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Chapter 5: Evidence

Noel Augustyn

CHAPTER 5

Evidence

NOEL AUGUSTYN*

§ 5.1. Prior Criminal Conduct — Impeachment — Judicial Discretion. It is well settled in Massachusetts[1] and other jurisdictions[2] that a witness's credibility may be impeached through the use of his prior convictions. This rule evolved from, and is a modification of, the ancient common law rule rendering totally incompetent a witness with a criminal record.[3] While today such witnesses are competent to testify, the prior conviction rule still creates problems of apparent unfairness. For example, the value of the rule may be questionable when the witness's prior crimes are unrelated to his propensity not to tell the truth. Moreover, the rule presents special difficulties when the witness subject to such impeachment in a criminal case is the

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* NOEL AUGUSTYN is Assistant Dean and Assistant Professor of Law at Boston College Law School.

§ 5.1. [1] G.L. c. 233, § 21 provides:

> The conviction of a witness of a crime may be shown to affect his credibility, except as follows:
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> First, the record of his conviction of a misdemeanor shall not be shown for such purpose after five years from the date on which sentence on said conviction was imposed, unless he has subsequently been convicted of a crime within five years of the time of his testifying.
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> Second, the record of his conviction of a felony upon which no sentence was imposed or a sentence was imposed and the execution thereof suspended, or upon which a fine only was imposed, or a sentence to a reformatory prison, jail, or house of correction, shall not be shown for such purpose after ten years from the date of conviction, if no sentence was imposed, or from the date on which sentence on said conviction was imposed, whether the execution thereof was suspended or not, unless he has subsequently been convicted of a crime within ten years of the time of his testifying. For the purpose of this paragraph, a plea of guilty or a finding or verdict of guilty shall constitute a conviction within the meaning of this section.
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> Third, the record of his conviction of a felony upon which a state prison sentence was imposed shall not be shown for such purpose after ten years from the date of expiration of the minimum term of imprisonment imposed by the court, unless he has subsequently been convicted of a crime within ten years of the time of his testifying.
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> Fourth, the record of his conviction for a traffic violation upon which a fine only was imposed shall not be shown for such purpose unless he has been convicted of another crime or crimes within five years of the time of his testifying.

[2] *See* McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE (1972), § 43, pp. 84-90.

[3] *Id.* at § 43.

accused himself, and when the prior conviction is similar, identical, or related to the crime with which he is presently charged.

The Massachusetts statute permitting impeachment of the accused on the basis of prior convictions[4] was examined during the *Survey* year by the Supreme Judicial Court in *Commonwealth v. Diaz*.[5] In *Diaz*, the defendant was indicted for unlawful distribution of a controlled substance (heroin) and for possession of a controlled substance with intent to distribute it.[6] At the close of the Commonwealth's case, defendant's counsel moved the court to exclude the Commonwealth's anticipated use of defendant's two prior convictions (for possession of heroin with intent to distribute) for the likely purpose of impeaching the defendant if he took the stand.[7] The trial court denied the motion as a discretionary ruling.[8] Defendant's counsel then stated that because of this ruling he would not call the defendant as a witness.[9] The defendant introduced no evidence and was found guilty on both charges.[10]

The defendant appealed, contending, *inter alia*, that the statute permitting witness impeachment via prior convictions was unconstitutional when applied to an *accused* where, as in the case at issue, the prior convictions (1) were identical with a crime now being charged and therefore highly prejudicial, and (2) did not involve the failure to tell the truth and were, therefore, not highly indicative of his credibility.[11] Defendant's argument was that the statute, as applied in this case, placed him in the proverbial jaws of Scylla and Charybdis; thus, were defendant to take the stand subject to impeachment via these prior convictions, the jury, despite limiting instructions, would use those convictions as a basis for inferring he committed the crimes at issue. Similarly, if defendant chose not to take the stand due to fear of the above, he would forego Massachusetts constitutional rights to testify in his own behalf, and moreover, might also suffer from negative inferences by the jury because of his failure to so testify.[12] The statute, so defendant argued, as applied in this case, prevented him from getting a fair trial. The Court interpreted and summarized defendant's argument "in essence that the statute, having the effects or probable effects described, is not justified by a sufficient State interest."[13]

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[4] *See* G.L. c. 233, § 21, *supra*, note 1.

[5] 1981 Mass. Adv. Sh. 605, 417 N.E.2d 950.

[6] *Id.* at 606, 417 N.E.2d at 951.

[7] *Id.* at 607, 417 N.E.2d at 952.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.* at 608, 417 N.E.2d at 952. The Court also discussed a double jeopardy question which is beyond the scope of this chapter. *Id.* at 614-17, 417 N.E.2d at 956-58.

[12] *Id.* at 608, 417 N.E.2d at 952.

[13] *Id.* at 609, 417 N.E.2d at 953.

The Court then examined applicable Federal and Massachusetts case law, as well as the Proposed Massachusetts Rule of Evidence 609(a), and denied defendant's appeal.[14] The Court reasoned that the power of the trial court to exercise its discretion to exclude the prior convictions where undue prejudice outweighed probative value was sufficient to guarantee defendant a fair trial.[15]

With respect to Federal law, the Court examined the United States Supreme Court decision of *Spencer v. Texas*,[16] which recognized that past convictions can be probative of credibility and not violate the due process clause of the Federal Constitution.[17] As to the special difficulties encountered when the witness is the accused, the Court read the *Spencer* decision as citing the ameliorative effects of (1) the trial court's instructions that the jury confine its use of prior convictions to the issue of credibility and of (2) the practice whereby judges, in their discretion, exclude use of the prior convictions altogether when such information would be "particularly prejudicial."[18] Thus, the Court concluded that under comparable Federal law and practice, there would be no violation of comparable Federal Constitutional fourteenth amendment rights.[19]

The Court reached the same conclusion with respect to Article 12 of the Declaration of Rights of the Constitution of the Commonwealth.[20] The Court cited the precedents of *Commonwealth v. Chase*,[21] and *Commonwealth v. Leno*[22] as well as other, earlier decisions[23] in finding no constitutional infirmity. The *Diaz* Court observed that in *Chase* and *Leno*, the accused was or would have been impeached by prior convictions of a crime

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[14] *Id.* at 609-14, 417 N.E.2d at 953-56.

[15] *Id.* at 611, 417 N.E.2d at 954.

[16] 385 U.S. 554 (1967).

[17] *Id.* at 560-61.

[18] 1981 Mass. Adv. Sh. at 609-10, 417 N.E.2d at 953.

[19] *Id.* at 610, 417 N.E.2d at 953.

[20] Article XII provides:

> No subject shall be held to answer for any crimes or offense, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself. And every subject shall have a right to produce all proofs, that may be favorable to him; to meet the witnesses against him face to face, and to be fully heard in his defense by himself, or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled, or deprived of his property, immunities, or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty, or estate, but by the judgment of his peers, or the law of the land.

[21] 372 Mass. 736, 363 N.E.2d 1105 (1977).

[22] 374 Mass. 716, 374 N.E.2d 572 (1978).

[23] Commonwealth v. Sheeran, 370 Mass. 82, 88 (1976); Commonwealth v. Boyd, 367 Mass. 169, 174 (1975); Commonwealth v. DiMarzo, 364 Mass. 669, 678 (1974); Commonwealth v. Ladetto, 353 Mass. 746 (1967).

similar to the one charged; moreover, those prior convictions did not bear directly on credibility.[24] Based upon its decisions against the accused appellants in those cases, the Court in *Diaz* held that the statute in question strikes an appropriate constitutional balance between possible unfairness to defendants and the need for the trier of fact to have useful information available, given the statutory exceptions for convictions remote in time and the use of limiting instructions at trial.[25] Moreover, while the applicable Massachusetts statute does not explicitly provide for judicial "discretion" in excluding altogether such impeaching evidence in situations where likely prejudice to the defendant is greatest,[26] the Court noted that its previous decision in *Chase* effectively recognized that the trial court has such discretion.[27] The trial court's failure to exercise this discretion in defendant's behalf, therefore, is not reversible error.

Finally, the Court looked to the future and examined Proposed Massachusetts Rule of Evidence 609(a). The Proposed Rule explicitly provides that "the court shall have discretion to exclude evidence of a prior conviction offered to impeach the credibility of the accused if it finds that its probative value is outweighed by the danger of unfair prejudice."[28] Thus, with respect to situations similar to the case at issue, the Proposed Rule, if enacted, would merely codify the trial court's authority to exclude such evidence, as established in *Diaz* and *Chase*.

The Court concluded its discussion by evaluating the types of factors a trial court might consider in applying the "probative value" v. "unfair prejudice" test, and cited those suggested in the landmark federal case of *United States v. Gordon*.[29] Specifically, the Court stated that some of the factors include the relation of the conviction to credibility, the defendant's criminal conduct, if any, after the conviction, the similarity of the current charge to past convictions, the importance of defendant's testimony to his defense and how important the defendant's credibility is to the resolution of factual disputes.[30] Furthermore, the Court recommended that a ruling

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[24] 1981 Mass. Adv. Sh. at 611, 417 N.E.2d at 954.

[25] *Id.*

[26] Indeed, G.L. c. 23, § 21, *supra* at note 1, makes no provision for exclusion by the judge of such evidence whatsoever.

[27] 1981 Mass. Adv. Sh. at 612, 417 N.E.2d at 954-55. Commonwealth v. West, 357 Mass. 245, 258 N.E.2d 22 (1970) which held that G.L. c. 23, § 21, did "not clothe the judge with discretion to receive or exclude" evidence of prior convictions. *Id.* at 249, 258 N.E.2d at 24. *West* was treated in the 1970 ANN. SURV. OF MASS. LAW § 27.2 at 679-81. *Diaz* effectively overrules *West* completely in this regard.

[28] The Proposed Rule quoted therein continues: "There shall be no discretion to exclude a prior conviction offered to impeach the credibility of any other witness."

[29] 383 F.2d 936 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 1029 (1968).

[30] 1981 Mass. Adv. Sh. at 613, 417 N.E.2d at 955.

should be made on a defendant's motion to bar this type of impeachment "at an early moment."[31] Thus, defense attorneys should be prepared to state such specific arguments for the exclusion of prior convictions when the defendant wishes to testify in his own behalf.

In sum, the Court in *Diaz* held that the application of chapter 233, section 21 of the General Laws permitting a prosecutor to impeach a defendant witness by introducing his prior convictions, even where one of those convictions was identical to one of the crimes at issue, and even where the convictions were not directly bearing on credibility did not deny the defendant's right to a fair trial as guaranteed by Article 12 of the Massachusetts Declaration of Rights. The Court observed and reaffirmed that this impeachment power, as interpreted and applied in previous decisions, is not absolute but is mitigated by the trial court's own power to issue limiting instructions to the jury and to exercise its discretion to exclude impeaching evidence altogether when its probative value is outweighed by undue prejudice. The Court's ruling is in accord with present Federal law and also with the Proposed Mass. Rule of Evidence 609(a), as the Court refused to construe the Massachusetts Constitution more broadly than its Federal counterpart. Future decisions may further define under what circumstances undue prejudice will override the need for "useful information."

Later in the *Survey* Year, the Court again addressed the issue of when prior convictions can be used as evidence in the case of *Commonwealth v. Jackson*.[32] In *Jackson* the defendant was tried and convicted of murder in the first degree.[33] At trial, he requested and received an advisory ruling concerning the prosecutor's use of prior convictions for murder and for assault with a deadly weapon. The trial court informed defendant that should he testify the murder conviction would be excluded but that the assault conviction, which was related to the crime at issue, could be used against him.[34] The defendant did not take the stand.[35]

The defendant appealed, contending, among other things, that the trial court's ruling "impermissibly infringed his right to testify on his own behalf and so denied his constitutional right to a fair trial" pursuant to Article 12 of the Declaration of Rights of the Massachusetts Constitution.[36] In deny-

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[31] *Id.*

[32] 1981 Mass. Adv. Sh. at 2196, 428 N.E.2d at 289.

[33] *Id.* at 2197, 428 N.E.2d at 290.

[34] *Id.* at 2203-04, 428 N.E.2d at 293-94.

[35] *Id.* at 2204, 428 N.E.2d at 294.

[36] *Id.* For the text of Art. 12 see note 20 *supra*. The defendant also argued that admission of evidence of prior crimes, a misstatement in the prosecutor's opening statement, the presence of witnesses after a sequestration order, and a fifty-seven month delay between indictment and trial were grounds for reversal. *Id.* at 2201-210, 428 N.E.2d at 292-97. All but the first of these issues is beyond the scope of this chapter.

ing the appeal, the Court cited the permissibility of the "prior convictions" impeachment technique pursuant to chapter 233, section 21.[37] The Court, citing *Diaz*, then went on to say that while the trial court has discretion to exclude the prior convictions, its refusal to do so and the possible prejudice to the defendant resulting therefrom is not a constitutional issue that can be reviewed on appeal.[38]

Thus, the Court in *Jackson* implicitly reaffirmed what it said, in effect, in *Diaz*, i.e., so long as the trial court is empowered with discretion to balance the competing factors of probative value and undue prejudice, the use of prior convictions pursuant to chapter 233, section 21, is not a violation of the "fair trial" provision of the Massachusetts Constitution, even when the prior convictions are similar to or, as here, related to the crime at issue. Pursuant to its discretionary powers, the trial court's determination that the defendant has not been unduly prejudiced normally will not be abrogated.

Jackson presented still another issue, not involving witness impeachment, which the Court viewed as being resolvable within the ambit of judicial discretion. This issue involved evidence of a statement the defendant made wherein he effectively confessed to the murders of five women, including the victim in the case at hand. Subsequent to the defendant's apprehension and arrest as a suspect he was visited by a friend who discussed with him newspaper articles concerning an investigation into the murders of six young women, one of whom was the victim in the case at issue. The newspaper articles referred to a murder in New Hampshire, and the defendant voluntarily told a friend, who so testified at trial, that "the one in New Hampshire [was not the defendant's]."[39]

Defendant, on appeal, argued that this testimony was inadmissible because it tied him not only to the murder at issue, but also to other well-publicized murders which created real danger that the jury would base its decision on the defendant's criminal propensity instead of the evidence of the crime.[40] The Court rejected this argument. It observed that defendant's statement regarding the murder of the victim in the instant case was literally "indivisible" from his statement about the other murders.[41] The Court noted that evidence which is otherwise relevant to the offense charged does not become "inadmissible simply because it tends to prove the commission of other crimes."[42] The Court also noted, in contrast, that where evidence

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[37] *Id.* at 2204, 428 N.E.2d at 294.

[38] *Id.*

[39] *Id.* at 2201, 428 N.E.2d at 292.

[40] *Id.*

[41] *Id.*

[42] *Id.* (citations omitted). At common law, evidence of other crimes cannot be admitted to prove defendant's criminal character. However, such evidence is admissible, when relevant, for other purposes, such as proof of motive, intent, plan, knowledge, identity, lack of mistake

of other crimes is not relevant to the offense at issue, that evidence generally is inadmissible, even if it stems from the defendant's voluntary admission.[43] Here, however, the Court found defendant's statement to be "obviously relevant."[44]

The Court having thus determined the existence of probative value, then turned to the counterweight of undue prejudice. In finding none existed, it said that in this case the risk of unfair prejudice to the defendant was diminished by his prior introduction of evidence which implicated him in yet a different murder.[45] The Court then held that the defendant's admission to his friend about the offense charged was so bound up with the unrelated crimes, that to sever the unrelated admission from the full statement would render the relevant admission unintelligible, and that the entire admission could be, and was, properly admitted into evidence.[46] Thus, the Court found that the trial judge had properly balanced considerations of probative value and prejudice, in his exercise of discretion, by not excluding the admission from evidence.[47]

In sum, in both *Diaz* and *Jackson* the Court found that the very existence of a trial court's power to exercise judicial discretion in excluding evidence of prior convictions for impeachment purposes was a sufficient guarantee against a violation of the "fair trial" provision of the Massachusetts Constitution. Moreover, in *Jackson* the Court appeared to extend the same reasoning to the use of evidence of "other crimes" in a nonimpeachment context.

§ 5.2. Rape Shield Statute — Impeachment — Right to Show Bias. A standard form of impeaching the credibility of a witness is to prove either on cross-examination or by adducing extrinsic evidence that the witness is "biased."[1] The ability of the cross-examiner to show witness bias, also called "prejudice," "interest," or "corruption,"[2] in Massachusetts is not a "collateral" matter, but rather a matter of "right" that may assume constitutional dimensions if the witness has testified to material facts.[3]

This "right" of the cross-examiner to prove witness bias was demonstrated during the *Survey* year in the difficult case of *Commonwealth v.*

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or accident, etc. *See* MCCORMICK, *supra* note 2, § 190, pp. 447-54. *See also* FED. R. EVID. 404(b) and PROPOSED MASS. R. EVID. 404(b).

[43] *Id.* at 2202, 428 N.E.2d at 292.

[44] *Id.* at 2201, 428 N.E.2d at 292.

[45] *Id.* at 2202, 428 N.E.2d at 293.

[46] *Id.*

[47] *Id.*

§ 5.2. [1] *See* MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE (1972) § 40, pp. 78-81.

[2] *Id.*

[3] LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE (1981) at 145.

Joyce.[4] In *Joyce* the defendant was convicted of rape and the commission of an unnatural and lascivious act.[5] His argument on appeal was that the trial court improperly excluded a line of questioning by defense counsel which intended to show bias by the complaining witness.[6]

The prosecution presented evidence showing that complainant was hitchhiking and defendant picked her up. The complainant testified that defendant drove her to a parking lot where he forced her to perform oral sex and to engage in intercourse twice.[7] She testified that she attempted twice to escape from the car and finally did so upon the approach of another car, which was a police cruiser.[8] Complainant ran to the cruiser and accused defendant of raping her.[9]

Defendant's testimony raised the defense of consent. He testified that it was the complainant who requested they drive to the parking lot and it was upon complainant's suggestion that they engaged in sexual acts.[10] At the trial, defendant wished to introduce evidence either through cross-examination of the complainant or through the testimony of police officers that on two separate occasions prior to the incident at issue the complainant had been charged with prostitution.[11] Defendant stated in effect that his purpose in introducing such evidence was not to impeach the defendant via the method of "prior bad acts."[12] Rather, defendant argued, by showing that complainant had been found in similar situations previously, and had consequently been arrested and charged with sexual crimes, he could prove she had in this instance a motive to falsify her accusation and testimony that defendant raped her so that she would not be further prosecuted herself for sexual criminal acts.[13] In brief, defendant argued that complainant's testimony was "biased." The trial judge, however, refused defendant permission to offer evidence or to cross-examine complainant on this issue. The judge based his ruling on the prohibition in the Massachusetts "rape-shield" statute, chapter 233, section 21B,[14] against admitting in a

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[4] 1981 Mass. Adv. Sh. at 29, 415 N.E.2d at 181.

[5] *Id.* at 39, 415 N.E.2d at 181.

[6] *Id.*

[7] *Id.* at 40, 415 N.E.2d at 183.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 41, 415 N.E.2d at 183.

[11] *Id.*

[12] *Id.* The term "specific instances of conduct" (actually "misconduct") and "prior bad acts" are used here synonymously. This impeachment technique is barred in cases of this kind by G.L. c. 233, § 21B, the so-called "Rape Shield Statute" discussed in the text and set forth in note 14 *infra*.

[13] 1981 Mass. Adv. Sh. at 41-42, 415 N.E.2d at 184.

[14] The statute provides:

¶ 21B. Evidence of sex crime victim's sexual conduct; admission hearing; findings

rape trial evidence of reputation or of specific instances of a rape victim's sexual conduct.[15]

The Supreme Judicial Court, on appeal, agreed with the defendant that there was error in the exclusion of the questions.[16] Upon review of the record, it found that the trial judge improperly applied the statute.[17]

The Court reviewed the policy for the statute's bar to the admission of evidence of "specific instances of sexual conduct" and found it to be essentially a codification of the pre-statute common law rule.[18] The Court noted previous decisions stating that evidence of these specific instances of conduct not only focuses the attention of the fact finder away from the alleged criminal act of the accused, but also has little probative value on the issue of consent in the trial at hand.[19] Similarly, the Court noted that the statute reversed the common law rule which rendered evidence of the complainant's "reputation" for unchastity admissible.[20] The rationale for this reversal, the Court observed, was that inquiries into the sexual history of a rape complainant often makes her unwilling to testify, and, moreover, are "only marginally, if at all, probative of consent."[21]

Upon this review of the statute's history, however, the Court concluded the legislative history of section 21B did not reveal any consideration of the constitutional right to cross-examination and, more particularly, the question of impeachment by proof of bias.[22] Indeed, the Court went on to say that "evidence of prior acts, statements or circumstances may be relevant to show a complainant's motive to accuse falsely the defendant."[23] Citing

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Evidence of the reputation of a victim's sexual conduct shall not be admissible in any investigation or proceeding before a grand jury or any court of the commonwealth for a violation of sections twenty-two, twenty-two A, twenty-three, twenty-four and twenty-four B of chapter two hundred and sixty-five. Evidence of specific instances of a victim's sexual conduct in such an investigation or proceeding shall not be admissible except evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or condition of the victim; provided, however, that such evidence shall be admissible only after an in camera hearing on a written motion for admission of same and an offer of proof. If, after said hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim, the evidence shall be admitted; otherwise not. If the proceeding is a trial with jury, said hearing shall be held in the absence of the jury. The finding of the court shall be in writing and filed but shall not be made available to the jury.

[15] 1981 Mass. Adv. Sh. at 42, 415 N.E.2d 184.

[16] *Id.* at 40, 415 N.E.2d at 183.

[17] *Id.* at 43-44, 415 N.E.2d at 184-85.

[18] *Id.* at 44, 415 N.E.2d at 185.

[19] *Id.*

[20] *Id.* at 45, 415 N.E.2d at 185.

[21] *Id.* at 45, 415 N.E.2d at 186.

[22] *Id.* at 45-46, 415 N.E.2d at 186.

[23] *Id.* at 46, 415 N.E.2d at 186.

earlier Massachusetts cases and authorities, the Court declared that "[r]easonable cross-examination to show motive or bias has long been a matter of right."[24] Moreover, in an annotation to this statement the Court said that although it had never resolved the question whether the common law rule which excludes specific instances of conduct must yield to the defendant's attempts to show bias, it is clear that the "defendant's right to show bias must take precedence."[25] The Court concluded, therefore, that the "rape-shield" statute did not abrogate the right to show bias based on specific instances of sexual conduct.[26]

With respect to the case at issue, the Court found that the bias theory was "not inconsistent with the defendant's version of the facts."[27] Thus, the evidence which defendant would have adduced, if so permitted, would, in reason, have a tendency to prove that the complainant was motivated to accuse defendant falsely in order to avoid her own further prosecution.

The Court did not regard its holding as a departure from either the belief that prostitution is not relevant to credibility, or the policy of the statute which views prior sexual conduct as inadmissible to show consent.[28] The Court recognized, though, that when relevant facts show bias, or a motive to lie, "the general evidentiary rule of exclusion must give way to the constitutionally based right of effective cross-examination."[29]

In limiting its holding, the Court reiterated that trial judges should use their discretion to restrict the scope of cross-examination in an effort to strike a balance between the policies of the "rape-shield" statute on the one hand, and the "right" to show bias on the other.[30] Thus, the trial judge should exclude as much evidence of specific instances of a complainant's sexual conduct as possible that will not unduly infringe upon the defendant's constitutional right to effective cross-examination in showing bias.[31] The trial court in the case at hand excluded all inquiry rather than simply limiting the scope of cross-examination, and thus a new trial was ordered.[32]

In a concurring statement, Justice Braucher said that while the majority in the instant case properly construed the law, the witness's prior criminal complaints for prostitution afforded "a very slender basis for inferring a motive for false accusation."[33] Chief Justice Hennessy, also concurring in

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[24] *Id.* (citations omitted).
[25] *Id.* at n.7.
[26] *Id.*
[27] *Id.* at 47, 415 N.E.2d at 187.
[28] *Id.* at 48, 415 N.E.2d at 187.
[29] *Id.* (citations omitted).
[30] *Id.* at 48-49, 415 N.E.2d at 787-88.
[31] *Id.* at 49, 415 N.E.2d at 188.
[32] *Id.*
[33] *Id.* at 50, 415 N.E.2d at 188.

the result, cautioned that the Court's opinion should be confined solely to those cases where the disputed evidence is "clearly relevant" to a showing of bias or motive to lie.[34]

Presumably, had the defendant in *Joyce* offered evidence not of criminal complaints concerning the alleged victim's prior sexual conduct, but simply "specific instances of conduct," "prior bad acts" or "reputation," the inference of her motive to fabricate to avoid criminal prosecution would be far too weak to overcome the "rape-shield" statute. The "bias" argument in that type of case simply would not be convincing, and the evidence or cross-examination would be barred pursuant to the statute. In contrast, other fact patterns might arise where evidence of previous acts of sexual conduct could indeed show that complainant had a motive to fabricate, as in the case at issue, and hence the right to show bias would prevail.

In sum, the Court in *Joyce* reaffirmed that showing "bias," at least insofar as the term is synonymous with "motive to fabricate," amounts to a "right" in Massachusetts which will not be overcome by the "rape-shield" statute. Indeed, where a conflict between the two exists, the trial court must do its best to permit the showing of bias while at the same time adhering to the proscription of the statute. Finally, concurring opinions emphasize that *Joyce* must be narrowly construed to further the policy of the statute.

One reading of the *Joyce* case is that the trial court simply confused the technique of witness impeachment via "bias" with that of impeachment via "specific instances of conduct," also called "prior bad acts."[35] A similar confusion, as to impeachment via "bias," "prior bad acts," as well as "prior convictions" existed in a case heard later in the *Survey* year, *Commonwealth v. Martinez*.[36]

Martinez involved a murder whereby the victim was bound and gagged and died of asphyxiation due to a gag in his mouth and a ligature around his neck.[37] Certain crucial events leading up to the murder were witnessed by two men, both of whom testified at the trial.[38] One of these witnesses, Ryan, was the proprietor of the rooming house where the murder took place. He testified that he knew the defendant, observed him in the victim's room the night of the murder, found the victim's body the following morning, and posted bail for the defendant.[39] Ryan had previously been con-

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[34] *Id.* at 49-50, 415 N.E.2d at 188.

[35] See note 12 *supra*.

[36] 1981 Mass. Adv. Sh. 1945, 425 N.E.2d at 300. Issues concerning the use of grand jury testimony were also discussed, *id.* at 1949-53, 425 N.E.2d at 303-05, but are not examined here.

[37] *Id.* at 1946, 425 N.E.2d at 301.

[38] *Id.* at 1946-47, 425 N.E.2d at 301-02.

[39] *Id.* at 1947, 425 N.E.2d at 301-02.

victed of certain crimes himself, although appeals from these convictions were pending.[40]

Defendant's appeal was based upon the trial court's refusal to permit the defendant from exploring with the witness Ryan the possibility of his having made some kind of arrangement with the prosecution concerning his own pending appeals, which arguably influenced his testimony.[41] The trial court ruled that defense counsel could not inquire about the pending appeals because they were not final convictions.[42]

The Supreme Judicial Court held that the trial court erred, set the verdict aside and remanded the case.[43] The Court implicitly noted that the trial court inexcusably confused different modes of impeachment. Thus, defendant's method of impeachment was not based upon attacking Ryan's credibility via "prior convictions,"[44] or via "prior bad acts," but rather was based, as was the case in *Joyce*, on "bias." Indeed, defendant clearly made known at trial what he was attempting to do, which the Court acknowledged.[45] The Court ruled that because there was no ambiguity in defense counsel's tactics, the trial judge should have permitted questioning where the witness had already testified to material facts.[46] The Court cited and reiterated its holding in *Joyce*, among other cases, "that reasonable cross-examination for the purpose of showing bias and prejudice is a matter of right."[47] Thus, the Court found that the trial judge abused his discretion.[48]

Both *Joyce* and *Martinez*, therefore, emphasize the distinction between impeachment via "bias" and via other techniques, particularly the method of "specific instances of conduct," or "prior bad acts." Moreover, the cases emphasize that impeachment via "bias" is a matter of right. Thus, in instances where impeachment via "bias" may overlap with improper impeachment via "prior bad acts," the court must exercise its discretion in such a way so that the right to show bias is not abrogated.

STUDENT COMMENT

§ 5.3. Intent—State of Mind Exception to the Hearsay Rule.* The existence of legal rights and liabilities often depends on a person's state of

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[40] *Id.* at 1947, 425 N.E.2d at 302.

[41] *Id.*

[42] *Id.* at 1948, 425 N.E.2d at 302.

[43] *Id.* at 1948, 1953, 425 N.E.2d at 302, 305.

[44] *See* MCCORMICK, *supra* note 1, §§ 40, 42 and 43.

[45] 1981 Mass. Adv. Sh. at 1948, 425 N.E.2d at 302.

[46] *Id.*

[47] *Id.*

[48] *Id.* at 1948-49, 425 N.E.2d at 302-03.

* By Mitchell P. Portnoy, staff member, ANNUAL SURVEY OF MASSACHUSETTS LAW.

mind.[1] The need to ascertain this mental state arises in criminal cases, for example, where intent typically is a material element of a crime.[2] The criminal defendant, by denying that he possessed any such criminal intent, effectively creates a disputed factual issue. The prosecution, to establish the presence of criminal intent on the part of the defendant, is permitted to rely on inferential evidence.[3] The criminal defendant, faced with the detrimental inferences generated by this type of evidence, instead may chose to rely on his personal testimony as the principal source of evidence in his favor.[4] Yet as he seeks to testify on his intent, the defendant may find his testimony constrained or even excluded by a combination of evidentiary rules and judicial misapplication of them.

Present day rules of evidence, and the sometimes confused application of these rules, have roots traceable to early common law. Historically, any person with a direct interest in the outcome of a trial was disqualified from testifying in it.[5] This broad incompetency rule extended to the parties in a lawsuit,[6] including the defendant in a criminal prosecution.[7] The rationale for these disqualifications was based on a fear of inaccurate, and especially

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§ 5.3. [1] G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 64 (1978); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 249, at 590 (2d ed. 1972); K.B. HUGHES, MASSACHUSETTS PRACTICE: EVIDENCE § 453(3), at 594 (1961).

[2] *See* MCCORMICK, *supra* note 1, at § 294; LILLY, *supra* note 1, at § 64; HUGHES, *supra* note 1, at § 566. *See also infra* note 16 and accompanying text. Other examples wherein mental state is relevant include determination of domicile, and transfers of property with the intention of defrauding creditors. MCCORMICK, *supra* note 1, § 294 at 695.

[3] *See* Commonwealth v. Aguiar, 370 Mass. 490, 350 N.E.2d 436 (1976); Commonwealth v. Woodward, 102 Mass. 155 (1869). *Cf.* Commonwealth v. Reynolds, 338 Mass. 130, 134, 154 N.E.2d 130, 133 (1958) (certain conduct by defendant created negative inference of guilt).

One typical example of evidence which circumstantially points toward guilt is flight by the accused from the scene of the crime. *See* Commonwealth v. Geagan, 339 Mass. 487, 512, 159 N.E.2d 870, 887-88, *cert. denied,* 361 U.S. 895 (1959); Commonwealth v. Cataldo, 326 Mass. 373, 376, 94 N.E.2d 761, 762 (1950); MCCORMICK, *supra* note 1, at § 271; P. LIACOS, HANDBOOK OF MASSACHUSETTS EVIDENCE 281-82 (5th ed. 1981). *But see* Wong Sun v. United States, 371 U.S. 471, 483 n.10 (1963) ("[W]e have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime."). Notwithstanding *Wong Sun*, a negative inference was desired in Commonwealth v. Caldron, 1981 Mass. Adv. Sh. 620, 626, 417 N.E.2d 958, 961 (1981).

[4] *See* HUGHES, *supra* note 1, at §§ 453(3), 567.

[5] MCCORMICK, *supra* note 1, at § 65 (extended to "the parties to the lawsuit and ... all persons having a direct pecuniary or proprietary interest in the outcome"); HUGHES, *supra* note 1, at § 121. Competence addresses the testimonial qualifications of witnesses. Today, witnesses are incompetent to testify when they are incapable of perceiving, remembering, or describing the event at issue, or when they are incapable of appreciating the duty to testify truthfully. LILLY, *supra* note 1, at § 22.

[6] MCCORMICK, *supra* note 1, at § 65; HUGHES, *supra* note 1, at § 121; LILLY, *supra* note 1, at § 22.

[7] HUGHES, *supra* note 1, at § 121.

perjured, testimony.[8] The judicial system instead relied upon the personal knowledge and out of court investigations of jurors to settle disputes.[9] Today, however, the judicial system operates in an adversarial fashion.[10] The blanket incompetency rule no longer exists;[11] it was abolished by statute in this Commonwealth more than a century ago.[12]

Despite a statutory abrogation of the blanket incompetency rule, two remnants of the common law rule persist. These two remnants, that of proving intent only by the use of circumstantial evidence and that of excluding testimony because it is self-serving, perpetuate an antiquated view that all potentially biased testimony should be excluded. The first remnant, whereby intent must be proved exclusively by circumstantial evidence, apparently emerged as a *de facto* consequence of the blanket incompetency rules.[13] With an interested party disqualified from testifying, his intent, when it was a material fact, could be proved only circumstantially.[14] Based upon this origin, however, restricting proof of intent to circumstantial evidence no longer is sustainable once the underlying incompetency rule is eliminated.[15] The rule today, is that, when intent is a factual issue to be proved, direct testimony relating to it is to be admitted in this Commonwealth.[16]

The second remnant of the common law blanket incompetency rule, whereby evidence may be excluded because it is self-serving, continues to

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[8] LILLY, *supra* note 1, at § 22; *see* HUGHES, *supra* note 1, at § 121.

[9] HUGHES, *supra* note 1, at § 451.

[10] *Id.* at § 452.

[11] HUGHES, *supra* note 1, at § 121; LILLY, *supra,* note 1, at § 22. *See* FED. R. EVID. 601 & advisory committee note; MASS. R. EVID. 601 (Proposed Draft 1980).

[12] HUGHES, *supra* note 1, at § 455; *see* 2 J. WIGMORE, EVIDENCE § 579, at 826 n.2 (Chadbourne rev. 1979); LIACOS, *supra* note 3, at 173-76; *see also* J.B Thayer, *A Chapter of Legal History in Massachusetts*, 9 HARV. L. REV. 1, 11-12 (1895) (parties to civil lawsuit made competent in 1856; criminal defendant made competent in 1866).

The law in Massachusetts presently reads:

> Any person of sufficient understanding, although a party, may testify in any proceeding, civil or criminal, in court or before a person who has authority to receive evidence, except as follows:
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> * * *
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> Third, The defendant in the trial of an indictment, complaint or other criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him.

G.L. c. 233, § 20.

[13] 2 WIGMORE, *supra* note 12, at § 581.

[14] *See id.*

[15] *Id.*

[16] Commonwealth Bank & Trust Co. v. Plotkin, 371 Mass. 218, 221, 355 N.E.2d 917, 919 (1976); Commonwealth v. Reynolds, 338 Mass. 130, 134, 154 N.E.2d 130, 133 (1958); Commonwealth v. Woodward, 102 Mass. 155, 161 (1869). *Accord* Crawford v. United States, 212 U.S. 183, 202-03 (1909).

cause substantial confusion in Massachusetts.[17] The exclusion of self-serving testimony, like the rule regulating the manner in which intent may be demonstrated, has been justified on the basis of potential unreliability.[18] The fear of unreliability notwithstanding, confusion has resulted from rote application of a self-serving declaration label. Originally, the exclusion was designed to restrict out of court declarations by a party who himself was disqualified from testifying at trial due to the blanket incompetency rule. Without a rule excluding such declarations, interested parties easily could circumvent the blanket incompetency rule by making a declaration, whether fabricated or not, in the presence of a disinterested witness who later could repeat the declaration at trial.[19] The self-serving declaration label also has been applied to the retrospective trial testimony of interested witnesses, even though, when considered in light of the abolition of blanket incompetency such an application can lead to a contradictory result.[20] Properly, the potential self-serving aspect of a witness' retrospective trial testimony should be considered exclusively as a question of that witness' credibility.[21] Unfortunately, application of the self-serving testimony exclusion, in lieu of the former blanket incompetency rule, remains possible due to imprecise language in several court opinions.[22] Similarly, insofar as the exclusion ostensibly pertained to self-serving out of court declarations, precedent has not expressed clearly the true nature of the exclusion.[23] The rule today in Massachusetts is that out of court declarations are to be ex-

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[17] HUGHES, *supra* note 1, at § 453(3); *see, e.g.,* Commonwealth v. Fatalo, 345 Mass. 85, 86-88, 185 N.E.2d 754, 755-56 (1962).

[18] HUGHES, *supra* note 1, at § 453(3); MCCORMICK, *supra* note 1, at § 290. See 6 J. WIGMORE, EVIDENCE § 1732, at 158 n.6 (Chadbourn rev. 1976).

[19] HUGHES, *supra* note 1, § 455, at 606 n.68.

[20] For example, in Commonweatlh v. Fatalo, 345 Mass. 85, 185 N.E.2d 754 (1962), the defendant sought to testify as to why he had failed to inform the police of a certain matter. This testimony was excluded on the ground that it was self-serving. The Supreme Judicial Court, however, denounced the use of a self-serving evidentiary label. *See* 345 Mass. at 86-88, 185 N.E.2d at 755-56. The practical effect of the trial judge's ruling was to nullify the statute rendering the defendant competent to testify.

[21] Assessors of Pittsfield v. W.T. Grant Co., 329 Mass. 359, 361 108 N.E.2d 536, 537 (1952); *see* LIACOS, *supra* note 3, at 176; MCCORMICK, *supra* note 1, at § 65.

[22] *E.g.,* Bouchard v. Bouchard, 313 Mass. 531, 48 N.E.2d 161 (1943) (self-serving declarations are not admissible in party's favor; discussing admissibility of letters); Commonwealth v. Cantor, 253 Mass. 509, 149 N.E. 205 (1925) (statement excluded because it was "merely self-serving;" *i.e.,* hearsay statement); HUGHES, *supra* note 1, at § 455 ("From its ready employment of the term, the impression is often created that [the Massachusetts] Court applies a separate and sweeping rule of exclusion of self-serving declarations, made and offered by a party to the action." Discussing extrajudicial statements).

[23] *See* Commonwealth v. Fatalo, 345 Mass. 85, 185 N.E.2d 754 (1962); HUGHES, *supra* note 1, at § 455.

cluded solely as a matter of hearsay, and even then may be admitted if they meet the criteria of a recognized hearsay exception.[24]

Hearsay statements are defined as any out of court declaration subsequently offered at trial as proof of the matter asserted therein.[25] The hearsay rule renders inadmissible all hearsay evidence, unless the particular evidence falls within a recognized exception to the general hearsay exclusion,[26] or unless no objection is received as to its admission.[27] The traditional explanation for excluding hearsay rests on the potential unreliability of such evidence; the factfinder is asked to accept the veracity of the declaration without the benefit of three features which encourage in-court credibility: oath or affirmation, personal presence at trial, and cross-examination.[28] Exceptions to the hearsay rule have been allowed when (1) there is a particularly strong need to admit evidence which otherwise would be excluded, and (2) the hearsay declaration is made in a context which offers some additional assurance of the statement's reliability.[29] Among the recognized hearsay exceptions is hearsay evidence descriptive of a present state of mind.[30] This state of mind exception, which permits the introduction of out of court declarations on criminal intent,[31] is justified on the theory that its contemporaneity with the mental condition it describes reduces the possibility of contrivance, coupled with the difficulty of otherwise ascertaining the disputed state of mind.[32]

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[24] *See* Commonwealth v. Fatalo, 345 Mass. 85, 185 N.E.2d 754 (1962); HUGHES, *supra* note 1, at § 455.

[25] LIACOS, *supra* note 3, at 262; HUGHES, *supra* note 1, at § 453 n.34; FED. R. EVID. 801(c); MASS. R. EVID. 801(c) (Proposed Draft 1980).

[26] *See* LIACOS, *supra* note 3, at 262; HUGHES, *supra* note 1, at § 453; FED. R. EVID. 802-804; MASS. R. EVID. 802-804 (Proposed Draft 1980).

[27] Freyermuth v. Lutfy, 376 Mass. 612, 616-17, 382 N.E.2d 1059, 1063 (1978); LIACOS, *supra* note 3, at 266; HUGHES, *supra* note 1, at § 452.

[28] MCCORMICK, *supra* note 1, at § 245. For a history of the hearsay rule, see *id.* at § 244. *See also,* 5 J. WIGMORE, EVIDENCE § 1364 (Chadbourn rev. 1974).

[29] LIACOS, *supra* note 3, at 266; MCCORMICK, *supra* note 1, at § 290.

[30] Commonwealth v. Ferreira, 1980 Mass. Adv. Sh. 1861, 409 N.E.2d 188 (1980); Commonwealth v. Wampler, 369 Mass. 121, 337 N.E.2d 892 (1975); Commonwealth v. DelValle, 351 Mass. 489, 221 N.E.2d 922 (1966); Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961 (1892) LIACOS, *supra* note 3, at 348. *See* Commonwealth v. Trainor, 374 Mass. 796, 374 N.E.2d 1216 (1978).

The present codification of this hearsay exception permits the introduction of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory of belief to prove the fact remembered or believed . . . ." FED. R. EVID. 803(3); MASS. R. EVID. 803(3) (Proposed Draft 1980).

[31] *See* Commonwealth v. Ferreira, 1980 Mass. Adv. Sh. 1861, 1865, 409 N.E.2d 188, 192 (1980); MCCORMICK, *supra* note 1, at § 294(a).

[32] HUGHES, *supra* note 1, at § 567; MCCORMICK, *supra* note 1, at § 294(a).

During the *Survey* year, the Massachusetts Supreme Judicial Court was presented with an opportunity to clarify these evidentiary rules. In *Commonwealth v. Caldron,*[33] the Court considered the admissibility of both direct testimony retrospectively descriptive of past states of mind as well as testimony seeking to recount previous conversations which themselves addressed mental condition. The Supreme Judicial Court concluded that both types of testimony should have been admitted.

The factual issue in *Caldron* was whether the defendant actually and intentionally participated in a combination robbery and assault. The victim of the attack testified on direct examination that he was accosted by two men late one night in Boston.[34] These men were identified as the defendant, Jesus Caldron, and his companion, Joseph Pope.[35] The victim stated that as the two men approached him, Pope told him that he was going to be robbed.[36] The attack, the victim further testified, began with the defendant striking him and then holding his arms while Pope rummaged through his pockets.[37] The victim maintained that a fisherman's knife and a wallet were removed by Pope.[38] Eventually, the victim explained, he managed to free one of his arms, whereupon Pope stabbed him with the knife.[39] Pope and the defendant immediately fled after the stabbing, according to the victim, but they were apprehended by the police less than fifteen minutes later.[40]

The accuracy of the victim's description of the attack, however, was challenged by two points raised on cross-examination. First, the victim was forced to concede that, although on direct examination he seemed confident in his description,[41] during the initial grand jury inquiry he was unsure as to what each of the two assailants actually had done.[42] Second, despite his direct testimony that the defendant assaulted him,[43] the victim admitted telling the defendant's counsel, one day prior to the trial, that the defendant had not participated in the attack.[44]

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[33] 1981 Mass. Adv. Sh. 620, 417 N.E.2d 958 (1981).

[34] *Id.* at 621, 417 N.E.2d at 959.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* The victim added that his wrist watch also had been taken. *Id.*

[39] *Id.*

[40] *Id.* at 621-22, 417 N.E.2d at 959. One of the two police officers who participated in the arrest also testified. *Id.* at 622, 417 N.E.2d at 959.

[41] *Id.*

[42] *Id.* The lapse of time between the attack and trial should be noted. The attack occurred in July, 1976. A grand jury inquiry was held approximately one month later. The jury trial, for an unexplained reason, was delayed until December, 1979. *See id.* at 621-23, 417 N.E.2d at 959.

[43] *Id.* at 621-22, 417 N.E.2d at 959.

[44] *Id.* at 622-23, 417 N.E.2d at 959.

The victim's testimony was further rebutted by the defendant, who was called as the only defense witness.[45] The defendant explained he had known Pope only for a short time prior to the robbery, and the two men were looking for Pope's girlfriend on the night of the attack.[46] According to the defendant, Pope unexpectedly and unilaterally initiated the assault, and then shouted for the defendant to participate.[47] The defendant testified that he refused to join in, and instead attempted to stop the attack.[48] Uncertain as to whether he had touched the victim at all during the altercation, the defendant speculated that if he had, it was as he tried to pull back Pope.[49] The defendant insisted that although he remembered seeing Pope clasp money and a shiny object, he never realized the victim was stabbed until being so informed following his arrest.[50]

The evidentiary dispute emerged from the defendant's assertion that he never intended to participate in the attack. The defendant's testimony in part was designed to bolster this position. Yet when defense counsel asked the defendant whether he ever intended to rob the victim, this question was excluded upon an objection raised by the Commonwealth.[51] Moreover, on three other occasions during the defendant's testimony the trial judge sustained objections to questions seeking details of an argument between Pope and the defendant immediately after they had fled from the scene.[52] As a result of these exclusions, the defense was left with only bits of rambling answers by the defendant to support his claimed absence of criminal intent.[53]

The Supreme Judicial Court considered, *inter alia,*[54] the propriety of the trial court's rulings excluding proffered testimony on criminal intent.[55] The court's analysis on this broad issue was undertaken in two parts. The first part of the analysis addressed the excluded testimony by the defendant directly describing his own intent;[56] the second part focused on the excluded

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[45] *Id.* at 622, 417 N.E.2d at 959. His companion, Pope, was not called to testify.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.* at 623, 417 N.E.2d at 959. No offer of proof was made by the defendant. *Id.* at 623 n.2, 417 N.E.2d at 960 n.2. This issue is discussed *infra* at note 84.

[52] 1981 Mass. Adv. Sh. at 623, 417 N.E.2d at 959-60.

[53] *Id.* at 626, 417 N.E.2d at 961.

[54] The Supreme Judicial Court also examined questions relating to the admissibility, for impeachment purposes, of evidence disclosing prior convictions. The Court held that this question was not open to appellate review, referring to its decision in Commonwealth v. Diaz, 1981 Mass. Adv. Sh. 605, 417 N.E.2d 950 (1981). *Diaz,* decided the same day as *Caldron,* is discussed in § 8.1 of this SURVEY.

[55] 1981 Mass. Adv. Sh. at 621 417 N.E.2d at 958.

[56] *Id.* at 623-24, 417 N.E.2d at 959-60.

testimony which would have recounted a conversation between the defendant and Pope.[57] The Court held that it was error to deny the defendant an opportunity to testify as to his intent.[58] Wrongful intent or purpose, the Court explained, was an element in each of the crimes with which the defendant had been charged,[59] adding that testimony relating to intent consequently was relevant.[60] The Court stated that relevant testimony should be admitted unless it can be excluded by a particular evidentiary rule.[61] The Court found that in *Caldron* no such exclusionary rule was applicable.[62]

The Court considered whether the defendant's testimony describing his own intent could be excluded because the testimony was self-serving.[63] The Court was not persuaded by this argument, however, and instead determined that the virtually unanimous rule permits a party to testify as to his own intent.[64] The Court added that it was of no consequence, insofar as admissibility is concerned, that the proffered testimony was self-serving.[65] The Court concluded its discussion on this issue by explaining that all testimony offered by a criminal defendant during his direct examination is likely to be self-serving, so this inevitability cannot be a legitimate basis for excluding it.[66]

After concluding that the defendant's testimony describing his own intent should have been admitted, the Supreme Judicial Court next considered the excluded testimony recounting an argument the defendant had with Pope in the moments between the attack and their arrest. The precise nature of the excluded testimony was not clear to the Court, as the defendant had failed to make an offer of proof.[67] Notwithstanding the defendant's neglect, the Court surmised that the testimony either would have dealt with a general argument providing inferential evidence of the defendant's state of mind, or would have been a direct statement made by the defendant descriptive of that mental condition.[68]

The Commonwealth contended only that the testimony, in either event, was excludable pursuant to the hearsay rule.[69] The Supreme Judicial Court,

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[57] *Id.* at 624-25, 417 N.E.2d at 960-61.

[58] *Id.* at 623, 417 N.E.2d at 960.

[59] *Id.* The defendant was charged under G.L. c. 265, §§ 15A, 19.

[60] 1981 Mass. Adv. Sh. at 623-24, 417 N.E.2d at 960.

[61] *Id.*

[62] *Id.* at 624, 417 N.E.2d at 960.

[63] *Id.*

[64] *Id.*

[65] *Id.*

[66] *Id. See also* United States v. Matot, 146 F.2d 197, 198-99 (2d Cir. 1944); Commonwealth v. Fatalo, 345 Mass. 85, 185 N.E.2d 754 (1962).

[67] 1981 Mass. Adv. Sh. at 624 n.3, 417 N.E.2d at 960 n.3. This aspect of *Caldron* is considered *infra* at note 84.

[68] 1981 Mass. Adv. Sh. at 624, 417 N.E.2d at 960.

[69] *Id.*

however, disagreed. The Court explained that if the testimony provided only inferential evidence of the defendant's mental state, then the testimony would fall without the hearsay rule.[70] Conversely, if the testimony offered prior statements by the defendant directly describing his mental condition, then according to the Court the hearsay rule would apply.[71] Even here, the Court added, a direct assertion in an out of court statement may be admitted under a state of mind exception to the hearsay rule.[72] Acknowledging that this hearsay exception was limited to declarations contemporaneous to the mental state described,[73] the Court held that the declaration in *Caldron,* made only moments after the attack, was admissible due to its proximity in time and sufficient probative value.[74] Furthermore, the Court concluded, the declaration should have been admitted, for these same reasons, even if it described what was technically the defendant's previous state of mind.[75]

The conclusion reached by the Supreme Judicial Court, whereby the defendant's testimony directly describing his own intent during the attack should have been admitted,[76] is supported by both precedent and policy. The rule in this Commonwealth, and repeated in *Caldron,*[77] is that relevant evidence is to be admitted unless some particular rule requires its exclusion.[78] In *Caldron,* the defendant's testimony was relevant for it addressed his intent, which was a material element in each of the crimes alleged.[79] The exclusion could not be justified using the former *de facto*

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[70] *Id.* at 624-25, 417 N.E.2d at 960-61.

[71] *Id.* at 625, 417 N.E.2d at 961.

[72] *Id.*

[73] *Id.* at 625 & n.4, 417 N.E.2d at 961 & n.4.

[74] *Id.*

[75] *Id.* at 626 n.4, 417 N.E.2d at 961 n.4. The Court ultimately determined that the erroneous exclusions were not harmless. *Id.* at 626-28 & n.5, 417 N.E.2d at 961-62 & n.5. In reaching this conclusion, the Court focused primarily on the excluded testimony wherein the defendant sought to describe his intent retrospectively. The excluded testimony, according to the Court, could not be viewed as cumulative simply due to the admission of other rambling evidence on point. *Id.* at 626, 417 N.E.2d at 961. The Court added that no factor which otherwise might mitigate the erroneous exclusion, such as evidence overwhelmingly supporting guilt or disproving it, was present. In fact, the Court noted, the harm resulting from the trial judge's ruling excluding the retrospective testimony on intent was exascerbated by the other erroneous rulings excluding the conversation between Pope and the defendant. *Id.* at 626-28, 417 N.E.2d at 961-62.

[76] *Id.* at 623, 417 N.E.2d at 960.

[77] *Id.* at 623-24, 417 N.E.2d at 960.

[78] Kramer v. John Hancock Mutual Life Ins. Co., 336 Mass. 465, 467, 146 N.E.2d 357, 358-59 (1957); HUGHES, *supra* note 1, at § 283; *see* FED. R. EVID. 402, 403; MASS. R. EVID. 402, 403 (Proposed Draft 1980).

[79] Regarding the charge for assault and battery under G.L. c. 265, § 15A, see Salemme v. Commonwealth, 370 Mass. 421, 424, 348 N.E.2d 799, 801 (1976); *accord* Commonwealth v. Meadows, 1981 Mass. App. Ct. Adv. Sh. 1875, 1880, 428 N.E.2d 321, 324 (1981). Regarding

restriction on party testimony regarding intent; formalization of this restriction, once it ceased to be a *de facto* phenomenon, has been universally rejected.[80] Similarly, the trial judge's ruling highlights a continued misunderstanding of the scope of the now discredited rationale excluding as self-serving out of court party declarations.[81] Application of a rule prohibiting parties from introducing self-serving retrospective testimony effectively would nullify statutes rendering interested witnesses competent to testify, and also would impair the adversarial system presently used. Such a scenario is contrary to the scheme which actually exists. The rule in Massachusetts, as reaffirmed in *Caldron,* is that a witness, whether or not he is a party, is not incompetent to testify at trial due to his interest in the outcome;[82] as a competent witness, he is disqualified neither wholly nor partially from testifying on any relevant matter including his intent, simply because his testimony may be self-serving.[83]

The Supreme Judicial Court's conclusion holding admissible the excluded testimony recounting a previous conversation between Pope and the defendant, also represents a sound determination. Unfortunately, analysis of this issue is made more complex, as it was for the Court, due to the defendant's failure to make an offer of proof.[84] The Court nevertheless speculated that this testimony either would have provided inferential evidence of the defendant's mental condition, or would have been a direct assertion by the defendant to Pope descriptive of that mental state.[85] As

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the robbery charge, G.L. c. 265, § 19, see Commonwealth v. Richards, 363 Mass. 299, 307-08, 293 N.E.2d 854, 860 (1973); Commonwealth v. Weiner, 255 Mass. 506, 509, 152 N.E. 359, 360 (1926).

[80] *See supra* notes 13-16 and accompanying text.

[81] *See supra* notes 17-24 and accompanying text.

[82] *See supra* notes 11, 12. *See also Caldron,* 1981 Mass. Adv. Sh. at 623-24, 417 N.E.2d at 960.

[83] *See supra* notes 17-24 and accompanying text.

[84] *See* 1981 Mass. Adv. Sh. at 623 n.2, 624 n.3, 417 N.E.2d at 960 nn. 2, 3 (1981). Justice Liacos explains that an offer of proof helps to demonstrate that the proponent was prejudiced by the evidentiary exclusion. Without such an offer, the appellate court normally has no basis for reversing, for it cannot know whether the excluded answer would have been favorable or not, and therefore is unable to determine whether the exclusion has caused harm. LIACOS, *supra* note 3, at 78. A second purpose of an offer of proof is to permit the trial judge to reconsider the evidentiary question, this time aided by knowing what the challenged answer will be. HUGHES, *supra* note 1, at § 214.

Notwithstanding the role played by offers of proof, failure to make such an offer is excused when the excluded answer is apparent from the context of the testimony or when the trial judge excludes all testimony on the particular issue. *See* First Nat'l Bank of Mount Dora v. Shawmut Bank of Boston, N.A., 378 Mass. 137, 141, 389 N.E.2d 1002, 1005 (1979); Ratner v. Canadian Universal Ins. Co., 359 Mass. 375, 385, 269 N.E.2d 227, 232 (1971); Moran v. Levin, 318 Mass. 770, 773-74, 64 N.E.2d 360, 362 (1945); FED. R. EVID. 103(a)(2); MASS. R. EVID. 103(a)(2) (Proposed Draft 1980).

[85] 1981 Mass. Adv. Sh. at 624, 417 N.E.2d at 960.

previously noted, the notion of self-serving testimony, although it ostensibly applied to out of court declarations, no longer has significance in terms of admissibility.[86] Consequently, if this testimony recounting prior testimony was not to be admitted, the exclusion would be founded on the hearsay rule.[87]

The defendant's testimony, if it would have provided merely inferential evidence of his state of mind, would not have been hearsay and therefore could not be excluded because of that rule. For example, the defendant, shocked and frightened by what had transpired, might have said to Pope something similar to "You are crazy to have jumped that guy the way you did." Such a statement should be admitted. It is relevant as evidence from which a factfinder could draw an inference that the defendant indeed was surprised there had been an attack.[88] It would seem far less likely the defendant had the requisite criminal intent based upon the above mentioned declaration. Moreover, this declaration, though made out of court, could not be excluded under the hearsay rule, for it is not offered to prove the truth of the matter asserted therein.[89] Regardless of whether or not Pope is crazy, as the defendant had asserted, the factfinder can elicit significant and relevant information from the declaration. When an out of court declaration is offered for a nonhearsay purpose, it cannot be excluded by the hearsay rule.[90]

If the recounted conversation was not limited to inferential evidence, and instead included direct assertions by the defendant descriptive of his mental state, then the hearsay rule would apply.[91] In such a case, the defendant would be asking a factfinder at trial to accept as indicative of the truth these earlier declarations made by the defendant to Pope. Under the accepted terminology, he would be offering out of court declarations in court as proof of the matter asserted in those statements.[92] Notwithstanding the technical purity of this distinction, however, in practice and theory it somewhat is blurred in Massachusetts.[93] As the Court noted in *Caldron,* evidence of mental condition appears to be equally reliable whether received directly or circumstantially.[94] This type of evidence, therefore, often is admitted, either as nonhearsay or as part of the state of mind exception to the hearsay rule.[95]

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[86] *See supra* notes 17-24 and accompanying text.
[87] *See supra* note 24 and accompanying text.
[88] *See* HUGHES, *supra* note 1, § 453(3) at 595.
[89] *See* LILLY, *supra* note 1, at § 50.
[90] *See Id.*; HUGHES, *supra* note 1, at § 563; LIACOS, *supra* note 3, at 262-63.
[91] *See* LILLY, *supra* note 1, at § 50; MCCORMICK, *supra* note 1, § 249, at 590.
[92] *See supra* note 25 and accompanying text.
[93] *See infra* note 95.
[94] 1981 Mass. Adv. Sh. at 624-25, 417 N.E.2d at 960-61.
[95] *See* Commonwealth v. Ferreira, 1980 Mass. Adv. Sh. 1861, 1865, 409 N.E.2d 188, 192

Despite the Court's desire to admit testimony of this variety, it must be emphasized that the state of mind hearsay exception has several prerequisites; only certain types of declarations will be admissible under this exception. The exception permits the introduction of a hearsay declaration of the declarant's then existing mental, emotional, sensational or physical condition, except for statements of memory offered to prove the fact remembered.[96] Before the *Caldron* declaration could be admitted under this hearsay exception, however, two potential problems must be addressed. First, the state of mind exception requires that the out of court declaration describe a *present* mental condition.[97] Although the defendant's testimony must be determined by speculation, it is possible that the declaration would have been something like "Pope, I am shocked that you could suddenly attack and rob that defenseless man." In this example the defendant, by recounting this testimony, is seeking to convince the factfinder that he actually was shocked by his companion's sudden conduct; he is offering the out of court declaration as proof of the matter asserted in it.[98] Yet the hearsay statement is not strictly contemporaneous with the defendant's state of mind at the time of the attack. Rather, it indicates his mental condition shortly after the attack had concluded. The Supreme Judicial Court found the declaration to be close enough chronologically, and of sufficient probative value, to merit its admission within the exception.[99] This ruling comports with other decisions by the Court rejecting the notion of strict contemporaneity in favor of a transactional approach, when evaluating certain of the hearsay exceptions.[100] Under this analysis, the defendant's declaration

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(1980); Commonwealth v. Wampler, 369 Mass. 121, 123, 337 N.E.2d 892, 893-94 (1975); McCORMICK, *supra* note 1, at § 294(a); LILLY, *supra* note 1, at § 50.

[96] FED. R. EVID. 803(3); MASS. R. EVID. 803(3) (Proposed Draft 1980). *See also supra* note 30.

[97] *See supra* note 96. *See also* LIACOS, *supra* note 3, at 348; McCORMICK, *supra* note 1, at § 294(a).

[98] *See supra* note 25 and accompanying text.

[99] *See* 1981 Mass. Adv. Sh. at 625 & n.4, 417 N.E.2d at 961 & n.4.

[100] The state of mind hearsay exception, FED. R. EVID. 803(3), MASS. R. EVID. 803(3) (Proposed Draft 1980), is a specialized application of the present sense impression hearsay exception, FED. R. EVID. 803(1), MASS. R. EVID. 803(1) (Proposed Draft 1980), separated to enhance its usefulness and accessibility. FED. R. EVID. 803 advisory committee note. This latter hearsay exception in turn is related to a third hearsay exception, for excited utterances, FED. R. EVID. 803(2), MASS. R. EVID. 303(2) (Proposed Draft 1980). LIACOS, *supra* note 3, at 351-52; FED. R. EVID. 803 advisory committee note. The hypothetical declaration herein under consideration especially resembles the excited utterance exception for it would have been a spontaneous exclamation made under the impulse of shock which characterizes and explains the event to which it relates. *See* LIACOS, *supra* note 3, at 350.

Massachusetts traditionally has required strict contemporaneity when using the excited utterance exception, but this requirement recently has been relaxed. *Id.* at 350-51. Rather than imposing strict time limits, courts prefer to consider the facts in the particular case, and will ad-

in *Caldron,* made during their flight from the scene of the attack, presents a combination of necessity and spontaneity-induced reliability to be included within the state of mind exception.

The second problem requiring attention before the defendant's testimony acceptably could be admitted relates to a declaration saying "Pope, how could you attack that man; I did not intend to attack him." This type of statement is one descriptive of a *past* state of mind. As such it too would not conform to the requirements of the hearsay exception currently under scrutiny. The Supreme Judicial Court again considered the overall transaction, and found that the statement would have qualified as a present declaration.[101] The Court noted, moreover, that Wigmore would admit even statements of past mental conditions.[102] Permitting this testimony to be admitted seems to be sound, at least when admission is the conclusion reached by employing the transactional analysis. Under this analysis, until the overall event concludes, there is little to distinguish a present declaration in one part of the transaction from what technically is a past declaration in a later part of it. In addition, as the event was fresh in the defendant's mind at the time he made the declaration, the statement should be at least as helpful to a factfinder as would be the defendant's retrospective description at trial. Finally, in evaluating the liberal approach undertaken by the Supreme Judicial Court in *Caldron,* respecting both possible versions of the recounted conversation, the practitioner should consider that the declarant and subsequent trial witness were one in the same. Consequently, an opportunity for cross-examination existed; the factfinder was not relegated exclusively to rely on the hearsay declaration for its veracity. When the hearsay declarant subsequently testifies at trial, it has been urged that courts should be more liberal in admitting the out of court declaration.[103] The

mit subsequent declarations where the delay was not long enough to allow the exciting influence to dissipate. Commonwealth v. Sellon, 1980 Mass. Adv. Sh. 789, 797-98, 402 N.E.2d 1329, 1337 (1980); Rocco v. Boston-Leader, Inc., 340 Mass. 195, 196-97, 163 N.E.2d 157, 158 (1960). *Accord* Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961 (1892) (declarations respecting mental condition should be admitted if sufficiently near in point of time); MCCORMICK, *supra* note 1, at § 294(a) (considering state of mind exception); 6 J. WIGMORE, EVIDENCE § 1732, at 161-62 (Chadbourn rev. 1976).

[101] 1981 Mass. Adv. Sh. at 625 n.4; 417 N.E.2d at 961 n.4.

[102] *Id.* (citing 6 J. WIGMORE, EVIDENCE § 1732, at 161 (Chadbourn rev. 1976)). McCormick warns that if retrospective testimony is not carefully controlled, it could amount to allowing "the exception for declarations of mental state to swallow substantially the entire hearsay rule." MCCORMICK, *supra* note 1, § 296(c), at 701.

[103] MCCORMICK, *supra* note 1, at § 251 (Prior statements are more recent than latter testimony, so probably more accurate; also an opportunity for cross-examination); LILLY, *supra* note 1, at § 52; *cf.* 6 J. WIGMORE, EVIDENCE § 1732, at 156 (Chadbourn rev. 1976) (whereas an accused's statements often can be used against him as admissions, there is a strong judicial tendency to admit statements offered in his favor). In certain circumstances, a witness could avoid the hearsay problem entirely by adopting his prior declaration at trial. *See* FED. R. EVID. 801(d) advisory committee note.

Supreme Judicial Court did not discuss this element of the hearsay issue in *Caldron*, thereby leaving open the question of whether the transactional approach might be constricted somewhat when the hearsay declaration is to be recounted at trial by someone other than the original declarant.