 910-11, 313 N.E.2d at 124.

[9] Id. at 910, 313 N.E.2d at 124. The Court did not, however, provide a minimum standard that must be met by a polygraph examiner before labeling him qualified. Id. at 933, 313 N.E.2d at 136 (dissenting opinion).

[10] Id. at 910-11, 313 N.E.2d at 124.

[11] 346 Mass. 266, 191 N.E.2d 479 (1963).

wealth; or (4) where the defendant moves that the court appoint an examiner.[12]

One can only speculate as to the ramifications, in this and in other jurisdictions, of the decision in *Commonwealth v. A Juvenile*. Justice Quirico's dissent does not, in all probability, even begin to scratch the surface of the problems trial judges will now face when a defendant moves (or fails to move) to introduce polygraph test results.[13] Two fundamental concerns pervade the probative value/prejudicial effect dilemma surrounding polygraph results: (1) Can the theoretical and mechanical underpinning of polygraphy be sufficiently established so as to achieve predictable consistency? (2) What precisely is the potential effect on jury deliberations of admitting lie detector test results? These two concerns are as yet unanswered, as is evident from the Court's decision. At any rate, whether the Court's "working out of its own destiny" justifies the holding of *Commonwealth v. A Juvenile* now rests with the trial judge's discretion and the process of trial and error.

§9.10. Legislation. The General Court, by enacting chapter 964 of the Acts of 1973, brought Massachusetts into line with the great majority of jurisdictions which prohibit impeaching a witness by introducing evidence of the witness's disbelief in the existence of God. Chapter 964 amended chapter 233, section 19 of the General Laws, which had permitted evidence of a witness's disbelief in the existence of God to be received on the issue of credibility.[1] Section 19 had long been considered unusual and controversial, and had been utilized in few cases. This long-overdue abolition of a method of attempted impeachment recognizes the legal inconsequence of a lack of religious belief on the credibility issue.

One of the exceptions to the patient-psychotherapist privilege, codified as section 20B(e) of chapter 233 of the General Laws, was

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[12] 1974 Mass. Adv. Sh. at 915-16, 313 N.E.2d at 126.

[13] Justice Quirico noted several problems inherent in the majority opinion: (1) a failure to consider that private biases and impressions formed by an examiner about his subject's guilt or innocence before the test could influence question formulation and test structuring, and thus, results; (2) ignoring the probable conclusive effect on the trial process, despite lingering doubts about the test's accuracy, due to the "almost impenetrable aura of scientific infallibility" which surrounds the lie detector machine in the minds of jurors; (3) the shortcomings of cross-examination of the expert as a safeguard since no minimum or uniform standards were established for qualification of examiners; and (4) certain "procedural and substantive legal questions," such as the permissibility of retesting by the Commonwealth after a defendant chooses his own expert pursuant to "option one," problems with defendant's waiver of the right to refrain from self-incrimination, and difficulties associated with a defendant's failure to offer evidence of polygraph test results. See id. at 926-37, 313 N.E.2d at 132-38 (Quirico, J., dissenting).

§9.10. [1] Acts of 1973, c. 964, amending G.L. c. 233, § 19.

modified by chapter 240 of the Acts of 1974.[2] In child custody cases where the mental fitness of either parent to care for the child was at issue, the prior exception provided that certain conditions had to be satisfied before a psychotherapist could testify as to the fitness of his patient: the issue of mental competence had to be raised by one of the parties, and the psychotherapist had to believe that disclosure of information regarding competence was necessary to protect the child. Section 20B(e) was amended to allow the judge, at an in-chambers hearing, to make the determination that a psychotherapist has evidence bearing significantly upon his patient's ability to care for the child.[3] Should the judge further determine in consideration of the child's welfare that disclosure of this evidence outweighs the necessity for upholding the psychotherapist-patient privilege, an exception to the privilege is now recognized and relevant testimony by the psychotherapist is mandated. This exception places the crucial determination of admissibility in the proper hands, *i.e.*, those of a neutral arbiter whose function is to maximize protection of the child.

Massachusetts' time limitations for allowing the introduction of proof of prior convictions for impeachment purposes, chapter 233, section 21 of the General Laws, has always contained an exception if the witness had subsequently been convicted of a "crime" within the time limitation.[4] Case law had interpreted a "crime" to be any crime—felony or misdemeanor.[5] This exception emasculated the effectiveness of the General Court's effort to keep evidence of certain convictions from the trier of fact since even a relatively minor traffic violation sufficed as a crime. Chapter 502 of the Acts of 1974 creates a fourth exception to section 21 which may serve to alleviate the problem. Records of conviction for traffic violations upon which a *fine only* was imposed may not be shown for impeachment purposes, and may not be introduced to "open the floodgates" to have records of other ancient convictions made admissible unless the witness has been convicted of another crime (presumably even another traffic violation upon which a fine only was imposed) within five years of the witness's testifying.[6]

Acts of 1974, chapter 598 amends chapter 152 of the General Laws by adding section 20B, which provides a hearsay exception to the in-

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[2] Acts of 1974, c. 240, amending G.L. c. 233, § 20B.

[3] G.L. c. 233, § 20B(e), as amended.

[4] "First, The record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said convictions was imposed, *unless he has subsequently been convicted of a crime within five years of the time of his testifying* . . . ." G.L. c. 233, § 21 (emphasis added).

[5] See, e.g., Quigley v. Turner, 150 Mass. 108, 22 N.E. 586 (1889); Commonwealth v. Ford, 146 Mass. 131, 15 N.E. 153 (1888).

[6] Acts of 1974, c. 502, amending G.L. c. 233, § 21.

troduction of medical reports of incapacitated, disabled or deceased physicians in proceedings before the Industrial Accident Board.[7] It is interesting to note that this expansive exception does not apply in full force to tort actions for personal injuries or death in a court of law, where, as provided in chapter 233, section 79H of the General Laws, only the report or expression of opinion of a deceased physician may, at the discretion of the trial judge, be admissible in evidence.[8] Depending on the Board's construction of the terms "incapacitated" and "disabled," allowing for this broad exception to the hearsay rule in administrative proceedings may present significant conflict with the Board's duty to afford due process to injured workers seeking relief before it.[9] However, the Administrative Procedure Act[10] clearly provides for judicial review of Board decisions and imposes the requirement of findings based upon "substantial evidence" upon the administrative body,[11] thus, perhaps, mitigating any possible abuses under the new statute.[12]

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[7] Acts of 1974, c. 598, adding G.L. c. 152, § 20B.

[8] G.L. c. 233, § 79H.

[9] See Haley's Case, 356 Mass. 678, 255 N.E.2d 322 (1970) (Constitutional due process requirements apply to board hearings and decisions in workmen's compensation cases).

[10] G.L. c. 30A.

[11] G.L. c. 30A, § 14(8)(e). See Healey, Administrative Law, 1968 Ann. Surv. Mass. Law § 11.6, at 338.

[12] Any finding based *exclusively* upon evidence which would be inadmissible hearsay is not deemed to be supported by substantial evidence, even in an administrative tribunal. Sinclair v. Director of Div. of Empl. Sec., 331 Mass. 101, 117 N.E.2d 164 (1954), citing Moran v. School Comm., 317 Mass. 591, 59 N.E.2d 279 (1945), and other cases.