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C H A P T E R 1 2

Criminal Law, Procedure and Administration

ARTHUR L. BERNEY

§12.1. **Crime in Massachusetts.** Not to depart from customary practice, the data representing the annual increase in crime in the Commonwealth are here presented. Table I shows the increase in the major offense crime rate over the last five-year period for which information is available. Over this relatively short period the Massachusetts crime rate has increased a startling 61 percent.

T A B L E I
Number of Major Offenses per One Hundred
Thousand of Population: 1959-1963¹

	<i>Total Offenses</i>	<i>Murder and Non-negligent Manslaughter</i>	<i>Forcible Rape</i>	<i>Robbery</i>
1959	708.1	1.2	4.5	16.5
1960	750.6	1.4	4.8	20.4
1961	927.2	1.5	5.6	20.4
1962	1030.1	1.8	5.0	25.8
1963	1137.1	1.9	4.5	27.0
	<i>Aggravated Assault</i>	<i>Burglary</i>	<i>Larceny \$50 and over</i>	<i>Auto Theft</i>
1959	19.4	287.5	169.5	209.6
1960	19.4	309.2	184.2	211.1
1961	22.6	376.1	229.6	271.6
1962	26.0	410.4	257.5	303.6
1963	28.8	443.1	265.7	366.0

In the past the figures for Massachusetts, New England, and the United States have been compared and consistently the Massachusetts crime rate falls between those of the other two areas.² Although the rate of crime in the Commonwealth still trails the national average, the margin of difference becomes slighter each year. Over the same

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§12.1. ¹ The data through 1962 is taken from 1963 Ann. Surv. Mass. Law §11.1, Table I. The 1963 figures are from the 1963 Uniform Crime Reports 57.

² See 1962 Ann. Surv. Mass. Law §11.1 at 121.

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five-year period (1959-1963) the rate of increase is 50 percent in New England and 31 percent in the United States, as compared to the 61 percent Massachusetts figure noted above. Should this trend continue, the Commonwealth rate of increase will soon outstrip the national rate — an ignominious honor.

T A B L E I I

Rate of Major Offenses Committed in Massachusetts,
New England, and the United States per One
Hundred Thousand of Population: 1959-1963³

	<i>Massachusetts</i>	<i>New England</i>	<i>United States</i>
1959	708.1	670.3	917.5
1960	750.6	725.8	1038.7
1961	927.2	811.3	1052.8
1962	1030.1	884.2	1103.5
1963	1137.1	1005.6	1198.3

Presumably Massachusetts would show up better in a comparison with other similar urban-industrial states. But this is not the case; in fact, the rate of growth contrasts prove most unfavorable. As Table III shows, the Massachusetts increase in crime rate (61 percent) was approximated only by New Jersey (58 percent). The figures for New York, Michigan, and Pennsylvania, 34, 25, and 17 percent respectively, fall far below the Massachusetts high mark.⁴

T A B L E I I I

Rate of Major Offenses Committed in Massachusetts,
New York, Pennsylvania, New Jersey, and
Michigan per One Hundred Thousand
of Population: 1959-1963⁵

	<i>Massachusetts</i>	<i>New York</i>	<i>Pennsylvania</i>	<i>New Jersey</i>	<i>Michigan</i>
1959	708.1	962.6	655.9	778.4	1077.2
1960	750.6	1045.0	688.2	994.0	1230.9
1961	927.2	1066.0	654.6	1005.5	1228.7
1962	1030.1	1147.1	700.4	1125.6	1293.6
1963	1137.1	1289.7	767.2	1234.4	1348.6

³ The data through 1961 is taken from 1962 Ann. Surv. Mass. Law §11.1, Table III. The 1962 and 1963 figures are from the 1963 Uniform Crime Reports 48.

⁴ The four states used for comparison were chosen on the basis of demographic similarity. Naturally the choice was made without regard to previous crime record. In terms of population and ratio of population living in metropolitan areas, Massachusetts most resembles Michigan and New Jersey. The ratio of city population to over-all population in these three states is as follows: Massachusetts — 5,174,000/5,218,000 (99%); Michigan — 6,877,000/8,116,000 (85%); New Jersey — 6,116,000/6,470,000 (95%). Compiled from 1963 Uniform Crime Reports 57-58, 60.

⁵ Compiled from 1959 Uniform Crime Reports 43-44, 46-48; 1960 Uniform Crime Reports 43-44, 46-48; 1961 Uniform Crime Reports 36; 1962 Uniform Crime Reports 45-46, 48-50; 1963 Uniform Crime Reports 57-58, 60-62.

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Although the Massachusetts rate is still lower than the major crime rate for the nation (Table II) and lower than rates of three of four comparable northeastern states (Table III), its high rate of increase seems to demand investigation and explanation. Actually, the marked differences in rate of increase may yield to careful statistical analysis, or may be the result of poorly standardized data-taking techniques⁶ or of some other nonsubstantive distinction, but only further study would expose such bases as these. Whether the figures alone can direct investigation is questionable. For example, the hypothesis that the discrepancy in rate growth may be ascribed almost wholly to the rate of change in the single category of auto theft⁷ (see Table IV) is, at this stage of inquiry, a matter of conjecture. That the figures invite investigation by persons concerned with such matters as this is, however, beyond doubt.

T A B L E I V

Number of Auto Thefts Committed per One Hundred
Thousand of Population in Massachusetts, New York,
Pennsylvania, New Jersey, Michigan, and the
United States: 1959 and 1963⁸

	<i>Massachusetts</i>	<i>New York</i>	<i>Pennsylvania</i>
1959	209.6	164.1	116.5
1963	366.0	229.0	157.0
Amount of Increase	156.4	64.9	40.5
	<i>New Jersey</i>	<i>Michigan</i>	<i>United States</i>
1959	159.3	175.8	162.3
1963	260.1	223.4	211.6
Amount of Increase	100.8	47.6	49.3

§12.2. Procedural due process: Arrest, search and seizure. Matters of procedural due process continue to be the dominant theme of

⁶ See Ferracuti, Hernandez and Wolfgang, *A Study of Police Errors in Crime Classification*, 58 J. Crim. L., C.&P.S. 113 (1962). The authors regarded their data "as additional proof of the low validity of crime reporting statistics and of the need for more careful control and specific training in this important police activity." *Id.* at 119. See also F.B.I., *Uniform Crime Reporting Handbook* (1955).

⁷ A reading of the applicable motor vehicle theft statutes proves the Massachusetts law, if anything, more specific and strict than those of the four sister states. Compare G.L., c. 266, §28, with Mich. Comp. Laws 750.413; N.J. Stat. Ann. 2A:119-2; 40 N.Y. Crim. Code c. 122, §§1293(a), 1294; and 18 Penn. Stat. §4903. Of course the kind of enforcement and administration a law receives qualifies its effect and meaning. For example, in 1961, out of 14,215 arrests in Massachusetts (1962 Uniform Crime Reports) for auto thefts, there were 1494 prosecutions and 864 convictions; 377 of those convicted were placed on probation. The records show that only 50 of these convicted persons were actually jailed in 1961, and only 21 received sentences of two years or longer. See 1961 Mass. Dept. of Correction Statistical Report 20, 22, 44, 45, 88.

⁸ Compiled from 1959 Uniform Crime Reports 35, 43-44, 46-48; 1963 Uniform Crime Reports 49, 57-58, 60-62.

criminal appeals in the Commonwealth. Recent major decisions of the United States Supreme Court in this area¹ provide the sustaining impetus to this laudable development. Almost all of the significant cases classifiable under the rubric Criminal Law raise issues of the administration of criminal justice under evolving constitutional standards. Many of these cases, consequently, are better considered under the heading Constitutional Law, and the reader is referred to that chapter of the SURVEY.²

Commonwealth decisions in the 1964 SURVEY year continued the struggle to work out the elements of illegal search and seizure.³ As in many other areas of law in which standards of conduct are prescribed, the temptation to achieve meaningful organization through factual categorization is strong. Actually, this may prove the more efficacious approach when, as here, the initial judgments are normally made in a noncontemplative atmosphere by policemen, men ordinarily not of judicious temperament or training. Rules governing particular situations, not principles, are better suited to such circumstances. Thus, through comparing cases such as *Commonwealth v. McCleery*⁴ with *Commonwealth v. LaBossiere*⁵ and *Rios v. United States*,⁶ the scope of a legal search of an occupied vehicle begins to emerge. In a similar manner, comparison of *Commonwealth v. Mekalian*⁷ with *Commonwealth v. McDermott*⁸ points up the differences between searches made pursuant to lawful and unlawful arrests of bookies.⁹ If the proscribed

§12.2. 1 See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 83 Sup. Ct. 792, 9 L. Ed. 2d 799 (1963) (right to counsel in state courts in noncapital offenses); *Mapp v. Ohio*, 367 U.S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961) (illegal search and seizure); *McNabb v. United States*, 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943) (federal requirements of early arraignment).

2 See §§11.3; 11.4 *supra*. Cases treated in those sections and not separately treated here include *Commonwealth v. McCarthy*, 1964 Mass. Adv. Sh. 1133, 200 N.E.2d 264; *La Morre v. Superintendent of Bridgewater State Hospital*, 1964 Mass. Adv. Sh. 859, 199 N.E.2d 204; *Commonwealth v. Bouchard*, 1964 Mass. Adv. Sh. 727, 198 N.E.2d 411; *Commonwealth v. O'Leary*, 1964 Mass. Adv. Sh. 689, 198 N.E.2d 403; *Keenan v. Commonwealth*, 346 Mass. 534, 194 N.E.2d 637 (1963); *Letters v. Commonwealth*, 346 Mass. 403, 193 N.E.2d 578 (1963).

3 At least four cases that past SURVEY year involved search and seizure issues: *Commonwealth v. LaBossiere*, 1964 Mass. Adv. Sh. 685, 198 N.E.2d 405; *Commonwealth v. McDermott*, 1964 Mass. Adv. Sh. 519, 197 N.E.2d 668; *Commonwealth v. Lehan*, 1964 Mass. Adv. Sh. 455, 196 N.E.2d 840; *Commonwealth v. Mekalian*, 346 Mass. 496, 194 N.E.2d 390 (1963).

4 345 Mass. 151, 186 N.E.2d 598 (1962), noted in 1963 Ann. Surv. Mass. Law §§10.2; 21.1.

5 1964 Mass. Adv. Sh. 685, 198 N.E.2d 405.

6 364 U.S. 253, 80 Sup. Ct. 1431, 4 L. Ed. 2d 1688 (1960). See also *Henry v. United States*, 361 U.S. 98, 80 Sup. Ct. 168, 4 L. Ed. 2d 134 (1959); *Brinegar v. United States*, 338 U.S. 160, 69 Sup. Ct. 1302, 93 L. Ed. 1879 (1949); *Carroll v. United States*, 267 U.S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543 (1925).

7 346 Mass. 496, 194 N.E.2d 390 (1963).

8 1964 Mass. Adv. Sh. 519, 197 N.E.2d 668.

9 Both arrests were based on G.L., c. 271, §17. See also *Commonwealth v. Berwick*, 346 Mass. 5, 189 N.E.2d 846 (1963), and *Commonwealth v. Laudate*, 345 Mass. 169, 186 N.E.2d 598 (1962), both noted in 1962 Ann. Surv. Mass. Law §10.2.

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conduct does not involve a breach of the peace this means that a lawful arrest can afford to wait upon, and therefore must be pursuant to, a valid warrant.

By far the most interesting of the arrest and search cases was *Commonwealth v. Lehan*,¹⁰ if for no other reason than the fact that it involved a pedestrian who, at the time of his initial detention and interrogation, was engaged in conduct no more suspicious than walking rapidly while carrying two cardboard cartons. Such a fact situation brings the force of search and seizure safeguards down to a personal level.

Although the Supreme Judicial Court held that, in the absence of probable cause for arrest, the inspection of the cartons, to verify the suspect's description of their contents, was an illegal search,¹¹ it was at pains to sustain the validity of "on-the-street detention" or "brief threshold inquiry" not amounting to an arrest. Reading the case of *Rios v. United States*¹² as recognizing the constitutionality of such "threshold inquiry even with brief detention,"¹³ the Supreme Judicial Court concurred in the California high court's view, in *People v. Mickelson*,¹⁴ that the "Federal constitutional proscription of unreasonable searches and seizures does not bar reasonable State rules covering on-the-street interrogation."¹⁵ Apparently the California court interpreted the federal decisions, including *Rios*, as elaborating a federal rule that would bar detention unless probable cause exists.¹⁶ The state rule authorizing this "reasonable on-the-street interrogation" in the *Lehan* case is General Laws, Chapter 41, Section 98,¹⁷ a supposed restatement of the New England night watch law¹⁸ and counterpart of

¹⁰ 1964 Mass. Adv. Sh. 455, 196 N.E.2d 840.

¹¹ Unless, of course, the fact finder determined that consent to search had been willingly given, or that the search had been made in order to assure the safety of the arresting officer—i.e., a frisking. *Id.* at 462, 196 N.E.2d at 846. See Uniform Arrest Act §3.

¹² 364 U.S. 253, 80 Sup. Ct. 1431, 4 L. Ed. 2d 1688 (1960).

¹³ 1964 Mass. Adv. Sh. 455, 459, 196 N.E.2d 840, 844.

¹⁴ 59 Cal. 2d 448, 380 P.2d 658 (1963).

¹⁵ 1964 Mass. Adv. Sh. 455, 460, 196 N.E.2d 840, 844.

¹⁶ *People v. Mickelson*, 59 Cal. 2d 448, 451-452, 380 P.2d 658, 660 (1963). See *Henry v. United States*, 361 U.S. 98, 80 Sup. Ct. 168, 4 L. Ed. 2d 134 (1959); *Brinegar v. United States*, 338 U.S. 160, 69 Sup. Ct. 1302, 93 L. Ed. 1879 (1949). See also *Dodd*, *Cases on Constitutional Law* 624 (1963 Supp.).

¹⁷ "During the night time . . . [police officers] may examine all persons abroad whom they have reason to suspect of unlawful design, and demand of them their business abroad and whither they are going. . . . Persons so suspected who do not give a satisfactory account of themselves . . . may be arrested by the police, and may thereafter be safely kept by imprisonment or otherwise unless released in a manner provided by law, and taken before a district court to be examined and prosecuted."

¹⁸ "Constables who developed from the 'tithing men' with responsibility for the good behavior of a 'tithing,' or group of ten houses, had their functions outlined by an old English statute in 1285 which defined the 'Watch and Ward' and directed them to watch during the night *and arrest suspicious persons*. . . [this act] simply restates the common law of New England." 36th Report of the Judicial Council, Pub. Doc. No. 144, at 69-70 (1960).

Section Two of the Uniform Arrest Act.¹⁹ There was, however, an intimation that such interrogation would not be confined to the terms of that particular statute.²⁰

One salutary aspect of the *Lehan* decision was the Court's willingness to consider the language in *Ker v. California*²¹ as inviting the implementation of the exclusionary rule according to reasonable state standards. Quoting from the *Ker* case to the effect that "the States are not . . . precluded from developing workable rules governing arrests, searches, and seizures to meet 'the practical demands of effective criminal investigation and law enforcement,'" ²² the Court, while recognizing the binding effect of federal standards, maintained that "there will be incidents of the exclusionary rule not so established which State courts may fashion at least in the first instance."²³

Superficially it would seem to make no difference whether the fruits of a search are excluded because the search was made incidental to a detention only or because it was made incidental to an arrest based upon no probable cause. However, it is the implication of this distinction that creates doubt. Supposedly, if the search in the *Lehan* case had been postponed until after the arrest, which the Court deemed reasonable, it would have been a legal search incident to a lawful arrest.²⁴ Therefore, the moment at which a mere detention becomes an arrest is crucial.²⁵ Clearly time alone cannot be the criterion, since an arrest is sometimes instantaneous.²⁶ Perhaps the only workable test would be based on the content of a reasonable threshold inquiry. In the terms of the Uniform Arrest Act provision: "demand of him his name, address, business abroad and whither he is going."²⁷ Unsatisfactory or evasive replies to such inquiries, in the light of the circumstances and the knowledge of the officer,²⁸ must either establish

¹⁹ See Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 344 (1942). See also N.H. Rev. Stat. Ann., c. 594, §2 (1955); R.I. Gen. Laws §12-7-1 (1956).

²⁰ 1964 Mass. Adv. Sh. 455, 460-461, 196 N.E.2d 840, 845.

²¹ 374 U.S. 23, 83 Sup. Ct. 1623, 10 L. Ed. 2d 726 (1963).

²² 1964 Mass. Adv. Sh. 455, 460, 196 N.E.2d 840, 844, quoting 374 U.S. 23, 34, 83 Sup. Ct. 1623, 1630, 10 L. Ed. 2d 726, 738 (1963).

²³ 1964 Mass. Adv. Sh. 455, 460, 196 N.E.2d 840, 844. See 1962 Ann. Surv. Mass. Law §10.2, at 107-108 (discussion raising this issue of federal-state standards). Cf. *Jackson v. Denno*, 378 U.S. 368, 401 n.1, 84 Sup. Ct. 1774, 1794 n.1, 12 L. Ed. 2d 908, 930 n.1 (1964) (Black J., dissenting).

²⁴ See 1964 Mass. Adv. Sh. 455, 462-463, 196 N.E.2d 840, 846.

²⁵ "The validity of the search thus turns upon the narrow question of when the arrest occurred." *Rios v. United States*, 364 U.S. 253, 262, 80 Sup. Ct. 1431, 1437, 4 L. Ed. 2d 1688, 1694 (1960).

The "smart criminal" in these circumstances may be able to gain an advantage by forcing the issue — asking whether he is under arrest and then attempting to leave should he receive a negative answer.

²⁶ Nor can we expect help from definitions. See Varon, *Searches, Seizures and Immunities* 70 (1961).

²⁷ Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 344 (1942). The significance of consent is dubious in that a sense of compulsion is natural in these circumstances. See *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951).

²⁸ For example, if the police in *Lehan* had information of a burglary having been

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the foundation for an arrest or else the suspect ought to be released. Detention beyond this stage, it is submitted, should amount to an arrest for the purpose of determining the legality of any subsequent searches and seizures. A similar end is achieved by the federal rule requiring that a detention be based upon probable cause.²⁹

Another disturbing aspect of this case concerns the length of time a suspect may be held under the guise of detention without being charged and arraigned. The Uniform Arrest Act provides for a two-hour maximum limit before charges are preferred.³⁰ Not to impose reasonable restrictions on pre-arraignment police interrogations is to make a mockery of recent Supreme Court decisions regarding right to counsel³¹ and prompt arraignment.³² This extraordinary power to arrest (detain) upon mere suspicion,³³ if legitimate at all,³⁴ must be construed strictly³⁵ and certainly cannot be understood to give sanction to the "72 hour hold for investigation" police practice³⁶ or similar unsupportable investigatory procedures. To do otherwise would produce the ludicrous result of condemning the arrest without a warrant of persons committing a non-breach-of-the-peace offense in the presence of an officer while condoning an arrest in the nighttime on mere suspicion.³⁷

It is paradoxical that the law should seek to protect the integrity of the individual by suppressing evidence of guilt obtained by coercion or immoderate searches while allowing direct invasions of the freedom of

committed in the area, they would have had probable cause for arresting a former burglary suspect who gave unsatisfactory answers to their questions.

²⁹ See note 15 *supra*.

³⁰ "The total period of detention shall not exceed two hours. The detention is not an arrest and shall not be recorded as an arrest in any official record. At the end of the detention the person so detained shall be released or be arrested and charged with a crime." Warner, *The Uniform Arrest Act*, 28 Va. L. Rev. 315, 344 (1942).

³¹ See, e.g., *Escobedo v. Illinois*, 378 U.S. 478, 84 Sup. Ct. 1758, 12 L. Ed. 2d 977 (1964); *Massiah v. United States*, 377 U.S. 201, 84 Sup. Ct. 1199, 12 L. Ed. 2d 246 (1964).

³² See, e.g., *Mallory v. United States*, 354 U.S. 449, 77 Sup. Ct. 1356, 1 L. Ed. 2d 1479 (1957); *McNabb v. United States*, 318 U.S. 332, 63 Sup. Ct. 608, 87 L. Ed. 819 (1943). Although the *McNabb-Mallory* rule is not yet binding on the state courts, its force cannot be ignored by them. See *Spano v. New York*, 360 U.S. 315, 79 Sup. Ct. 1202, 3 L. Ed. 2d 1265 (1959).

³³ Keating, *Search and Seizure*, 7 Boston Bar J. 11, 18 (No. 3, 1963).

³⁴ See *Draper v. United States*, 358 U.S. 307, 318, 79 Sup. Ct. 329, 336, 3 L. Ed. 2d 327, 335 (1959) (Douglas J., dissenting). See also Douglas, *Vagrancy and Arrest on Suspicion*, 70 Yale L.J. 1, 13 (1960).

³⁵ Once the special bases for a different rule of arrest during the nighttime have been dissipated, that is, once the identity of the suspect has been ascertained and it has been established that he is not engaging or about to engage in conduct which would amount to a breach of the peace (see *Commonwealth v. Gorman*, 288 Mass. 294, 192 N.E. 618 (1934) and notes 7 and 8 *supra*), the ordinary criteria of lawful arrest ought to come into play.

³⁶ Varon, *Searches, Seizures and Immunities* 4 (1961).

³⁷ *Commonwealth v. Mekalian*, 346 Mass. 496, 194 N.E.2d 390 (1963); *Commonwealth v. O'Conner*, 7 Allen 583 (Mass. 1863); *Commonwealth v. Ruggles*, 6 Allen 558 (Mass. 1863).

the individual by unwarranted arrests.³⁸ The United States Supreme Court in *Mapp*³⁹ decided to apply the exclusionary rule universally as the only effective deterrent to illegal searches and seizures.⁴⁰ By analogy, the only effective deterrent to illegal arrests might be the barring of prosecutions arising out of such arrests.⁴¹ This is hardly a likely development.⁴² Firstly, the rule that illegal arrest provides no ground for challenging criminal jurisdiction is grounded in a well-established policy that crimes are wrongs against the public order and therefore cannot be vitiated by the wrongdoing of the state's agents.⁴³ Secondly, it simply might be placing too great an obstacle in the path of zealous prosecution of our law enforcers' duties.⁴⁴

One alternative to this admittedly extreme remedy would be to extend the "fruit of the poisonous tree" doctrine to any evidence educed in connection with an illegal arrest.⁴⁵ This issue was not quite reached in *Commonwealth v. Palladino*,⁴⁶ since there the alleged "tainted evidence" — conceivably contradictory statements of the accused — was held not harmful. It is fair to infer, however, that the Massachusetts high Court does not mean to extend the doctrine beyond the limitations enunciated in *Wong Sun v. United States*:⁴⁷

We need not hold that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at

³⁸ See Barrett, Personal Rights, Property Rights, and the Fourth Amendment, 1960 Sup. Ct. Rev. 46; Foote, Safeguards in the Law of Arrest, 52 N.W.U.L. Rev. 16, 41-42 (1957).

³⁹ 367 U.S. 643, 81 Sup. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

⁴⁰ This rationale may already have been extended to the problem of self-incrimination — so intimately related to both search and seizure and arrest. *Malloy v. Hogan*, 378 U.S. 1, 84 Sup. Ct. 1489, 12 L. Ed. 2d 653 (1964).

⁴¹ See Note, 100 U. Pa. L. Rev. 1182, 1215 (1952). Certainly the authorities are correct in describing the interrogation upon arrest as a most critical stage in establishing guilt. Note, An Historical Argument for the Right to Counsel During Police Interrogation, 73 Yale L.J. 1000, 1041-1044 (1964); Note, The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 220 (1964). See §11.3, n.4, *supra*.

⁴² Cf. *Frisbie v. Collins*, 342 U.S. 519, 72 Sup. Ct. 509, 96 L. Ed. 541 (1952); *Ker v. Illinois*, 119 U.S. 436, 7 Sup. Ct. 225, 30 L. Ed. 421 (1886). See also Allen, Due Process and State Criminal Procedures: Another Look, 48 N.W.U.L. Rev. 16, 27-28 (1953).

⁴³ See *Commonwealth v. Miller*, 297 Mass. 285, 287, 8 N.E.2d 603, 604 (1937); *Commonwealth v. Gorman*, 288 Mass. 294, 300, 192 N.E. 618, 620 (1934).

⁴⁴ The hue and cry of law enforcement officials would make faint, by contrast, the outcries against the *Mapp* and *McNabb* rules. The dire predictions concerning the hampering of criminal administration have not materialized in the federal arena. But see Inbau, Police Interrogation — A Practical Necessity, 52 J. Crim. L., C.&P.S. 16 (1961).

⁴⁵ Cf. *Nardone v. United States*, 308 U.S. 338, 341, 60 Sup. Ct. 266, 268, 84 L. Ed. 307, 311-312 (1939); *Commonwealth v. Spofford*, 343 Mass. 703, 708, 180 N.E.2d 673, 676 (1962).

⁴⁶ 346 Mass. 720, 195 N.E.2d 769 (1964).

⁴⁷ 371 U.S. 471, 83 Sup. Ct. 407, 9 L. Ed. 2d 441 (1963).

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by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."⁴⁸

These are hardly distinctions apt to deter either illegal arrests or ordinary wrongful interrogation techniques.⁴⁹ The interest in prompt and efficient law enforcement and the interest in preventing the abridgement of individual rights by unconstitutional means of law enforcement are sometimes hard to reconcile.

§12.3. Search warrant: Hearsay. Only two other cases, both arising in the federal courts in Massachusetts, deserve some mention in this Chapter. Both raise issues collateral to the topic under discussion above.

With the increased emphasis on search and arrest matters, the basis for issuance of search and arrest warrants has gained corresponding significance in recent years.¹ It is not surprising, therefore, to discover new legislative efforts in this area.² In *Ventresca v. United States*,³ the validity of a search warrant issued on the basis of hearsay evidence, to an indeterminate degree, was reviewed. The First Circuit Court of Appeals, one judge dissenting, considered an affidavit comprising information based on personal knowledge of the affiant, a federal agent, and reports of observations and investigations obtained from other federal agents, inadequate in that it failed to distinguish the personal knowledge from the hearsay and failed to state whether such hearsay was direct or not. The decision is significant in its refusal to accept as a basis for issuance the fact that all information allegedly came from government agents. Apparently the warrant issuer must also know the basis and nature of the information before he can rightly judge its reliability and credibility, notwithstanding the unquestionable trustworthiness of the informant.⁴ This is a strict, but justified, reading of issuance of warrants based on hearsay as sanctioned in *Jones v. United States*.⁵

§12.4. Illegal arrest: Inadmissible evidence. The other federal decision of interest is *Burke v. United States*.¹ In that case one John Burke was sought for questioning by postal authorities in connection with a mail robbery. Co-operating Boston police officers arrested John's brother Leo when he arrived at John's home in an intoxicated

⁴⁸ Id. at 487-488, 83 Sup. Ct. at 417, 9 L. Ed. 2d at 455, quoted in 346 Mass. 720, 724, 195 N.E.2d 769, 771 (1964).

⁴⁹ See generally Kamisar, *Illegal Searches or Seizures*, 1961 U. Ill. L. Forum 78; Remington, *The Law Relating to "On the Street" Detention*, 51 J. Crim. L., C.&P.S. 386 (1960).

§12.3. ¹ See discussion in §11.2, n.13 *et seq. supra*.

² G.L., c. 276, §§1-7, amended by Acts of 1964, c. 557, §§1-7. See §12.5 *infra*.

³ 324 F.2d 864 (1st Cir. 1963).

⁴ Cf. *Jones v. United States*, 362 U.S. 257, 80 Sup. Ct. 725, 4 L. Ed. 2d 697 (1960); *United States v. McCormick*, 309 F.2d 367 (7th Cir. 1962), *cert. denied*, 372 U.S. 911, 83 Sup. Ct. 724, 9 L. Ed. 2d 719 (1963).

⁵ 362 U.S. 257, 80 Sup. Ct. 725, 4 L. Ed. 2d 697 (1960).

§12.4. ¹ 328 F.2d 399 (1st Cir. 1964).

condition. The only explanation he received of his arrest was that he was "under suspicion of a mail robbery in Dorchester." A search of his person disclosed \$118 in bills, some of which, it was later learned, were marked bills taken in the mail robbery. At the time of his arrest Leo was not considered a federal suspect, but postal inspectors, when informed of his arrest, availed themselves of the earliest opportunity, seven hours after arrest, to question him. During this interrogation one of the inspectors was given permission to have the bills examined, after he had warned Leo of the possible consequences and advised him of his constitutional rights.

The court found Leo's arrest to be illegal. Nevertheless, evidence obtained during the arrest and interrogation was not excluded, because "not every statement or surrender of property made during an illegal arrest is created inadmissible because of the illegal arrest."² The evidence was found to be voluntarily surrendered.

Perhaps of greater consequence is the holding that Rule 5(a) of the Federal Rules of Criminal Procedure, requiring arraignment without unnecessary delay, had not been violated because the facts were insufficient to constitute Leo a federal prisoner under the protection of those rules.³ The only case cited in support of this holding was *United States v. Coppola*,⁴ which was described by Judge Aldrich, in a dissenting opinion, as inapposite, since there the suspect was held on bona fide state charges.⁵ Although the court does say that Leo was booked on state charges, the dissent indicates that there is no evidence to support this statement,⁶ and the statements of fact seem contra.⁷

It would appear that "the mere fact that it [federal authority] had not requested the arrest does not mean . . . that the excessive detention was not under the circumstances a 'working arrangement.' . . ."⁸ The implications of this case, if not the facts, are highly reminiscent of the "silver platter doctrine."⁹ Cases like this, whatever one's view of the exigencies of pre-arraignment interrogation, can only accelerate the process of federal standardization of rules of criminal procedure.

§12.5. Testimony before legislative hearing: Immunity from criminal prosecution. Quite coincidentally, the only criminal prosecution initiated in Massachusetts to reach the Supreme Court of the United States last year raised issues representative of those which beset

² Id. at 402. Cf. *Commonwealth v. Palladino*, 1964 Mass. Adv. Sh. 175, 195 N.E.2d 769.

³ The circuit court avoided the district court's contention that the arraignment rule was not applicable to one too drunk to recognize the nature of the proceedings. 328 F.2d 399, 403 (1st Cir. 1964).

⁴ 281 F.2d 340 (2d Cir. 1960), *aff'd per curiam*, 365 U.S. 762, 81 Sup. Ct. 884, 6 L. Ed. 2d 79 (1961).

⁵ 328 F.2d 399, 404 (1st Cir. 1964).

⁶ Id. at 403.

⁷ Id. at 402.

⁸ Id. at 404 (dissent); see *Anderson v. United States*, 318 U.S. 350, 63 Sup. Ct. 599, 87 L. Ed. 829 (1943).

⁹ See *Elkins v. United States*, 364 U.S. 206, 80 Sup. Ct. 1437, 4 L. Ed. 2d 1669 (1960).

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the Supreme Judicial Court this past SURVEY year. In *United States v. Welden*¹ the Supreme Court, reversing the dismissal of an indictment by the United States District Court of Massachusetts,² held that a person who had testified before a Congressional subcommittee concerning matters covered by indictment was not immune from prosecution thereunder.³ The resolution of intriguing issues of statutory construction involving, as the majority perceived it, questions of amendment by implication,⁴ led to the conclusion that the immunity provision of the act under scrutiny⁵ applied only to persons testifying in judicial proceedings. The words "in any proceeding, suit, or prosecution under said Acts"⁶ were construed not to include testimony before legislative committees.

The concerns raised in the *Welden* case, particularly as emphasized in dissent,⁷ broadly reflect apprehensions very pertinent to Massachusetts today. What are the legitimate ends and purposes of legislative investigating committees; what limitations ought to be placed on their powers; and what safeguards must be accorded individuals required to testify before such committees? These are but some of the questions that will be pressed on our courts as the role and function of the Massachusetts Crime Commission are more clearly delineated in cases still to come before the Supreme Judicial Court. The harbingers have already appeared.

The *Welden* case reflected most specifically the same issues which involved the Crime Commission in its first case to reach the Supreme Judicial Court last year. In *Commonwealth v. Benoit*⁸ the Court rejected a claim of immunity from prosecution which related to testimony presented before the Crime Commission. The claim of immunity was based upon General Laws, Chapter 271, Section 39, which relates to acts of bribery of persons or corporations engaged in private business. The relevant portion of Section 39 provides that:

. . . no person shall be liable to any suit or prosecution, civil or criminal, for or on account of any transaction, matter or thing concerning which he may testify or produce evidence . . . before said court or in obedience to its subpoena or in any such case or proceeding.

In reaching the conclusion that this immunity provision did not extend to testimony given before the Crime Commission, the Court

§12.5. 1 377 U.S. 95, 84 Sup. Ct. 1082, 12 L. Ed. 2d 152 (1964).

2 215 F. Supp. 656 (D. Mass. 1963).

3 The indictment was for conspiracy to fix milk prices and to defraud the United States, in violation of the Sherman Anti-Trust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §1 (1962); 62 Stat. 701 (1948), 18 U.S.C. §371 (1962).

4 This involves questions admirably suited for inclusion in materials such as Hart and Sacks, *The Legal Process* (1958), but not appropriate for treatment here.

5 Act of Feb. 25, 1903, 32 Stat. 903, 904 (1903), 15 U.S.C. §32 (1958).

6 *Ibid.*

7 Justices Black and Douglas joined each other in separate dissents, 377 U.S. 95, 107, 115, 84 Sup. Ct. 1082, 1090, 1094, 12 L. Ed. 2d 152, 162, 166 (1964).

8 1964 Mass. Adv. Sh. 221, 196 N.E.2d 228.

stressed that the term "said court" referred to the phrase "any court having jurisdiction of the offence," which appeared in the immediately preceding sentence of Section 39:⁹

No person shall be excused from . . . testifying or producing . . . documents before any court or in obedience to the subpoena of any court having jurisdiction of the offence described herein on the ground . . . that the testimony or evidence . . . may tend to criminate him or subject him to a penalty or forfeiture.

This rather narrow construction of an immunity statute, ignoring as it does the possible significance of the last words of the provision, "or in any such case or proceeding," is most discouraging, especially since it was not necessary to the decision of the case. The defendant's argument that, in view of its relevant power to issue summonses and subpoena witnesses, and ultimately to compel testimony "in the same manner and to the same extent as before . . . courts,"¹⁰ the Commission is a court, within the purpose and meaning of the immunity clause of Section 39, hardly necessitated the adoption of this "court having jurisdiction of the offence" construction. If the Court believed otherwise, why then did it add the broader ground that the Commission, notwithstanding the defendant's contentions, is not a court?¹¹ This last point was embellished with the following dictum:

The commission is merely authorized to investigate, find facts, make studies, and file reports which may be used as a basis for legislative action. It lacks power to apply the law or to prescribe punishment. To hold otherwise would raise serious constitutional doubts as to the separation of powers.¹²

Finally, why did the Court consider the immunity provisions of Section 39 at all, since in fact the indictment charged only violations of bribery laws applicable to public officials, which laws contain no immunity provisions?¹³

Given the history of crime commissions in the Commonwealth,¹⁴

⁹ This eminently logical reading is similar to the common sense interpretation which prevailed in the *Welden* case: "The words 'any proceeding, suit, or prosecution under said Acts' in the proviso plainly refer to the phrase 'proceedings, suits, and prosecutions under said Acts in the courts of the United States,' in the previous sentence." 377 U.S. 95, 97, 84 Sup. Ct. 1082, 1084, 12 L. Ed. 2d 152, 156 (1964). (Emphasis supplied by Court.)

¹⁰ Resolves of 1962, c. 146, para. 4 (Resolution establishing the Crime Commission).

¹¹ 1964 Mass. Adv. Sh. 221, 225, 196 N.E.2d 228, 231.

¹² *Ibid.* This dictum could have been a source of embarrassment to the Court in subsequent cases in which the extension of the Commission's activities beyond these limits was attacked.

¹³ See *id.* at 223-224, 196 N.E.2d at 230-231; *Commonwealth v. Benoit*, 346 Mass. 294, 191 N.E.2d 749 (1963); G.L., c. 268A, §8; G.L., c. 268, §8, repealed by Acts of 1962, c. 779, §3.

¹⁴ See Resolves of 1953, c. 100; *Cabot v. Corcoran*, 332 Mass. 44, 123 N.E.2d 225 (1954); *Corcoran v. Commonwealth*, 335 Mass. 29, 138 N.E.2d 348 (1956).

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the wisdom of conferring immunity on persons compelled to testify¹⁵ before legislative investigative bodies is questionable.¹⁶ As to the current Crime Commission, the question was clearly settled by a decision not to include any immunity provisions.¹⁷ It does not necessarily follow, however, that specific immunity provisions passed in conjunction with particular criminal statutes, for presumably good and sufficient reasons, will not apply with equal force to legislative investigatory proceedings.

Two other cases involving the Crime Commission this past year pertained to the efforts of the Commission to obtain information regarding certain practices and transactions of the Massachusetts Turnpike Authority.¹⁸ The effect of the cases, taken together, is that reluctant public officials or agencies may not be compelled to give testimony or produce evidence in connection with Crime Commission investigations into their affairs, except in conformity with the general subpoena and summons powers applicable to all persons.

A somewhat cynical, but nonetheless accurate, description of the effect of the holding in *Gardner v. Callahan*¹⁹ is that governmental officials and departments are under no special obligation to cooperate in the Commission's task of uncovering corrupt practices in government. There the Court sustained a demurrer to a petition for a writ of mandamus which would have required the Turnpike Authority to make available to the Crime Commission certain of its records. It did not appear that the requests would unreasonably interfere with the work of the Authority or unduly inconvenience it. Nor would it appear that a court is unable to determine whether such requests are reasonable.²⁰ Presumably much of the same information was sought for examination under the subpoena powers sustained in *Gardner v. Massachusetts Turnpike Authority*.²¹

The articulated ground of decision in *Callahan*, in the words of the demurrer, is that the "duty of cooperation . . . imposed by . . . Chapter 146²² contains no legislative standard and is too vague and uncertain to be enforced by the courts."²³ It is believed, however,

¹⁵ Another strange element in this case is that it is unclear whether the testimony given was voluntary or compelled. It is quite difficult to make out any case for immunity based on voluntary testimony. See *United States v. Armour and Co.*, 142 Fed. 808 (N.D. Ill. 1906); 34 Stat. 798 (1906), 15 U.S.C. §33 (1958).

¹⁶ There may be constitutional doubts as well. See *Ullman v. United States*, 350 U.S. 422, 440, 76 Sup. Ct. 497, 507, 100 L. Ed. 511, 525 (1956).

¹⁷ Senate Nos. 272, 519, 578 (1962), all contained specific immunity clauses. Senate No. 890 (1962), out of which Resolves of 1962, c. 146, grew, did not.

¹⁸ *Gardner v. Callahan*, 1964 Mass. Adv. Sh. 243, 196 N.E.2d 301; *Gardner v. Massachusetts Turnpike Authority*, 1964 Mass. Adv. Sh. 881, 199 N.E.2d 186.

¹⁹ *Gardner v. Callahan*, *supra* at 244-245, 196 N.E.2d at 301-302.

²⁰ See *Finance Commission of Boston v. McGrath*, 343 Mass. 754, 180 N.E.2d 808 (1962).

²¹ 1964 Mass. Adv. Sh. 881, 882, 888-889, 199 N.E.2d 186, 189, 192.

²² Resolves of 1962, c. 146, para. 3. "The Commission may require the co-operation of all agencies of state and local governments."

²³ 1964 Mass. Adv. Sh. 243, 244, 196 N.E.2d 301, 302.

that this unwillingness of the Court to give force to the legislative requirement of cooperation has less to do with the vagueness of the standard²⁴ than with a reluctance to interfere with the conduct of the affairs of co-ordinate branches of government. A sound sense of judicial self-restraint may inform such a decision but where, as here, it forces a foolish result—causing the Crime Commission to resort to the procedurally restrictive and cumbersome device of gaining information piecemeal from governmental agencies by summons and subpoena²⁵—one may have wished for a bit more daring on the part of the Court.²⁶ Perhaps until such time as we develop something akin to the French Administrative Court system,²⁷ any growth of a rule of law within the administrative branch of government must remain the work of our judiciary.

As mentioned previously, the Court did sustain the efforts of the Commission to obtain its information about Turnpike Authority activities through the summons and subpoena powers, rejecting both objections that the summonses were too broad and general and assertions of inconvenience.²⁸ Almost as if to ameliorate the effect of the rebuff in *Callahan*, the Court appeared in the *Turnpike Authority* case to be quite solicitous of the broad investigatory needs of a body charged with the obligations of the Commission. It refused to limit the summons powers to inquiries into specific transactions, such as would be required of a summons in connection with the trial of criminal cases. The respondents contended that such a limitation was required by that portion of the Resolve which authorized enforcement of summonses “in the same manner and to the same extent as before said courts.” This passage, the Court replied, was intended only to incorporate procedures to enforce compliance with summonses issued

²⁴ The Court maintained that “courts are not equipped for the task of carrying on supervision of cooperation,” particularly where uncertainty of definition is based upon necessarily elastic interpretations. It is submitted that this task is not much different from interpreting any other standards, an activity in which courts constantly indulge. In any case, whatever elasticity appears in the term “cooperation,” it certainly includes minimally free access to governmental records. *Id.* at 243, 245, 196 N.E.2d 301, 302.

²⁵ A method appropriate to safeguarding the constitutional privileges of unwilling witnesses, but wholly inapposite where no constitutional claims are possible.

²⁶ If anything, the supplemental grounds of the *Callahan* decision enfeeble the holding. See *id.* at 245-246, 196 N.E.2d at 302. Clearly, special obligations on the part of the Commissioner of Public Safety, whose department of government is charged with the ordinary process of crime detection and investigation, are to be expected, and these will hardly be the measure of the standards to be imposed on all other agencies. Likewise, the precise citation of the detail in which the summons process must be stated detracts from the position that the legislature did not contemplate a different process for obtaining information from governmental departments.

²⁷ See Langrod, *The French Council of State: Its Role in the Formulation and Implementation of Administrative Law*, 49 *Am. Pol. Sci. Rev.* 673 (1955).

²⁸ *Gardner v. Massachusetts Turnpike Authority*, 1964 *Mass. Adv. Sh.* 881, 199 N.E.2d 186.

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and did not limit the broad investigatory power of the legislature²⁹ here delegated to the Commission.³⁰ Thus, a Commission empowered to conduct investigations and studies to provide "a basis for legislative action" is "in effect directed by the Legislature to make general inquiries, and the investigation of a general pattern is within the scope of the authorization."³¹ This is not to say that the summons need not conform to established limitations with regard to adequate specification of the subject of the inquiry,³² a description with reasonable particularity of the records to be produced and exclusion of records plainly irrelevant to the subject of such inquiry.³³ In the face of the extension of the permissible breadth of summonses issued by administrative bodies, as noted by the Court,³⁴ there can be little question of the correctness of the Court's rulings on the matters thus far discussed.

Another aspect of the *Turnpike Authority* case raises issues of serious difficulty and doubt. Both in this case and in *Sheridan v. Gardner*,³⁵ the Commission's status as an investigatory arm of the legislature has been challenged. The easy dictum of the *Benoit* case,³⁶ to the effect that the Commission is clearly part of the legislative branch of government, is now made a point at issue. Relying (1) on the Commission's own views of its role, as described in its May³⁷ and December³⁸ 1963 Reports, in conjunction with (2) the Commission's practice of "submit[ing] to the . . . Attorney General such evidence . . . as in the opinion of the Commission warrants such submission"³⁹ and (3) the appointment by the Attorney General of the counsel for the Commission as a Special Assistant Attorney General, for the ostensible

²⁹ Citing *Watkins v. United States*, 354 U.S. 178, 187, 77 Sup. Ct. 1173, 1179, 1 L. Ed. 2d 1273, 1284 (1957).

³⁰ 1964 Mass. Adv. Sh. 881, 887, 199 N.E.2d 186, 192.

³¹ *Id.* at 887-888, 199 N.E.2d at 192.

³² See *Watkins v. United States*, 354 U.S. 178, 77 Sup. Ct. 1173, 1 L. Ed. 2d 1273 (1957).

³³ See *Finance Commission of Boston v. McGrath*, 343 Mass. 754, 761, 765, 180 N.E.2d 808, 813, 816 (1962).

³⁴ See *Civil Aeronautics Board v. Hermann*, 353 U.S. 322, 77 Sup. Ct. 804, 1 L. Ed. 2d 852 (1957), *rev'g per curiam*, 237 F.2d 359 (9th Cir. 1956); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 66 Sup. Ct. 494, 90 L. Ed. 614 (1945); Note, 69 Yale L.J. 131, 131-134 (1959).

³⁵ 1964 Mass. Adv. Sh. 229, 196 N.E.2d 303.

³⁶ 1964 Mass. Adv. Sh. 221, 225, 196 N.E.2d 228, 231.

³⁷ Second Report of the Massachusetts Crime Commission to the Legislature, May 22, 1963, p. 8, wherein it was stated that ". . . if limited investigations would enable the Commission to recommend significant legislation, such legislation would be a futile gesture if the persons in power who are primarily responsible for corruption are not eliminated."

³⁸ Third Report of the Massachusetts Crime Commission to the Legislature, Dec. 2, 1963, p. 3, wherein it was said that this "cannot be done until their guilt has been proven by their conviction."

³⁹ 1964 Mass. Adv. Sh. 881, 884, 199 N.E.2d 186, 190. Resolves of 1962, c. 146, para. 6, expressly authorizes the Commission to submit evidence to the Attorney General.

purpose of his presenting to the grand jury the evidence obtained by the Commission,⁴⁰ the petitioner in *Sheridan* and respondents in *Turnpike Authority* contended that the Commission had become, in effect, an agency of law enforcement and prosecution of crime and that this constitutes a violation of the mandate of Article XXX of the Declaration of Rights.⁴¹

The intricate constitutional issues evoked by the presentation of this inquiry into separation of powers far exceed the scope of this chapter. One might conclude that the Supreme Judicial Court was similarly in no mood to tangle with this problem directly. In *Turnpike Authority* the Court quite adroitly avoided it by suggesting that respondents' standing to raise the matter is subject to doubts.⁴² In *Sheridan*, where the private rights of an individual may become concerned, the standing argument carries less force. Instead, that opinion avoids a clear declaration on the issue of separation by directing its discussion to collateral matters. Possibly what the Court in *Sheridan* intended by pointing out the absence of exposure for the sake of exposure⁴³ is that at the hearing stage the Resolve requires secret proceedings identical to those conducted by a grand jury,⁴⁴ or that there is no constitutional protection for engaging in organized crime,⁴⁵ or that no abridgment of rights is caused by the practices of the Commission.⁴⁶

In the two cases, then, the Court ultimately resolved this argument of separation by holding that the practices of the Commission in aid of law enforcement did not invalidate its legitimate legislative functions carried forward by the issuance of the summonses in question.⁴⁷

⁴⁰ 1964 Mass. Adv. Sh. 881, 884, 199 N.E.2d 186, 190.

⁴¹ This requires separation of the executive, legislative, and judicial powers.

⁴² These doubts were raised because they have no standing to protest on constitutional grounds the conduct of criminal proceedings initiated against others, citing *Hynson, Westcott & Dimming, Inc. v. Commissioner of Public Health*, 1964 Mass. Adv. Sh. 37, 195 N.E.2d 743, and because as public officials their private rights may not be sufficiently involved to establish claims of constitutional infringement, citing *Assessors of Haverhill v. New England Telephone & Telegraph Co.*, 332 Mass. 357, 124 N.E.2d 917 (1955). See 1964 Mass. Adv. Sh. 881, 886, 889, 199 N.E.2d 186, 191, 193.

⁴³ Distinguishing *Watkins v. United States*, 354 U.S. 178, 200, 77 Sup. Ct. 1173, 1185-1186, 1 L. Ed. 2d 1273, 1291 (1957). See 1964 Mass. Adv. Sh. 229, 237, 196 N.E.2d 303, 309.

⁴⁴ Resolves of 1962, c. 146, para. 5.

⁴⁵ This should be compared with the protection of free expression. See *Sweezy v. New Hampshire*, 354 U.S. 234, 77 Sup. Ct. 1203, 1 L. Ed. 2d 1311 (1957); *Gibson v. Florida Legislative Investigation Commn.*, 372 U.S. 539, 83 Sup. Ct. 889, 9 L. Ed. 2d 1424 (1963).

⁴⁶ The allusion to the Supreme Court's holdings that separation of powers is not mandatory in state governments under the Fourteenth Amendment is also seen as an effort to demonstrate that serious individual rights are not being abridged. See *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 77 Sup. Ct. 1203, 1214, 1 L. Ed. 2d 1311, 1327 (1957); *Carfer v. Caldwell*, 200 U.S. 293, 297, 26 Sup. Ct. 264, 265, 50 L. Ed. 488, 489 (1906).

⁴⁷ This formulation is expressed in *Gardner v. Massachusetts Turnpike Authority*, 1964 Mass. Adv. Sh. 881, 886, 199 N.E.2d 186, 190.

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The Court found support for this position by quoting from *Nelson v. Wyman*,⁴⁸ to the effect that: "When the investigation provided for is a general one, the discovery of a specific, individual violation of law is collateral and subordinate to the main object of the inquiry. . . . The existence of such a possibility does not change the investigation from a legislative to a criminal one."⁴⁹ If by taking this tack the Court is merely deferring a decision on the constitutional merits to a case in which an individual is indicted on the basis of evidence submitted to the grand jury by the Commission, this may prove regrettable judicial policy. It is conceivable that many criminals will be able to evade prosecution simply because an unconstitutional practice was not stopped in time.⁵⁰ The *Sheridan* case was dismissed on appeal to the United States Supreme Court for want of a substantial federal question.⁵¹ The destruction of organized crime and the exposure of corrupt practices are matters of deep importance in the Commonwealth. It is hoped that the Supreme Judicial Court has made the right policy determination with regard to the ultimate attainment of these goals.

⁴⁸ 99 N.H. 33, 38, 105 A.2d 756, 762 (1954). See also *Matter of Di Brizzi*, 303 N.Y. 206, 101 N.E.2d 464 (1951); *Washington v. Superior Court*, 40 Wash. 2d 502, 244 P.2d 668 (1952).

⁴⁹ *Sheridan v. Gardner*, 1964 Mass. Adv. Sh. 229, 238, 196 N.E.2d 228, 310, quoting from *Nelson v. Wyman*, 99 N.H. 33, 38, 105 A.2d 756, 762 (1954).

⁵⁰ This is in the event that the practice of turning over Crime Commission findings on individual criminal behavior to the Attorney General is found unconstitutional. If, as suggested in the Turnpike Authority case, the investigative power of a legislative body is broader than that of the grand jury, see *Matter of Moore v. Delaney*, 180 Misc. 844, 45 N.Y.S.2d 95, (Sup. Ct. 1943); Note, 74 Harv. L. Rev. 590 (1961), then certainly there is some doubt that evidence uncovered by legislative investigation can be freely turned over to prosecuting authorities.

⁵¹ *Sheridan v. Gardner*, 379 U.S. 647, 85 Sup. Ct. 612, 13 L. Ed. 2d 552 (1965).