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Dwight Golann

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CHAPTER 15

Constitutional Law

DWIGHT GOLANN*
CHARLES WYZANSKI**

CIVIL CONSTITUTIONAL LAW†

§ 15.1. Declaration of Rights — Article 9 — Access to the Ballot. The Bill of Rights in the United States Constitution protects the rights of private persons against interference by the state. Absent "state action," the Bill of Rights is not applicable. When interpreting similar provisions in the Massachusetts Declaration of Rights, the Supreme Judicial Court tends to follow the lead of the United States Supreme Court.[1] The state court, of course, is bound by federal constitutional interpretations, but it may invoke the state constitution when providing greater safeguards for the rights guaranteed in the federal and state constitutions.[2]

During the *Survey* year in *Batchelder v. Allied Stores International, Inc.*,[3] a narrow majority of the Supreme Judicial Court took a potentially significant step toward broadening the application of the Declaration of Rights. The Court held that, in some circumstances, the Declaration of Rights protects a person's rights from interference by private parties as well as by the state.[4] Unlike federal law, therefore, the Massachusetts Constitution may apply to situations where there is no "state action."

The case arose when Donald Batchelder, a candidate for Congress of the Citizens' Party, entered the North Shore Shopping Center ("North Shore") to distribute leaflets and solicit signatures in an effort to obtain a place on the ballot.[5] Batchelder solicited signatures in common areas of

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* Dwight Golann is Chief of the Consumer Protection Division of the Massachusetts Department of the Attorney General.

** Charles Wyzanski is an Assistant District Attorney in Middlesex County.

† Dwight Golann

§ 15.1. [1] Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U.L. REV. 887, 889 (1980).

[2] *Id.*

[3] 388 Mass. 83, 445 N.E.2d 590 (1983).

[4] *Id.* at 89, 445 N.E.2d at 593.

[5] *Id.* at 84-85, 445 N.E.2d at 591. The North Shore is the largest shopping center in Massachusetts. *Id.* at 85, 445 N.E.2d at 591. It consists of ninety-five retail stores and an enclosed mall, together with other facilities ranging from a bowling alley to a chapel. *Id.*

the center in "an orderly and quiet manner" for a half-hour, when he was stopped by a security guard employed by the mall owner, Allied Stores.[6] Batchelder brought suit, claiming that he had been deprived of his state constitutional right to solicit signatures in support of ballot access.[7] The superior court found for North Shore, and Batchelder appealed.[8]

The Supreme Judicial Court upheld Batchelder's constitutional right to solicit signatures in support of ballot access in the North Shore.[9] The Court first determined that federal constitutional law was neutral on the issue, noting that a person has no federal right to distribute handbills in a privately-owned shopping mall.[10] Finding no federal mandate or restraint, the Court then considered whether the plaintiff had any greater rights under the Massachusetts Constitution.[11] Analyzing article 9, which guarantees free elections and equal access to the vote and to public office,[12] the Court concluded that, unlike the first amendment to the federal Constitution, article 9 is not directed only against government action.[13] The Court found no "state action" requirement in article 9 and rejected any suggestion that the Declaration of Rights should be read as directed exclusively toward restraining government action.[14] Consequently, the Court found that Batchelder had a constitutional right to solicit signatures in the North Shore.[15] At the same time, the Court

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North Shore regularly sponsors a variety of civic and entertainment events, including exhibits, fairs and band concerts. *Id.* All of the shopping center's facilities and events are open to the public. It has been the policy of North Shore to permit candidates already on the ballot to appear at the mall and shake hands with voters but to forbid solicitation of signatures for any purpose. *Id.* at 85-86, 445 N.E.2d at 592.

[6] *Id.* at 85, 445 N.E.2d at 591.

[7] *Id.* at 84, 445 N.E.2d at 591.

[8] *Id.*

[9] *Id.* at 93, 445 N.E.2d at 596.

[10] *Id.* at 87, 445 N.E.2d at 592. *See* Hudgens v. NLRB, 424 U.S. 507 (1976) (repudiating Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972); Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza Inc., 391 U.S. 308 (1968)).

[11] *Batchelder*, 388 Mass. at 87, 445 N.E.2d at 593.

[12] *See* MASS. CONST. part I, art. IX, which provides that "[a]ll elections ought to be free; and all the inhabitants of the commonwealth, having such qualifications as they shall establish by their frame of government, have an equal right to elect officers, and be elected, for public employments."

[13] 388 Mass. at 88, 445 N.E.2d at 593.

[14] *Id.*

[15] *Id.* at 92, 445 N.E.2d at 595. It is not clear why the Court found that article 9 was violated on the facts of this case. The opinion noted that, "North Shore has consistently applied a nondiscriminatory policy concerning political campaigning. No solicitation of signatures is permitted. Candidates already on the ballot may appear at the shopping center and shake hands with voters." *Id.* at 86, 445 N.E.2d at 592.

As the dissent pointed out, it is not at all apparent how this policy interfered with the plaintiff's right to "free" or "equal" elections. *See id.* at 96-97, 445 N.E.2d at 597 (Lynch,

stressed that the mall owner retained the right to place reasonable limitations on the time, place and manner of any ballot solicitation.[16]

The *Batchelder* decision represents a potentially significant development in Massachusetts constitutional law. It is the latest of several Supreme Judicial Court decisions that have interpreted the Declaration of Rights more broadly than the United States Supreme Court has interpreted corresponding provisions of the federal Constitution.[17] Exactly how important *Batchelder* will be depends on whether the Court extends its holding to the other provisions of the Declaration of Rights and whether the Court extends its protection of the exercise of constitutional rights to property less clearly public than a major shopping mall. In order for the principles of *Batchelder* to have a major effect on future litigation, the Court will have to develop clear guidelines by which to weigh the competing claims in such cases.

The Court will probably be reluctant to apply *Batchelder* to provisions other than article 9 of the Declaration of Rights. Three judges dissented in the case, and the author of the dissenting opinion, Justice Lynch, took the opportunity in a case decided later in the *Survey* year to stress that "the [state and federal] constitutional provisions . . . give rights to the *citizens* which may not be infringed by the *government*."[18] The justices of the Supreme Judicial Court thus do not appear to have resolved the "state action" issue and there is obvious resistance to extending the scope of the *Batchelder* holding. If the Court were to extend its ruling, it probably would do so first in cases involving freedom of speech[19] and freedom of assembly.[20]

J., dissenting). It may be that the Court understood article 9 to impose a positive obligation on private persons to facilitate electoral activity. More likely, the majority applied that article to Batchelder's claim because, as discussed below, the Court was unwilling to address the plaintiff's troublesome free speech and free assembly arguments.

[16] *Id.* at 93, 445 N.E.2d at 595.

[17] *See, e.g.*, Attorney General v. Colleton, 387 Mass. 790, 796-98, 444 N.E.2d 915, 919-20 (1982) (self-incrimination clause of the Declaration of Rights imposes greater requirements on an attempt by the Commonwealth to compel testimony than does fifth amendment to the U.S. Constitution).

[18] Spence v. Boston Edison Co., 390 Mass. 604, 608, 459 N.E.2d 80, 83 (1983) (emphasis in original). The *Spence* case involved a suit by the Boston Housing Authority against the state Department of Public Utilities for alleged violations of the Authority's constitutional rights. *Id.* at 605, 459 N.E.2d at 81.

[19] *See* MASS. CONST. part I, art. XVI, which provides: "[T]he liberty of the press is essential to the security of freedom in a state: it ought not, therefore, to be restrained in this commonwealth. The right of free speech shall not be abridged."

[20] *See* MASS. CONST. part I, art. XIX, which provides: "[T]he people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and to request of the legislative body, by the way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer."

In *Batchelder*, the Court avoided addressing the issues of free speech[21] and assembly.[22] Later in 1983, however, the Court decided *Commonwealth v. Hood*,[23] which squarely presented the question of whether articles 16 and 19 of the Declaration of Rights, which guarantee freedom of speech and of assembly, apply to private property.[24] In *Hood*, four persons were convicted of trespass after they entered on the premises of a defense contractor, Charles Stark Draper Laboratories, Inc., ("Draper Laboratories") to distribute leaflets advocating nonviolence as a means to avert nuclear war.[25] The defendants were arrested after refusing to leave an outdoor courtyard on the property, which was open to public pedestrian and automobile traffic but bore "No Trespassing" signs.[26] The defendants claimed that their convictions violated their rights to freedom of religion, speech and assembly under articles 1, 16 and 19 of the Massachusetts Declaration of Rights as well as under the corresponding provisions of the federal Constitution.[27] The *Hood* Court again avoided deciding whether article 16 contains a state action requirement. The Court stated that regardless of whether state action is required, article 16 does not apply in the *Hood* case because of the nature of Draper Laboratories.[28] Draper is a private business, and the leafletting occurred during regular business hours. Permitting members of the public to pass through the Draper Laboratories property, the Court noted, did not change the essentially private nature of the premises.[29] According to the *Hood* Court, *Batchelder* does not suggest that the protections of articles 16 and 19 extend to such private premises.[30]

In addition, article 114, the recently adopted constitutional amendment that bars discrimination against otherwise qualified handicapped persons "under any program or activity within the commonwealth," may also apply in purely private circumstances.

[21] 388 Mass. at 88, 445 N.E.2d at 593.

[22] The *Batchelder* Court noted, but refused to reaffirm, a statement in a 1978 decision that "[a]rticles 16 and 19 protect the rights of free speech and assembly from abridgement by the government. Therefore guarantees of those articles do not extend to . . . conduct . . . which occurred on the property of a private employer." *Id.* at 89 n.8, 445 N.E.2d at 593 n.8 (quoting Commonwealth v. Noffke, 376 Mass. 127, 134, 379 N.E.2d 1086, 1090 (1978)). The *Batchelder* Court dismissed this language as "dictum" and distinguished *Noffke* in other respects, but did not overrule it. *Id.* at 89-90 n.8, 445 N.E.2d at 593 n.8. The Court also declined in *Batchelder* to address the scope of article 19, noting that the issue had not been briefed. *Id.* at 92 n.11, 445 N.E.2d at 595 n.11.

[23] 389 Mass. 581, 452 N.E.2d 188 (1983).

[24] *Id.* at 584, 452 N.E.2d at 191.

[25] *Id.* at 583, 452 N.E.2d at 190.

[26] *Id.*

[27] *Id.* at 584, 452 N.E.2d at 191.

[28] *Id.* at 585, 452 N.E.2d at 191.

[29] *Id.* at 586, 452 N.E.2d at 192.

[30] *Id.* at 585, 452 N.E.2d at 191. The question of what would constitute "state action," if it were required, was addressed by the Court twice in 1983, in *Hood*, 389 Mass. at 581, 445

Although the *Hood* Court, in dicta, dismissed the applicability of *Batchelder* to articles 16 and 19,[31] the rationale used in *Batchelder* to find no state action requirement under article 9 applies equally well to articles 16 and 19. The *Batchelder* Court found that article 9 applied to private as well as government parties because the provision did not explicitly refer to governmental action.[32] Neither article 16 nor article 19 makes any reference to state action.[33] The reasoning in *Batchelder* therefore should result in extension of the no state action requirement to articles 16 and 19.

Although the Supreme Judicial Court did not explain its reluctance to address the issues of free speech and freedom of assembly on private property, the Court may have been concerned about the problems of balancing and policing the exercise of these rights. The solicitation of signatures to gain access to a ballot is carried on only during election periods, and the relatively few people who seek to become candidates are not likely to behave disruptively because of their desire to gain public support. The rights of free speech and assembly, on the other hand, apply to all people at all times and to many activities, ranging from political meeting to nude dancing. In addition, under the federal Constitution, "speech" may not be regulated on the basis of its content or subject matter.[34] It is not surprising, therefore, that the Supreme Judicial Court has avoided deciding whether the state action requirement applies to the speech and assembly provisions of the Declaration of Rights.

The future impact of the *Batchelder* decision will depend not only on whether the Supreme Judicial Court finds no state action requirement in articles 16 and 19, but also on whether the Court is willing to apply the holding to private properties less obviously "public" than the common areas of a major shopping center. In the majority opinion in *Batchelder*, Justice Wilkins stressed that the common areas of North Shore were

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N.E.2d at 188 (defense laboratory not shown to serve a "public function" or to be in a "symbiotic relationship" with state), and Phillips v. Youth Dev. Program, Inc., 390 Mass. 652, 459 N.E.2d 453 (1983) (discharge of employee by juvenile program which was supported by Commonwealth was not "state action"). In *Phillips*, the Court suggested that a "due process" claim under article 12 of the Declaration of Rights probably would require state action, in part because that article refers explicitly to "the law of the land." *Id.* at 658, 459 N.E.2d at 457-58.

[31] *Hood*, 389 Mass. at 585, 452 N.E.2d at 191.

[32] 388 Mass. at 88-89, 445 N.E.2d at 593.

[33] *See supra* notes 20-21. In contrast, U.S. CONST. amend. I, provides that "Congress shall make no law respecting an establishment of religion . . . ," and U.S. CONST. amend. XIV provides that "[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law . . . ."

[34] *See* Police Dept. of Chicago v. Mosely, 408 U.S. 92, 95 (1972), and cases cited therein.

voluntarily exposed to intense community use,[35] and that Batchelder's actions did not adversely affect the economic interests of the shopping center's owners or tenants.[36] In the *Hood* case, on the other hand, the Court was unwilling to find that leafletters had a constitutional right to access to the outer courtyard or parking lot of a private employer.[37] There are, however, many types of property that lie somewhere between the quasi-public North Shore and the private Draper Laboratories. College campuses, sports facilities and exhibition halls, for instance, are open to the public, and their owners usually cannot demonstrate a convincing interest in excluding political activity and speech from these facilities. The Supreme Judicial Court could well extend the *Batchelder* holding to cover such properties. In New Jersey, for example, the state supreme court held that Princeton University, a private institution, had violated the state constitution by invoking trespass laws to prevent a person from distributing political literature on campus.[38] Future plaintiffs in Massachusetts may also seek access to privately-owned entities such as mobile home parks, migrant labor camps, retirement communities and large apartment and condominium complexes, on the grounds that they are self-contained communities that have many of the attributes of a municipality.[39]

Relying on *Batchelder*, the Massachusetts courts could also decide that commercial advertisers must sell space for political advertising on billboards, common carriers, and other advertising spaces.[40] It is, however, highly unlikely that *Batchelder* will be applied to require newspapers and other media with specific editorial content to accept political advertising, since the press has specifically and jealously guarded countervailing constitutional rights.[41] In short, the *Batchelder* decision may

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[35] 388 Mass. at 92, 93 & n.12, 445 N.E.2d at 595 & n.12. In practice, most of the litigation concerning the exercise of constitutional rights on private property has involved shopping centers. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Hudgens v. NLRB, 424 U.S. 507 (1976); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 635 P.2d 108 (1981).

[36] 388 Mass. at 93, 445 N.E.2d at 595.

[37] *See supra* notes 24-31 and accompanying text.

[38] State v. Schmid, 84 N.J. 535, 423 A.2d 615 (1980), *cited in Batchelder*, 388 Mass. at 90, 445 N.E.2d at 594. The *Batchelder* Court also cited Commonwealth v. Tate, 495 Pa. 158, 432 A.2d 1382 (1981) (prosecution of nonstudents for entering private college campus, and picketing and distributing leaflets to protest the appearance of a government official at a campus symposium, held barred by Pennsylvania constitution).

[39] *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[40] *Cf.* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (a municipality has no first or fourteenth amendment obligation to open its buses to political messages, where there is a "risk of imposing on a captive audience" and the municipality can demonstrate a consistent policy of carrying only commercial and service advertising).

[41] *See* U.S. CONST., amend. I; MASS. CONST. part I, art. XVI. *See also* Miami Herald Publishing Corp. v. Tornillo, 418 U.S. 241, 258 (1974).

provide the precedent for finding that political candidates have a constitutional right of access to a variety of quasi-public facilities and to certain advertising opportunities.

It is difficult to predict with any specificity how the *Batchelder* opinion will influence future litigation because the Supreme Judicial Court did not formulate any general principles that could be applied in other factual contexts. Decisions by other state supreme courts, however, some of which were cited by the *Batchelder* Court, have identified several factors to be considered in such cases. The first factor is the private owner's economic and privacy interests in the property, taking into account the nature and use of the property.[42] The second factor is the nature of the constitutionally protected activity, and whether it can be carried out by other means.[43] The third factor is the injury that the activity will cause to private interests, in light of the owner's ability to impose reasonable time, place and manner restrictions.[44]

In summary, the *Batchelder* decision reaffirms the willingness of the Supreme Judicial Court to interpret state law broadly to protect individual rights in contexts in which the United States Constitution has been held not to apply. On the specific issue of "state action," however, the majority's emphasis on the facts of the case — ballot access solicitation at a major shopping center — and the Court's reluctance to extend free speech guarantees in a similar manner in other cases suggests that the Court will be very cautious in applying its ruling to other constitutional rights or other types of property. The Court's failure to establish general guidelines for balancing the competing interests in *Batchelder* also makes it difficult to predict how the *Batchelder* holding will be applied in other cases.

§ 15.2. The Establishment Clause — State Aid to Parochial Schools. The Supreme Court has established a three-part test for determining whether state aid to parochial schools is constitutional.[1] During the *Survey* year, in *Taunton Eastern Little League v. City of Taunton*,[2] the Supreme Judicial

[42] *See* Robins v. Pruneyard Shopping Center, 23 Cal. 3d 899, 903-04, 592 P.2d 341, 346-48, 153 Cal. Rptr. 854, 856-58 (1979), *aff'd*, 447 U.S. 74 (1980); State v. Schmid, 84 N.J. 535, 555-57, 423 A.2d 615, 630-33 (1980), *appeal dismissed sub. nom.* Princeton Univ. v. Schmid, 445 U.S. 100 (1982); Alderwood Assocs. v. Washington Envtl. Council, 96 Wash. 2d 230, 240-42, 635 P.2d 108, 116-17 (1981).

[43] *See supra* note 42.

[44] *See supra* note 42. In Massachusetts, the fifth and fourteenth amendments to the United States Constitution and article 10 of the Declaration of Rights restrain the state from authorizing incursions on private property which are so extensive as to amount to a "taking" or to a denial of due process. *See* Pruneyard Shopping Center v. Robins, 447 U.S. 74, 82-85 (1980). No state court, and particularly not the *Batchelder* majority, has even approached this constitutional limitation.

§ 15.2. [1] Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[2] 389 Mass. 719, 452 N.E.2d 211 (1983).

Court stretched the test as far as possible without actually permitting the transfer of state funds to parochial schools. In *Taunton Eastern Little League*, the Supreme Judicial Court reviewed the constitutionality of a city's decision to protect the revenues of a parochial school in order to avoid possible increased burdens on its public school system. Although the Court relied on established precedents in aid-to-religion cases, it applied those precedents in a manner that may have opened a new avenue for indirect state aid to religious schools.

The case arose when the Taunton Eastern Little League ("Little League") applied to the city for a license to conduct beano games.[3] The city council allowed the application, but then rescinded its approval in response to petition from a local Catholic parish. The parish already held a beano license for the same night and wanted to prevent any loss of revenue by competition from the Little League.[4] The city council's revocation of the Little League's license was explicitly intended to protect the parish's beano revenues, which supported a Catholic grammar school run by the parish.[5] The council was concerned that loss of those revenues could force the school to close, which would substantially increase the demand on the city's public school system.[6]

The Supreme Judicial Court held that the Taunton city council was entitled to prefer the parish over the Little League because the council's action did not have the effect of advancing religion.[7] Because the plaintiff did not raise any state constitutional issues, the Court only considered whether the city's decision violated the first amendment to the United States Constitution.[8] Following established precedent, the Court applied a

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[3] *Id.* at 720-21, 452 N.E.2d at 212.

[4] *Id.* at 721, 452 N.E.2d at 212-13.

[5] *Id.* at 721, 452 N.E.2d at 213.

[6] *Id.*

[7] *Id.* at 725, 452 N.E.2d at 213.

[8] *See id.* at 722 & n.3, 452 N.E.2d at 213 & n.3. In particular, the plaintiff presented no claim under the "anti-aid" amendment to the Massachusetts Constitution. *Id.* at 722, 452 N.E.2d at 213. *See* MASS. CONST. amend. art. XVII, § 2, as amended by art. CIII. The Court suggested in its opinion that the plaintiff erred by not citing article 18 and by failing to challenge G.L. c. 38, § 10. *See Taunton Eastern Little League*, 389 Mass. at 724-25, 452 N.E.2d at 214. Chapter 38 requires that all profits from beano games licensed under its authority "shall be used for charitable, religious or educational purposes . . . ." The Court stated, "[a]bsent a challenge to the statute, the plaintiff cannot argue that funds received by a parochial school from a beano game constitute state financial aid to religion." *Id.* It is not clear, however, that by limiting the permissible uses of beano profits, the Legislature intended to authorize discrimination in favor of religious entities.

The Court also suggested that a contrary result in *Taunton Eastern Little League* would have prevented the city from denying the plaintiff a license for any reason, for example, as part of a neutral policy to prefer existing licensees. *Id.* at 727, 452 N.E.2d at 216. If the city had adopted such a policy, however, the "effect" at issue would have been that of the overall policy, rather than its application in any particular case.

three-part test to the city council's action: "[f]irst, the [action] must have a secular . . . purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the [action] must not foster an 'excessive government entanglement with religion.' "[9]

The Court had little difficulty in finding that the first and third criteria of this test were met. According to the Court, the city's ultimate purpose of avoiding a burden on the public schools was secular,[10] and the decision to award or deny a license was unlikely to result in excessive entanglement with religion.[11] The most serious question involved the second criterion, whether the principal or primary *effect* of the city's decision was to advance religion.[12] The Court held that even though the council's decision did "result in an indirect benefit to a religion, that benefit was incidental" to the secular purpose of avoiding a sudden influx of students into the public school system.[13] Having found that the Taunton city council's revocation of the Little League's beano license met the three-part test, the Supreme Judicial Court affirmed the council's right to prefer the Catholic parish in granting beano licenses.

The Supreme Judicial Court thus balanced the secular *purpose* of the Taunton city council's decision against its religious *effect*. By doing so, the Massachusetts Court departed from United States Supreme Court precedents, which call for comparing the secular effect of a governmental action against its religious effect to determine which is primary. In this case, the effect on a religious institution of increasing parish revenues should have been compared to the effect of the decision to deny a license on secular institutions.[14]

In *Committee for Public Education and Religious Liberty v. Nyquist*, for example, the United States Supreme Court considered the constitutionality of a New York statute that granted maintenance funds to private schools, and tuition reimbursements and tax credits to parents who enrolled children in private schools.[15] The Court noted that New York had acted out of a real and substantial "concern for an already overcrowded

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[9] 389 Mass. at 722, 452 N.E.2d at 213 (citing *e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971)).

[10] *See id.* at 723, 452 N.E.2d at 213-14.

[11] *See id.* at 728, 452 N.E.2d at 216.

[12] *Id.* at 724, 452 N.E.2d at 214.

[13] *Id.* at 725, 452 N.E.2d at 215.

[14] *See* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), where the Court stated that "[o]ne factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program." *Id.* at 795. The Supreme Court went on to explain that what is at stake in establishment clause cases is preventing the strife and strain on a political system that can be caused by state support of a religious institution. *Id.* at 796.

[15] *Id.* at 756.

public school system."[16] The Supreme Court stressed, however, that "the propriety of a legislature's purposes may not immunize from further scrutiny a law which . . . has a primary effect that advances religion."[17] Finding that the direct subsidies and indirect tax and tuition grants in the New York program had the "inevitable effect of subsidizing sectarian schools," the Court struck them down.[18] In *Taunton Eastern Little League*, the Supreme Judicial Court also found that the city had a real concern for the public school system, but the Court then failed to give "further scrutiny" to the effect that supporting the Catholic Church's beano game could have on religious and secular institutions.

The *Taunton Eastern Little League* Court justified its holding, and distinguished *Nyquist* and other federal precedents, on the ground that the Taunton city council "did not provide public funds to [the] parish."[19] This distinction is a tenuous one. It is true that the city wrote no checks to the parish or its members. There is little doubt, however, that by granting the parish an exclusive beano license, the city conferred a valuable governmental benefit on a religious charity. In so doing, the council explicitly discriminated against a secular non-profit group. The effect of that decision was to increase the revenues of the Catholic Church at the expense of a community institution.

If the *Taunton* decision is representative of how the Supreme Judicial Court will apply the three-part test in establishment clause cases, the possibilities for state aid to parochial schools in the Commonwealth have been expanded. State and local governments have discretion to award a wide variety of permits and franchises, many of them more valuable than a beano license.[20] State legislatures have become increasingly inventive in their approach to parochial school aid, and more efforts at indirect assistance following the *Taunton Eastern Little League* decision may therefore be expected.[21]

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[16] *Id.* at 773.

[17] *Id.* at 774.

[18] *Id.* at 779-80, 794.

[19] 389 Mass. at 723, 452 N.E.2d at 213-14.

[20] One commentator has observed that a key issue in aid-to-religion cases is the breadth of the class benefitted by the governmental decision. Programs affecting a large group containing predominantly secular entities will be accorded greater presumptive validity than an action that benefits a narrow class consisting primarily of religious organizations. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 845 (1978). Under this test, general awards of beano licenses would be upheld, but Taunton's decision to grant a license to a religious entity while denying a license to a secular one would be presumptively invalid.

[21] Religious organizations might, for example, be given preference in the award of income-generating concessions and franchises, or in the use of government-owned property. *But see* MASS. CONST., amend. art. 18, § 2 (the "anti-aid" amendment).

§ 15.3. Governmental Agencies — Due Process and Equal Protection Rights. During the *Survey* year, in *Spence v. Boston Edison Co.*,[1] the Supreme Judicial Court reaffirmed that government agencies do not have due process or equal protection rights under the Massachusetts Constitution.[2] The case involved a claim by the Boston Housing Authority ("BHA") that the electricity rate set by the defendant Massachusetts Department of Public Utilities ("DPU"), which established the charges collected by the defendant Boston Edison Company, was unconstitutionally discriminatory because it forced the BHA to pay large amounts of money for electric service to apartments that had long stood vacant or been combined with other units.[3]

The Supreme Judicial Court affirmed the superior court's decision to dismiss the BHA's claim on the ground that a state agency may not challenge the acts of its "creator state."[4] The Court cited federal precedents for the proposition that governmental entities do not enjoy the constitutional guarantees of due process and equal protection, and may not sue under either federal or state civil rights statutes.[5] Similarly, the Court held, government agencies have no rights under articles 1, 10 or 12 of the Massachusetts Declaration of Rights.[6] The BHA, the Court found, therefore had no right to challenge the constitutionality of the rates set by the DPU.[7]

The decision in *Spence* appears to be correct. As the Court noted, the language of the constitutional provisions at issue excludes agency plaintiffs.[8] More importantly, however, a contrary rule would allow the courts to be drawn into political and policy disputes between branches of the executive which should be resolved by the governor and Legislature.[9]

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§ 15.3. [1] 390 Mass. 604, 459 N.E.2d 80 (1983).

[2] *Id.* at 608, 459 N.E.2d at 83.

[3] *Id.* at 606, 459 N.E.2d at 82. The BHA also claimed that Boston Edison was in violation of G.L. c. 93A and its contract with the BHA. *Id.*

[4] *Spence*, 390 Mass. at 606, 459 N.E.2d at 82.

[5] *Id.* at 608, 459 N.E.2d at 83. *See, e.g.*, Newark v. New Jersey, 262 U.S. 193 (1923).

[6] 390 Mass. at 610, 459 N.E.2d at 83.

[7] *Id.* at 610, 459 N.E.2d at 82. Although government agencies may not have constitutional rights, public officials have at least a few. In another decision during the *Survey* year, Town of Brookline v. Goldstein, 388 Mass. 443, 447 N.E.2d 614 (1983), the Court upheld portions of an injunction that prevented a citizen from contacting town officials incessantly, at home and at work, day and night, to complain about town government on the ground that officials have "a legitimate expectation of privacy and freedom from harassment" by angry citizens. *Id.* at 449-50, 446 N.E.2d at 645.

[8] 390 Mass. at 608, 459 N.E.2d at 83.

[9] *See, e.g.*, G.L. c. 30, § 5, which states that inter-agency disputes should be presented to and resolved by order of the governor and executive council. Intrusion by the courts into such controversies could also compromise the governor's constitutional role as Supreme Executive Magistrate. *See* MASS. CONST. part 2, art. 1.

§ 15.4. Political Parties — Regulation of Primary Elections. In *Democratic Party of United States v. Wisconsin*,[1] the United States Supreme Court struck down Wisconsin's attempt to require its state delegation to the Democratic Party convention to vote in accordance with the results of the state primary election, on the ground that the law violated party members' constitutional rights of association. In *Langone v. Secretary of the Commonwealth*,[2] decided during the *Survey* year, the Supreme Judicial Court confronted the converse of that issue: whether a political party may impose significant controls on the state's conduct of a primary election. In this case as well, the party's interest prevailed.

The *Langone* case concerned the Massachusetts Democratic Party's "15% rule." This rule, which first took effect in the 1982 state elections, provides that a statewide candidate may not be listed on the Democratic primary ballot unless he or she obtains at least fifteen percent of the votes on any ballot of the state Democratic convention.[3] The Democratic Party enacted the 15% rule to increase the importance of, and participation in, its caucuses and convention.[4] In the 1982 election, the rule eliminated two of the seven candidates for lieutenant governor.[5] The losers, with their supporters, then filed suit to enjoin its enforcement.[6]

The Court first considered whether the requirements of the state statute governing primaries, chapter 53 of the General Laws, conflicted with the 15% rule and, if so, whether the statute was constitutional.[7] The provisions of chapter 53, the Court noted, made it possible for candidates who had little or no support from the regular party membership to win the Democratic primary.[8] According to the Court, the constitutional right to freedom of association entitles a political party to an effective role in determining its candidates.[9] The Court found that the 15% rule was an appropriate method to ensure such a role, since it gave the party some control over its candidates without interfering with the state interest in eliminating party "bossism" and in giving the public control of the elec-

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§ 15.4. [1] 450 U.S. 107 (1981).

[2] 388 Mass. 185, 446 N.E.2d 43 (1983).

[3] *Id.* at 188, 446 N.E.2d at 44-45.

[4] *See id.* at 198, 446 N.E.2d at 50.

[5] *Id.* at 188-89, 446 N.E.2d at 45.

[6] *Id.* at 189, 446 N.E.2d at 45.

[7] *Id.* at 189-94, 446 N.E.2d at 45-48.

[8] *Id.* at 189-94, 446 N.E.2d at 46-47. G.L. c. 53 provides that a voter may enroll at the polling place immediately before voting in a primary and become unenrolled the day after the primary. *Langone*, 388 Mass. at 194, 446 N.E.2d at 47. Thus it is possible to vote in a party primary with little more than a momentary affiliation and for reasons entirely "inconsistent with or at least insupportive of the principles of the parties." *Id.*

[9] *Id.* at 190, 446 N.E.2d at 46.

toral process.[10] Therefore, the Court reasoned, chapter 53 would be unconstitutional if it conflicted with the 15% rule. To avoid "constitutional difficulties," the Court construed chapter 53 as allowing the creation of party rules, such as the 15% rule, provided there was no conflict with the specific terms of the statute or with the constitutional rights of candidates or voters.[11]

The Court then considered the separate issue of whether the plaintiffs' constitutional rights as candidates or as voters were infringed by the rule's application, and decided that they were not.[12] The Court began its analysis by noting that "strict scrutiny" of the 15% rule would be required only "if the interests asserted by plaintiffs [were] fundamental and the infringement of them [was] substantial."[13] According to the Court, the plaintiff candidates did not have a constitutional right to a place on the ballot, but the 15% rule did restrict their supporters' right to vote, which it deemed fundamental. The Court then decided that both voter and candidate interests were fundamental.[14] Although it found that fundamental interests were involved, the Court nevertheless ruled that the impact of the 15% rule — the elimination of the plaintiff candidates — was not substantial enough to trigger strict scrutiny, and required only "rational relationship" analysis.[15] The Court finally concluded that the 15% rule did not violate the constitutional rights of voters, candidates, or their supporters.[16]

Given the Court's concern for ballot access in *Batchelder v. Allied Stores International Inc.*,[17] also decided during the *Survey* year, the Court's finding in *Langone* is surprising. Moreover, there is also at least an apparent inconsistency between the Court's conclusion, in the first section of its opinion, that the 15% rule so seriously affected Democratic Party members' associational rights that the rule should take precedence over the Commonwealth's traditional right to regulate primaries, and the

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[10] *Id.* at 194, 446 N.E.2d at 48. In the 1982 election, application of the 15% rule eliminated only two of the seven candidates for lieutenant governor, but rendered the United States Senate primary meaningless by barring the only declared challenger to the incumbent senator.

[11] *Id.* at 194, 446 N.E.2d at 48.

[12] *Id.* at 195-96, 446 N.E.2d at 48. The plaintiffs asserted claims under the first and fourteenth amendments to the United States Constitution and articles 1, 9, 16 and 19 of the Declaration of Rights. *Id.*

[13] *Id.* at 196, 446 N.E.2d at 49 (citing Bullock v. Carter, 405 U.S. 134, 142-44 (1972)). In a case decided shortly after *Langone*, the Supreme Court did not employ this test, but instead characterized its task as one of identifying and then weighing the relative importance of each litigant's interests. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

[14] *Langone*, 388 Mass. at 196, 446 N.E.2d at 49.

[15] *Id.* at 197, 446 N.E.2d at 49.

[16] *Id.* at 200, 446 N.E.2d at 51.

[17] 388 Mass. 83, 445 N.E.2d 590 (1983). See *supra* § 15.1 for a discussion of *Batchelder*.

Court's later finding that enforcement of the rule had only an "insubstantial" impact on candidates and voters.[18] One of the purposes of the election process, of course, is to eliminate candidates, and, as part of that process, ballot access requirements are intended to, and do have, a "substantial" effect on candidacies. Almost any challenge by a loser or his or her supporters should therefore trigger "strict scrutiny" under traditional doctrines.

When deciding ballot-access cases, the United States Supreme Court has looked less to whether the result of a requirement is substantial and more to whether it operates in an invidious or arbitrary manner.[19] The criteria of invidiousness and fair opportunity have also been applied by the Supreme Judicial Court in past election decisions.[20] Under this approach, the key criterion in *Langone* should have been whether the 15% rule unfairly discriminated or discouraged challenges by outsiders. In fact, although it used the language of substantiality, the Court did examine whether the 15% rule was invidious. When the Court found that the 15% rule did not "deny candidates access to the primary ballot in an unfair way,"[21] the Court in essence did find that the rule was not invidious or arbitrary. As a result, even though the *Langone* Court's analysis is questionable, the ultimate holding is constitutionally correct.

CRIMINAL CONSTITUTIONAL LAW†

§ 15.5. Due Process in Prison Disciplinary Hearings — Introduction. As Justice White stated in *Wolff v. McDonnell*, "there is no iron curtain drawn between the Constitution and the prisons of this country."[1] Yet a review of seven prisoners' rights cases decided during 1983 shows that the Supreme Judicial Court admitted precious little new light into the prisons of Massachusetts. This failure to accord prisoners greater rights was due in part to the prisoner-litigants' complete reliance on the United States

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[18] *Compare* 388 Mass. at 191, 446 N.E.2d at 46, *with* 388 Mass. at 197, 446 N.E.2d at 49.

[19] As one commentator observed, "the vigor of judicial review of election laws has been roughly proportioned to their potential for immunizing the current leadership from attack." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 774 (1978). *See* Jeness v. Fortson, 403 U.S. 431, 437-40 (1971) (uniform signature requirement for candidates upheld); Williams v. Rhodes, 393 U.S. 23, 32 (1968) (statute favoring established parties and frustrating access of others to the ballot held unconstitutional).

[20] In 1981, for example, the Court struck down a Massachusetts statute that would have forbidden candidates from listing themselves on the ballot as "independents," and required the use of the more pejorative term "unenrolled," because of its invidious nature. Bachrach v. Secretary of Commonwealth, 382 Mass. 268, 275-76, 415 N.E.2d 832, 836 (1981).

[21] 388 Mass. at 197, 446 N.E.2d at 49.

† Charles Wyzanski

§ 15.5. [1] 418 U.S. 539, 555-56 (1974).

Constitution to the exclusion of arguably broader grounds available in cognate state constitutional provisions.[2] It was also attributable, however, to the Supreme Judicial Court's unwarranted reluctance to recognize provisions of Massachusetts law as creating a liberty interest cognizable under the United States Constitution.

The federal Constitution entitles prisoners to due process if certain underlying substantive rights are at stake. These rights may originate from provisions other than the fourteenth amendment's due process clause itself.[3] For example, under the first amendment, prisoners have the right to limited free speech,[4] to the reasonable exercise of religion,[5] and to access to the courts.[6] Under the eighth amendment, prisoners have the right to be free from cruel and unusual punishment[7] and, under the fourteenth, from racial discrimination.[8] In addition, when a liberty interest originates in the state law rather than in other provisions of the federal Constitution, due process may also be invoked through the federal due process clause. Thus, when guaranteed by state law, a prisoner cannot be transferred into administrative segregation[9] or a mental hospital,[10] and may not be deprived of good-time credit for satisfactory behavior while in prison,[11] or excluded from probation,[12] or parole[13] without due process of law.

§ 15.6. Due Process in Prison Disciplinary Hearings — Failure to Properly Support Allegations. During the *Survey* year, in two separate lawsuits, claims made by a prisoner, Anthony Jackson, to due process protection were denied for failure to show that any underlying constitutional right was affected. In the first case, *Jackson v. Hogan*,[1] Jackson alleged that various defendants, employees of the Department of Correction, violated his civil rights by refusing to transfer him from an isolation to a "cadre" unit, by denying him the opportunity to hold an inmate job through which

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[2] See Attorney General v. Colleton, 387 Mass. 790, 796 n.5, 444 N.E.2d 915, 919 n.5 (1982), and cases cited therein for a broader interpretation.
[3] U.S. CONST. amend. XIV, § 1 provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property without due process of law."
[4] Pell v. Procunier, 417 U.S. 817 (1974).
[5] Cruz v. Beto, 405 U.S. 319 (1972) (per curiam).
[6] Johnson v. Avery, 393 U.S. 483 (1969).
[7] Estelle v. Gamble, 429 U.S. 97 (1973).
[8] Lee v. Washington, 390 U.S. 333 (1968) (per curiam).
[9] Hewitt v. Helms, 459 U.S. 460 (1983).
[10] Vitek v. Jones, 445 U.S. 480 (1980).
[11] Wolff v. McDonnell, 418 U.S. 539 (1974).
[12] Gagnon v. Scarpelli, 411 U.S. 778 (1973).
[13] Morrissey v. Brewer, 408 U.S. 471 (1972).
§ 15.6. [1] 388 Mass. 376, 446 N.E.2d 692 (1983).

he could earn money and good-time credit, by refusing to permit him to attend religious services, and by not allowing him to purchase fruit.[2] The Court, noting that Jackson was classified as a maximum security prisoner, found that Jackson had failed as a factual matter to support his allegation that due to racial discrimination he had been refused transfer from an isolation segregation unit to a cadre unit.[3] Similarly, according to the Court, Jackson, in connection with his second claim, failed to allege that the state had guaranteed anyone with his security status eligibility to earn good-time credits for time served.[4] Furthermore, had he been eligible for such a right, the Court stated, the right "could also be constitutionally restricted by rules stemming from valid penological concerns, such as security and order."[5]

Jackson's other constitutional contentions failed on legal rather than factual grounds. Addressing the religious issue, the Court found that Jackson had no unlimited right to attendance at group services in the free exercise of his religion.[6] The Court stated: "[W]hen an institutional restriction infringes a specific constitutional guarantee, . . . the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security."[7] This was satisfied, in the Court's view, by the unrebutted affidavit of Deputy Superintendant Vose, which stated that Jackson's security status prohibited his attendance at regular religious services but that a minister would be provided upon special request.[8] Finally, the Court held that the denial of an opportunity to purchase fruit did not rise to the level of a legally protected right and could be refused Jackson on any basis.[9]

In Jackson's second appeal, *Jackson v. Commissioner of Correction*,[10] the Court reviewed a full factual record developed by a special master.[11] In this case, Jackson sought to enjoin his transfer by the Commissioner of the Department of Correction (the "Commissioner") from a medium to a maximum security institution, arguing that the classification board had

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[2] *Id.* at 377, 446 N.E.2d at 694. A cadre is a core group of residents with special skills, such as cooking, that provides services to a state correctional facility. *Id.* at 378 n.2, 446 N.E.2d at 694 n.2. *See* 103 C.M.R. 453.06(1) (1978). The plaintiff also alleged that his personal property was improperly confiscated. 388 Mass. at 380, 446 N.E.2d at 695. The Court denied defendant Vose summary judgment on this issue. *Id.*

[3] 388 Mass. at 378, 446 N.E.2d at 694.

[4] *Id.* at 379, 446 N.E.2d at 695.

[5] *Id.*

[6] *Id.* at 382, 446 N.E.2d at 696-97.

[7] *Id.* at 381, 446 N.E.2d at 696 (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)).

[8] *Id.* at 381, 446 N.E.2d at 696.

[9] *Id.* at 383-84, 446 N.E.2d at 697.

[10] 388 Mass. 700, 448 N.E.2d 60 (1983).

[11] *Id.* at 701, 448 N.E.2d at 61.

recommended the transfer either in retaliation for his frequent litigation against the Commissioner, or, alternatively, that the transfer resulted from a procedurally defective disciplinary hearing.[12]

The Supreme Judicial Court affirmed the special master's finding that no facts supported the allegation of retaliation.[13] The Court found that the Commissioner's decision was based instead on a good faith and reasonable review of Jackson's entire institutional record, the serious criminal offenses for which he had been convicted, the length and consecutive nature of many of his sentences which provided him a strong incentive to escape, and the risk to the public in the event he succeeded.[14] The Court did not consider or decide whether the antecedent disciplinary reports and hearing were procedurally flawed, as Jackson alleged.[15] The Commissioner's good faith and reasonable review of Jackson's record, the Court stated, superseded the reports and hearing, making them "largely irrelevant" to the classification board's transfer decision.[16]

In both of Jackson's lawsuits, the Court unerringly identified what were, and what were not, the constitutional interests deserving of due process protection. The right to buy fruit, while doubtless important to the prisoner deprived of so much else, cannot, as a constitutional or practical matter, be the subject of judicial oversight. On the other hand, an individual's reasonable opportunity to exercise religion, his access to the courts, and his freedom from racial discrimination are rooted in the constitution and are fundamental both to the individual and to the integrity of the correctional system.

The difficulty in the Court's result is practical, although perhaps less troubling because it concerns a self-confessed "chronic litigator."[17] The problem is whether curtailment of the exercise of religion or state-guaranteed good-time rights should be tolerated simply on the basis of a conclusory affidavit of a prison official that prison security or the prisoner's security status requires it. If constitutional guarantees are so easily avoided, due process need never attach, and prisoners, Justice White notwithstanding, might just as well be curtained off from constitutional protection.

§ 15.7. Due Process in Prison Disciplinary Hearings — Identification of a Liberty Interest. The critical importance of due process protection in a

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[12] *Id.* at 703, 705, 448 N.E.2d at 62-63.
[13] *Id.* at 704, 448 N.E.2d at 63.
[14] *Id.*
[15] *Id.* at 705 n.4, 448 N.E.2d at 63 n.4.
[16] *Id.* at 705-06, 448 N.E.2d at 63.
[17] *Id.* at 704 n.3, 448 N.E.2d at 62 n.3.

custodial setting is well-illustrated in five other prisoners' rights cases. All of the cases were argued before a Supreme Judicial Court panel on the same day and all were decided unanimously in opinions written by Justice Liacos. In all of them, prisoners claimed violations of due process and sought reversal of the sanctions that resulted. In contrast to the *Jackson* cases,[1] the alleged underlying constitutional interests were not clearly delineated and did not originate in other than the fourteenth amendment due process clause provisions of the United States Constitution.

In each case, the Court's fundamental constitutional analysis was twofold. First, the Court looked at the sanction imposed to determine whether it affected a "liberty interest" which required any amount of due process. If a liberty interest could be identified, the Court then determined what level of due process was appropriate in light of the importance of the interest, and whether the challenged procedures were constitutionally sufficient.[2]

1. Isolation Time. The critical importance of the threshold liberty interest question was highlighted by the plaintiffs' failure to satisfy it in *Cassesso v. Commissioner of Correction*.[3] In *Cassesso*, two inmates received sanctions of fifteen days in isolation and a recommendation of reclassification and transfer to a higher security institution following a disciplinary board proceeding.[4] The disciplinary board had found the inmates guilty of major institutional misconduct after hearing, out of their presence, the testimony of a Superintendent Walsh.[5] The superintendent had testified concerning the personal observations of, and information conveyed to him by, a Trooper Sterling and an unnamed inmate.[6] This information was considered by the board but not disclosed to the inmates pursuant to the informant privilege embodied in the administrative Code of Massachusetts Regulations.[7] The inmates challenged the action of the disciplinary board, claiming deprivation of their federal due process rights.[8] The Commissioner moved for summary judgment. A judge of the superior court granted the motion, and the Supreme Judicial Court affirmed.[9]

In its opinion, the Court acknowledged that the procedure had probably

§ 15.7. [1] *See supra* § 15.6.

[2] Nelson v. Commissioner of Correction, 390 Mass. 379, 388-89, 456 N.E.2d 1100, 1106 (1983).

[3] 390 Mass. 419, 456 N.E.2d 1123 (1983).

[4] *Id.* at 422, 456 N.E.2d at 1125.

[5] *Id.* at 421-22, 456 N.E.2d at 1125.

[6] *Id.* at 421, 456 N.E.2d at 1125.

[7] *Id. See* 103 C.M.R. § 430.15 (1978).

[8] *Cassesso*, 390 Mass. at 420, 456 N.E.2d at 1124.

[9] *Id.*

been flawed, as the inmates had claimed.[10] State and federal case law, the Court noted, support the argument that the informant privilege does not attach to an officer of the law.[11] Yet, according to the Court, the inmates did not meet the threshold requirement for establishing deprivation of a constitutional right because they had "not argued that they suffered a loss of liberty under the United States Constitution,"[12] nor had they argued a state-created liberty interest in the procedures governing disciplinary hearings.[13] Consequently, the Court found that the inmates had failed to state a claim on which relief could be granted, and summary judgment was therefore appropriate.[14]

The Court's decision in *Cassesso* may be no more than the result of inept pleading in the trial court. Rather than asserting just their interest in avoiding transfer, the plaintiffs could have argued a constitutional interest in avoiding isolation time sufficient to trigger some level of due process. Isolation time represents the kind of grievous loss that the United States Supreme Court suggested, in *Meachum v. Fano*,[15] might impinge on a state-created liberty interest and trigger due process protection, at least when coupled with an "explicit mandatory" state regulation.[16] In *Meachum,* an inmate housed in the Massachusetts Correctional Institution at Norfolk ("M.C.I. Norfolk"), sought to block his reclassification and transfer to the less favorable living conditions of the Massachusetts Correctional Institution at Walpole ("M.C.I. Walpole") on due process grounds.[17] A majority of the Supreme Court held that due process, under the United States Constitution, did not attach because the inmate's conviction had "sufficiently extinguished his liberty interest to empower the State to confine him in any of its prisons."[18] Moreover, according to the Court, Massachusetts had not created a state liberty interest because, insofar as the Court had been advised, Massachusetts law "conferred no right on the prisoner to remain in the prison to which he was initially assigned, defeasible only upon proof of specific acts of misconduct."[19]

The *Meachum* Court carefully noted, however, that these facts did not entail disciplinary confinement.[20] The Supreme Court quoted with approval the language of *Wolff v. McDonnell*,[21] that "a convicted felon does

[10] *Id.* at 423, 456 N.E.2d at 1126.
[11] *Id.* at 423 n.5, 456 N.E.2d at 1126 n.5.
[12] *Id.* at 424, 456 N.E.2d at 1126.
[13] *Id.* at 424 n.6, 456 N.E.2d at 1126 n.6.
[14] *Id.* at 424, 456 N.E.2d at 1127.
[15] 427 U.S. 215 (1976).
[16] *See id.* at 226.
[17] *Id.* at 222.
[18] *Id.* at 224.
[19] *Id.* at 226.
[20] *Id.* at 222.
[21] 418 U.S. 539 (1974).

not forfeit all constitutional protections by reason of his conviction and confinement in prison."[22] In *Wolff*, the Supreme Court held that prisoners are entitled to due process when good-time credits are subject to forfeiture, noting that "it would be difficult for the purposes of procedural due process to distinguish between the procedures that are required where good time is forfeited and those that must be extended when solitary confinement is at issue."[23]

Indeed, the United States Supreme Court in *Baxter v. Palmigiano*,[24] a companion case to *Meachum*, held that minimum due process applied where named plaintiffs were placed in punitive segregation for thirty days and had their classification downgraded.[25] Although no state-created liberty was identified, it was apparently enough that one of the inmates was subject to loss of privileges and that all had been brought before prison disciplinary hearings for allegedly serious misconduct.[26]

Whether or not the United States Constitution itself mandates due process when prisoners are placed in isolation, Massachusetts regulations seem to create a liberty interest — a legitimate expectation in inmates that they will not be subject to isolation absent due process. In Massachusetts, isolation is not the sort of confinement that inmates reasonably anticipate. Isolation time, like forfeiture of good-time credits, is a major sanction.[27] According to administration regulations the Commissioner of Correction can impose major sanctions only after convening a formal disciplinary board.[28] The regulations further require that advance notice to the inmate of the charges "shall be served," that the inmate "may" be represented and may record the hearing, that the hearing board "shall" be impartial, and that the inmate "shall" have limited rights to call favorable witnesses and confront and cross-examine adverse ones.[29] Isolation can then be recommended only if the inmate is found guilty, and he may not subsequently be placed in isolation without having waived his right to appeal.[30] In short, Massachusetts regulations are couched in language of an unmistakably mandatory character, requiring that certain procedures "shall," "will" or "must" be employed and that isolation will not occur absent a specified substantive predicate, that is, a guilty finding of major

[22] *Meachum*, 427 U.S. at 225 (quoting Wolff v. McDonnell, 418 U.S. 539, 556 (1974)).
[23] *Wolff*, 418 U.S. at 571 n.19.
[24] 425 U.S. 308 (1976).
[25] *Id.* at 313.
[26] *Id.* at 323.
[27] 103 C.M.R. § 430.23(3) (1978).
[28] *Id.*
[29] *Id.* §§ 430.11-.14.
[30] *Id.* §§ 430.16(2), 430.20.

misconduct.[31] Consequently, in future cases similar to *Cassesso*, the Court should find that inmates have a liberty interest in avoiding isolation time which requires due process protection, assuming the complaint is properly pleaded.

While the outcome in *Cassesso* may signify no more than poor pleading, other prisoners' rights cases during the *Survey* year manifested the Court's reluctance to address the substantive constitutional issues involved in the imposition of isolation. The Court in several instances invoked the mootness doctrine to avoid the issue. In both *Nelson v. Commissioner of Correction*,[32] and *Real v. Superintendent, Massachusetts Correctional Institution, Walpole*,[33] plaintiffs challenged the isolation time imposed by the Commissioner of Correction. The Supreme Judicial Court refused to consider the question in either case because the plaintiffs had already served their isolation time.[34] By invoking the mootness doctrine, the Court displayed a general deference to prison administration. The Court fully set out its basis for applying the doctrine in *Stokes v. Superintendent, Massachusetts Correctional Institution, Walpole*.[35] In *Stokes*, an inmate challenged his continuing placement in the Department Segregation Unit ("D.S.U.") at M.C.I. Walpole for failure to provide him with a status review hearing pursuant to regulations.[36] A status hearing was held after commencement of the legal action, but before the superior court decided the case.[37] Justice Nolan, writing for the Court, concluded that the case was moot because there was "no strong likelihood that the same dispute [would] recur between the same parties."[38]

Because the issue of isolation time already served had been raised three times in one term, the Court should have recognized the well-established, and frequently used, exception to the mootness doctrine. This exception applies when controversies, which are not likely to recur between the same parties, are "capable of repetition, yet evading review."[39] The

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[31] *See* Hewitt v. Helms, 459 U.S. 460, 470-71 (1983) (state regulations held to create liberty interest in not being placed in administrative or non-punitive segregation); Ecomoto v. Wright, 462 F. Supp. 397, 402-03 (N.D. Calif. 1976), *aff'd*, 434 U.S. 1052 (1978) (state regulations held to create liberty interest in not being placed in administrative solitary confinement).

[32] 390 Mass. 379, 456 N.E.2d 1100 (1983).

[33] 390 Mass. 399, 456 N.E.2d 1111 (1983).

[34] *Nelson*, 390 Mass. at 381 n.5, 456 N.E.2d at 1102 n.5; *Real*, 390 Mass. at 403 n.8, 456 N.E.2d at 1114 n.8.

[35] 389 Mass. 883, 452 N.E.2d 1123 (1983). Although *Stokes* did not raise a constitutional issue, the Court expressed its reason for invoking the mootness doctrine in prisoner rights cases most clearly in that case.

[36] *Id.* at 885, 452 N.E.2d at 1124.

[37] *Id.*

[38] *Id.* at 887, 452 N.E.2d at 1125.

[39] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 124-25 (1973); Blake v. Massachusetts Parole Bd., 369 Mass. 701, 708, 341 N.E.2d 902, 906 (1976).

exception should apply to the sanction of isolation time because state regulations require the superintendent to wait only five days before imposing the sentence, not long enough for judicial review of the disciplinary proceeding.[40]

2. Transfer to Segregation Unit or Higher Security Prison. During the *Survey* year, the Supreme Judicial Court, deferring to precedent, also refused to recognize a liberty interest regarding disciplinary transfer of prisoners to a higher security prison or to segregation.[41] In *Nelson v. Commissioner of Correction*, M.C.I. Norfolk inmates Nelson and Goldman had been accused of violating prison regulations by possessing a firearm and by stealing.[42] After a hearing, the disciplinary board of the Department of Correction found them guilty and imposed sanctions of thirty days isolation time, forfeiture of good time, referral of the matters to the district attorney, and recommendation of reclassification.[43] Both inmates served their isolation time and were duly reclassified from M.C.I. Norfolk to M.C.I. Walpole, a higher security prison. Reviewing the facts before it, the Court noted that the decision in the Supreme Court case, *Meachum v. Fano*[44], had concerned the very same institutions as did *Nelson*.[45] In *Meachum*, the Supreme Court had reviewed Massachusetts law and concluded that it conferred no right on a prisoner to remain in any particular prison.[46] According to the *Meachum* Court, "[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself . . . is too ephemeral and insubstantial to trigger procedural due process protections as long as prison officials have discretion to transfer him for whatever reason or for no reason at all."[47] Noting

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[40] *See* 103 C.M.R. §§ 430.18, 430.20.

[41] *Nelson*, 390 Mass. at 397, 456 N.E.2d at 1110; *Real*, 390 Mass. at 408, 456 N.E.2d at 1117. The reluctance of the Court can be inferred from its recognition in both cases that the prisoners' argument, which the trial court embraced, was "based on logic," followed by Court opinions holding to the contrary, with citations to federal authority. *See Nelson*, 390 Mass. at 397, 456 N.E.2d at 1110; *Real*, 390 Mass. 408, 456 N.E.2d at 1117.

[42] 390 Mass. at 382, 456 N.E.2d at 1103.

[43] *Id.* at 384, 386, 456 N.E.2d at 1104, 1105.

[44] 427 U.S. 215 (1976).

[45] *Nelson*, 390 Mass. at 382, 456 N.E.2d at 1103.

[46] 427 U.S. at 229.

[47] *Id.* at 228. In addition to *Meachum*, *Nelson* based its holding on later federal authority that applied the rule of *Meachum* in other contexts: McDonald v. Hall, 610 F.2d 16, 18-19 (1st Cir. 1979); Daigle v. Hall, 564 F.2d 884, 885-86 (1st Cir. 1977); Four Certain Unnamed Inmates v. Hall, 550 F.2d 1291, 1292 (1st Cir. 1977). *Nelson*, 390 Mass. at 397, 456 N.E.2d at 1110. Not cited was Lombardo v. Meachum, 548 F.2d 13 (1st Cir. 1977), which examined regulations postdating *Meachum*. The court of appeals in *Lombardo* saw no basis for concluding that the regulations, any more than the statutes or case law, created a "liberty interest." 548 F.2d at 15.

that disciplinary and administrative transfers may be ordered at the Commissioner's discretion, the *Nelson* Court found that inmates have no liberty interest requiring due process that can be violated by transfer to a higher security unit or facility.[48]

Similarly, in *Real v. Superintendent, Massachusetts Correctional Institution, Walpole*, the Supreme Judicial Court found that an inmate's transfer to segregation does not implicate a liberty interest requiring due process, even if the transfer resulted from a tainted disciplinary hearing.[49] John Real was an inmate in the general population of M.C.I. Walpole.[50] As a result of disciplinary board findings that he had violated various regulations, Real was subjected to sanctions of thirty-five days isolation, forfeiture of good time, and a referral to the D.S.U. at M.C.I. Walpole.[51] On appeal, the superintendent affirmed the recommendation to transfer Real to segregation, and the inmate was placed in the Institutional Disciplinary Unit ("I.D.U."), a short-term segregation disciplinary unit,[52] pending reclassification.[53]

The Supreme Judicial Court carefully noted that because the trial judge implicitly found that the segregation was for disciplinary reasons, the Court need not consider whether the statutes and regulations of the Commonwealth created a protected liberty interest respecting administrative transfers.[54] The Court found the short-term punitive segregation to be similar to any other transfer, and disposed of the due process issue by referring to its decision in *Nelson*.[55] As a result, the Court found that the trial judge had improperly ordered the return of the plaintiff to the general prison population.[56]

The Court did not find significant, nor cite, a critical change in the state regulations subsequent to the First Circuit decisions relied on in *Nelson*. The Court's failure to distinguish *Nelson* may be explained by the fact that the prisoner appeared pro se. On January 1, 1978, the Department of Correction adopted the following provision: "Notwithstanding any rule or regulation of the department to the contrary, a resident shall not be transferred to a departmental segregation unit for committing a specific

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[48] 390 Mass. at 397, 456 N.E.2d at 1110.

[49] 390 Mass. 399, 456 N.E.2d 1111 (1983).

[50] *Id.* at 403, 456 N.E.2d at 1114.

[51] *Id.* at 402, 456 N.E.2d at 1114.

[52] *Id.* at 400 n.3, 456 N.E.2d at 1113 n.3.

[53] *Id.* at 403, 456 N.E.2d at 1114.

[54] *Id.* at 407, 456 N.E.2d at 1116.

[55] *Id.* at 408, 458 N.E.2d at 1117. "As we have noted today, regardless of the logic of the trial judge's ruling, even if transfers are the direct consequence of a tainted disciplinary hearing, they do not implicate or infringe a state-created liberty interest protected by the due process clause of the fourteenth amendment." *Id.*

[56] *Id.*

punishable offense unless a disciplinary board has found him guilty of such specific offense and imposed a sanction . . . and the commissioner has made a finding . . . ."[57] The use of unmistakably mandatory language in this section creates a reasonable expectation, rooted in state law, of substantive due process protected by the United States Constitution, which must be provided prior to imposition of segregation, whether temporary in the I.D.U. or more permanent in the D.S.U. The trial judge in *Nelson* found the transfer punitive and the plaintiff was subjected to segregation as a punishment.[58] These segregated conditions were not reasonably anticipated by the plaintiffs, whatever the terminology of the Department of Correction. The Court therefore should have examined, as it did with good-time forfeiture, how much due process was owed Real before he could be segregated and if that standard had been met.

The failure of the Court to consider the issue is particularly difficult to reconcile with *Royce v. Commissioner of Correction*.[59] In *Royce*, the Commissioner was found in violation of the same section of regulations that governs the transfer of prisoners to D.S.U.[60] The prisoner plaintiff had allegedly been confined to the D.S.U. for two years without ever having received a classification hearing and a resulting order that he be placed in segregation.[61] Because the inmate had not been reclassified, the Court assumed he was in the D.S.U. as an inmate in administrative segregation awaiting action.[62] According to the Court, the two-year period violated Department of Correction rules requiring weekly status reviews.[63] While not reaching the constitutional question, the *Royce* Court indicated that the mandatory language in the "intricate classification procedures" required by the 1978 regulations before transferring an inmate to the D.S.U. appeared to create binding regulations, and failure to follow them gave rise to a viable cause of action.[64]

Finally, in *Lamoureux v. Superintendent, Massachusetts Correctional Institution, Walpole*, the Court considered whether due process applies to non-punitive or administrative segregation.[65] When the superior court heard the case, Lamoureux had been temporarily placed in the D.S.U. at M.C.I. Walpole awaiting reclassification.[66] A disciplinary board had

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[57] 103 C.M.R. § 421.07(2) (1978).
[58] 390 Mass. at 401, 456 N.E.2d at 1113.
[59] 390 Mass. 425, 456 N.E.2d 1127 (1983).
[60] *See* 103 C.M.R. § 421.07 (1978).
[61] *Royce*, 390 Mass. at 427 n.4, 456 N.E.2d at 1128 n.4.
[62] *Id.* at 429, 456 N.E.2d at 1129-30.
[63] *Id.* at 430, 456 N.E.2d at 1130.
[64] *Id.* at 428, 430, 456 N.E.2d at 1129-30.
[65] 390 Mass. 409, 411, 456 N.E.2d 1117, 1119 (1983).
[66] *Id.* at 413, 456 N.E.2d at 1121.

found him guilty of participation in a planned violent takeover of M.C.I. Walpole and recommended his reclassification to the D.S.U., along with other sanctions.[67] The trial judge found constitutional defects in the disciplinary hearing and ordered the inmate returned to the general prison population.[68] According to the trial court, Lamoureux's transfer to segregation was an administrative, and not a punitive decision.[69] On appeal, the Supreme Judicial Court found a protected liberty interest in state regulations governing administrative segregation of inmates awaiting investigation of misconduct or posing a security risk, and ruled that some level of due process was required, in contrast to its reasoning in *Real*.[70]

Constitutional adjudication should not turn on fine distinctions such as between administrative and punitive segregation. The *Lamoureux* Court noted rather archly that "the defendant and plaintiff have done little to make clear to us the morass of statutes, rules, and regulations surrounding isolation or solitary confinement, segregation, or separate confinement (administrative and disciplinary), and transfers (administrative and punitive) . . . ."[71] Consequently, the Court should not have decided the issue on such a narrow difference.

3. Good-Time Credits. Although prisoners were frustrated in their attempt to show a liberty interest in transfer to isolation or segregation units during the *Survey* year, the Supreme Judicial Court was willing to invalidate Department of Correction hearing procedures on due process grounds where good-time credits were involved. In *Wolff v. McDonnell*, the United States Supreme Court had already identified a number of minimum requirements of procedural due process when the forfeiture of good-time credit was at issue.[72] According to *Wolff*, a prisoner must be afforded: (1) advance written notice of the alleged violation of the disciplinary rules; (2) an impartial tribunal; (3) a written statement by the fact finders of the evidence relied upon and the reasons for the disciplinary action taken; and (4) the right to call witnesses and present documentary evidence if not "unduly hazardous to institutional safety or correctional goals."[73] Because of the high risk of reprisal, the Court stopped short of imposing constitutional requirements as to confrontation and cross-examination of adverse witnesses.[74] It was left to the sound discretion of

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[67] *Id.*
[68] *Id.* at 411, 456 N.E.2d at 1119.
[69] *See id.* at 416, 417, 456 N.E.2d at 1122.
[70] *Id.* at 417, 456 N.E.2d at 1122.
[71] *Id.* at 411 n.7, 456 N.E.2d at 1120 n.7.
[72] 418 U.S. 539, 563-72 (1974).
[73] *Id.* at 566.
[74] *Id.* at 567-69.

corrections officials to fashion measures that would minimize the risks of error and unfairness to the prisoner on the one hand, and avoid disruption in the prison on the other.[75]

In *Nelson v. Commissioner of Correction*,[76] the inmate challenged the constitutionality of the measures adopted by the Commissioner which provided that informant information could be considered by the disciplinary board outside of the presence of the inmate.[77] Nelson had been accused of possession of a firearm and stealing in violation of prison regulations.[78] The evidence presented at the disciplinary hearing consisted of the testimony of the deputy superintendent, who stated that he had received information from a "reliable informant" that Nelson had broken into an office at M.C.I. Norfolk, stolen a gun and sold it to another inmate.[79] The informant alleged that the other inmate charged in the incident, Goldman, knew where the gun was.[80] The disciplinary board adjourned in executive session to determine if disclosure of the informant or informants would create a substantial risk of harm and if their information was reliable.[81] The deputy superintendent presented the informant information and withdrew.[82]

At the conclusion of the executive session, the chairman announced that the information was reliable, that it had been independently corroborated, and that the informant would not be disclosed.[83] The only evidence offered in corroboration was an incident report and the testimony of a corrections officer that, at some time on the day of the alleged break-in, he had seen Nelson with another inmate near the office.[84] The disciplinary board found Nelson guilty and imposed loss of good-time, isolation, and recommendation of transfer.[85]

The Court found the informant procedures insufficient where the disciplinary board sought "to impose sanctions as severe as the sanctions in this case," the loss of good-time credits.[86] According to the Court, broad conclusory findings that a possible hazard to potential witnesses and institutional security existed did not justify consideration of hearsay in-

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[75] *Id.* at 568.
[76] 390 Mass. 379, 456 N.E.2d 1100 (1983).
[77] *Id.* at 380-81, 456 N.E.2d at 1102. *See* 103 C.M.R. §§ 430.14(3), 430.15 (1978).
[78] 390 Mass. at 382, 456 N.E.2d at 1103.
[79] *Id.* at 382-83, 456 N.E.2d at 1103.
[80] *Id.* at 383, 456 N.E.2d at 1103.
[81] *Id.*
[82] *Id.* at 384, 456 N.E.2d at 1103.
[83] *Id.* at 384-85, 456 N.E.2d at 1103-04.
[84] *Id.* at 384, 456 N.E.2d at 1103-04.
[85] *Id.* at 384, 456 N.E.2d at 1104.
[86] *Id.* at 393-94, 456 N.E.2d at 1109.

formation.[87] The record, the Court held, must establish some facts by which a reviewing court could reasonably conclude that the board inquired and found the informants or their information reliable.[88] The Court therefore remanded the case, ordering that the inmates' good-time credits be restored or that a new hearing be held.[89]

In *Lamoureux v. Superintendent, Massachusetts Correctional Institution, Walpole*, the Court found the record of the disciplinary hearing inadequate to protect due process rights.[90] A correctional officer had alleged that, based on his investigation and on reliable informant information, inmate Lamoureux had participated in a planned violent takeover of M.C.I. Walpole by the manufacture of weapons at the institution foundry.[91] The board reviewed the informant information outside the presence of the inmate and accepted it.[92] The board's written summary of the evidence did no more than state that the informants had been used in the past, had proved reliable, and had no motives or inducements.[93] The board did not indicate what the information was or whether it was personally known to the informant.

The Court held that, while the board had adequately indicated the basis for believing the informants credible, thus satisfying the requirements set forth in *Nelson*, the board must also indicate the extent to which the information was probative.[94] The board, according to the Court, was constitutionally required to record the informants' statements in factual rather than conclusory terms and to establish, by the specificity of the statements, that they were made from the informants' personal knowledge.[95]

4. Inmate Witnesses. In *Real v. Superintendent, Massachusetts Correctional Institution, Walpole*, the Court was receptive to the prisoner's position with respect to another procedural issue left unresolved by *Wolff*

[87] *Id.* at 394, 456 N.E.2d at 1109.

[88] *Id.* at 396, 456 N.E.2d at 1110.

[89] *Id.* at 398, 456 N.E.2d at 1111.

[90] 390 Mass. 409, 456 N.E.2d 1117 (1983).

[91] *Id.* at 412, 456 N.E.2d at 1120.

[92] *Id.* at 412-13, 456 N.E.2d at 1120.

[93] *Id.* at 414, 456 N.E.2d at 1121. It is unclear whether it was the knowledge of the reporting officer or of the members of the disciplinary board that established the informant's credibility.

[94] *Id.* at 415, 456 N.E.2d at 1122-23.

[95] *Id.* at 414, 456 N.E.2d at 1121. In *Nelson*, the Court suggested it might carry these requirements even further. Although not argued by counsel, the Court noted that when "*essential to a fair determination of a cause*, the disclosure of an informant's identity and the contents of his communication may be required on pain of dismissal." 390 Mass. at 394 n.19, 456 N.E.2d at 1109 n.19 (quoting Rovario v. United States, 353 U.S. 53, 60-61 (1957)) (emphasis in original).

v. McDonnell.[96] The issue in *Real* was whether federal due process requirements impose a duty on the disciplinary board to explain, in any fashion, at the hearing or later, why witnesses the prisoner sought to call were not allowed to testify.[97] The pertinent state regulations did not require it.[98]

Real had been charged with disobeying an order and with various serious violations impairing the security and orderly running of M.C.I. Norfolk.[99] He requested representation of counsel, the presence of the reporting officer, and two inmates as witnesses in his defense.[100] These requests were denied.[101]

The Supreme Judicial Court invalidated the disciplinary hearing and its sanctions on the ground that the prison authorities had made no explanation for the denial of inmate witnesses.[102] The Court stated that the right to call witnesses is important to a prisoner who faces a severe credibility problem when trying to disprove the charges of a prison guard.[103] Accordingly, the Supreme Judicial Court held that the administrative record must justify a decision not to call witnesses, lest the hearing become a mere charade.[104] The Court indicated, however, that this requirement might well not apply to a decision to place an inmate in administrative segregation.[105] In such an instance, according to the Court, " 'an informal nonadversary evidentiary review [may be] sufficient with merely some notice of the charges against [the prisoner] and an opportunity to present his views.' "[106]

In summary, during the *Survey* year, the Supreme Judicial Court narrowly applied the threshold liberty interest test to prison disciplinary hearings. It relied on federal constitutional law and precedent to find isolation time and punitive transfer — either to other institutions or to segregation within the institution — outside the reach of the procedural protections of the due process clause. The decisions do not, however, clearly foreclose new attempts to establish liberty interests in these and other contexts through the state constitution and through more vigorous and thorough exposition of the Department of Correction's own regula-

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[96] *See Wolff*, 418 U.S. at 566.
[97] *Real*, 390 Mass. at 405, 456 N.E.2d at 1115.
[98] 103 C.M.R. § 430.14 (1978).
[99] 390 Mass. at 402, 456 N.E.2d at 1114.
[100] *Id.* at 403, 456 N.E.2d at 1114.
[101] *Id.*
[102] *Id.* at 407, 456 N.E.2d at 1116.
[103] *Id.* at 406, 456 N.E.2d at 1116.
[104] *Id.* at 406-07, 456 N.E.2d at 1116.
[105] *Id.* at 407, 456 N.E.2d at 1116.
[106] *Id.* at 407 n.11, 456 N.E.2d 1116 n.11 (citing *Hewitt v. Helms*, 459 U.S. 460, 476 (1983)).

tions. Together with the Court's willingness to look critically at prison procedures, new life may yet be found in the due process clause.

§ 15.8. Right to Privacy — Sexual Acts. Two cases during the *Survey* year involving private consensual sexual behavior between adults implicated the constitutional right to privacy. In *Commonwealth v. Walter*,[1] the defendant was convicted of prostitution.[2] She had solicited customers for massage in a newspaper advertisement.[3] When an undercover policeman responded, she had, for a fee, performed a sexual act for him.[4]

The Supreme Judicial Court declined to extend a constitutional right to privacy, either under the federal or Massachusetts constitution, to a person engaged in indiscriminate sexual acts for hire.[5] The Court referred to the impersonal nature of the performance, its availability to anyone willing to pay, and concluded that it did not involve "the type of intimate, personal decision which is protected by the right to privacy."[6]

In *Commonwealth v. Stowall*,[7] the defendant filed a motion to dismiss a complaint against her for adultery.[8] The trial court reported the question. The defendant had flagged down a passing van and, after a short conversation with the driver, proceeded with him to a secluded, wooded area.[9] She was seen by police through the rear window of the van having sexual relations with the male driver.[10] Later, the defendant admitted that she was married to someone else.[11]

The Court decided that the defendant was not protected by any privacy right under the United States Constitution.[12] According to the Court, any personal right to commit adultery free from prosecution was not "fundamental" or "implicit in the concept of ordered liberty," as were those rights relating to marriage, procreation, and family relations.[13] On the other hand, the Court found that the state had a legitimate interest in preserving the institution of marriage and could therefore prohibit adultery.[14]

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§ 15.8. [1] 388 Mass. 460, 446 N.E.2d 707 (1983).
[2] *Id.* at 461, 446 N.E.2d at 708.
[3] *Id.*
[4] *Id.* at 462, 446 N.E.2d at 709.
[5] *Id.* at 465, 446 N.E.2d at 710.
[6] *Id.*
[7] 389 Mass. 171, 449 N.E.2d 357 (1983).
[8] *Id.* at 172, 449 N.E.2d at 358.
[9] *Id.*
[10] *Id.* at 172, 449 N.E.2d at 359.
[11] *Id.*
[12] *Id.* at 173-76, 449 N.E.2d at 359-61.
[13] *Id.* at 174, 449 N.E.2d at 360.
[14] *Id.* at 175, 449 N.E.2d at 360.

The Court's analysis and conclusion in *Walter* is difficult to fault. Clearly, Walter's advertisement and indiscriminate behavior belied any asserted privacy interest. Stowall's claim was similarly affected, although the Court did not explicitly advert to it. The casual and open circumstances under which she committed adultery suggested no great personal concern for her privacy. This openness would have been a narrower and sounder basis for decision than the normative and tautological statement that sexual behavior, or the freedom to engage in it free of prosecution, is not fundamental or implicit in the concept of ordered liberty.[15] No one can doubt that society can proceed against the "sexual embrace at high noon on Times Square."[16] But to imply that any sexual conduct inimical to marriage may not be constitutionally protected would seem to go unjustifiably far to defeat legitimate expectations of privacy.

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[15] *See* Smayda v. United States, 352 F.2d 251 (9th Cir. 1965) (toilet stall in public park used for homosexual activities held not protected for fourth amendment purposes).

[16] Paris Adult Theatre I v. Slaton, 413 U.S. 49, 67 (1973).