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## Chapter 2: Constitutional Law

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## CHAPTER 2

# Constitutional Law

MARC G. PERLIN\*

**§ 2.1. Introduction.** During 1980, controversial legislative enactments dealing with capital punishment and school prayers, issues which have divided national public opinion for over a decade, were tested in the Supreme Judicial Court. The Court held both enactments unconstitutional. In *District Attorney for the Suffolk District v. Watson*,<sup>1</sup> the Supreme Judicial Court held that the legislature's attempt to draft a death penalty law consistent with federal constitutional standards nevertheless failed to meet the more stringent standards demanded by the Massachusetts Constitution. In *Kent v. Commissioner of Education*,<sup>2</sup> the Supreme Judicial Court held that a statute which established a daily period of prayer in the public classroom violated the first amendment to the United States Constitution. Consequently, the Court did not decide the constitutionality of school prayers under the Massachusetts Constitution.

A third major case discussed in this chapter, *Matter of Spring*,<sup>3</sup> traces the continuing evolution in Massachusetts of the constitutional right to refuse medical treatment, a right grounded in both federal and state law sources. In *Spring*, the Supreme Judicial Court held that this right of bodily integrity prevailed over the state interests in continuing the involuntary medical treatment of a terminally ill patient.

**§ 2.2. The Death Penalty: Cruel or Unusual Punishment.** Justice Marshall, commenting in 1980 on the United States Supreme Court's continuing attempt to prevent arbitrary imposition of the death penalty, predicted that "the enterprise on which the Court embarked in *Gregg v. Georgia*<sup>1</sup> [in 1976]

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§ 2.1 <sup>1</sup> 1980 Mass. Adv. Sh. 2231, 411 N.E.2d 1274. See § 2 *infra*.

<sup>2</sup> 1980 Mass. Adv. Sh. 803, 402 N.E.2d 1340. See § 3 *infra*.

<sup>3</sup> 1980 Mass. Adv. Sh. 1209, 405 N.E.2d 115. See § 4 *infra*.

§ 2.2. <sup>1</sup> 428 U.S. 153 (1976). *Gregg* was one of a series of 1976 cases in which the Supreme Court held that state capital punishment laws could withstand an eighth amendment attack if the laws guided the sentencing body and reduced its discretion in imposing the death sentence. *Id.* at 195.

*Gregg* upheld the constitutionality of Georgia's capital sentencing provisions which provided for a bifurcated trial where guilt and punishment were determined at separate hearings; where

... increasingly appears to be doomed to failure.” Acknowledging that appellate courts were powerless to ensure even-handed application of the death penalty, he urged his colleagues to abandon the death penalty.<sup>2</sup> During the *Survey* year, the Supreme Judicial Court of Massachusetts adopted the essence of Justice Marshall’s position and brought an end to the legislative attempt to reinstitute capital punishment in Massachusetts. In *District Attorney for the Suffolk District v. Watson*,<sup>3</sup> the Court held that the death penalty offended contemporary standards and that the death penalty had been applied in an arbitrary manner, in violation of the Massachusetts Constitution.<sup>4</sup> *Watson* represents yet another example of the increasing reliance by state courts on *state* constitutional provisions to protect individual rights. This reliance on state constitutions has grown dramatically since the middle of the 1970s and has been advocated by some members of the United States Supreme Court.<sup>5</sup>

The decision in *Watson* is the culmination of a series of Supreme Judicial Court decisions, beginning in 1975, which signal the demise of legislatively-authorized capital punishment in Massachusetts. In the 1975 case of *Commonwealth v. O’Neal (O’Neal I)*,<sup>6</sup> the Court reviewed a Massachusetts statute which provided for a mandatory death sentence to punish a murder committed during a rape.<sup>7</sup> The Court held that under both the due process clause of the fourteenth amendment and the cognate provisions of the Massachusetts Constitution, the right to life was fundamental.<sup>8</sup> By imposing the death penalty, the state infringes on a fundamental right, and “trig-

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the sentencing body had to find at least one of ten statutory aggravating factors prior to imposing death. In addition, the statute provided for speedy appellate review by the Georgia Supreme Court. The statute directed the state supreme court to consider whether imposition of death in the case before it was the product of passion or prejudice, whether the evidence supported the finding of a statutory aggravating factor, and whether the sentence was disproportionate in comparison with similar cases. *Id.* at 162-68.

For an analysis of the 1976 cases, see Comment, *Constitutional Law*, 1976 ANN. SURV. MASS. LAW § 13.5, at 387-434. See also Barry, *Furman to Gregg: The Judicial and Legislative History*, 22 How. L.J. 53 (1979).

<sup>2</sup> *Godfrey v. Georgia*, 446 U.S. 420, 434 (1980) (Marshall, J. and Brennan, J., concurring in the judgment). Since the 1976 opinions upholding the federal constitutionality of a properly drafted death penalty law, Justices Marshall and Brennan consistently have taken the position that the death penalty is *per se* unconstitutional. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 646 (1980) (Brennan, J., concurring, and Marshall, J., concurring in the judgment).

<sup>3</sup> 1980 Mass. Adv. Sh. 2231, 411 N.E.2d 1274.

<sup>4</sup> *Id.* at 2232, 411 N.E.2d at 1275.

<sup>5</sup> See Perlin, *Constitutional Law*, 1979 ANN. SURV. MASS. LAW § 7.1, at 202-03 and notes 8 & 9; Ortwein, *Constitutional Law*, 1978 ANN. SURV. MASS. LAW § 12.4 at 282. See also Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of The United States Constitution*, 14 SUFFOLK U. L. REV. 887, 927-28 (1980).

<sup>6</sup> 367 Mass. 440, 327 N.E.2d 662 (1975).

<sup>7</sup> *Id.* at 441, 327 N.E.2d at 663.

<sup>8</sup> *Id.* at 449-50, 327 N.E.2d at 668-69.

gers strict scrutiny under the compelling State interest and least restrictive means test. Thus, in order for the State to allow the taking of life by legislative mandate it must demonstrate that such action is the least restrictive means toward furtherance of a compelling governmental end.”<sup>9</sup> The Court thereupon allowed the parties a period of time to file briefs addressing whether the imposition of the death penalty advanced a compelling state interest that could not be advanced as effectively by a sentence of life imprisonment.<sup>10</sup>

Later in 1975, the Court responded to the Commonwealth’s attempt to demonstrate the state’s interest in imposing the death penalty. In *Commonwealth v. O’Neal (O’Neal II)*,<sup>11</sup> the Court held that the mandatory death provision in the rape-murder statute violated the Massachusetts constitutional prohibition against cruel or unusual punishments.<sup>12</sup>

The approach of the Supreme Judicial Court in the *O’Neal* cases was unlike that of the United States Supreme Court in its death penalty cases. Instead of determining whether the punishment of death was cruel and unusual because it may have violated contemporary standards of decency, or because it may have constituted torture,<sup>13</sup> the Supreme Judicial Court relied on the preferred status of *life* as a state constitutional standard, as well as the state constitutional prohibition against cruel or unusual punishments.<sup>14</sup> Since the right to life is the most fundamental of all rights, the

<sup>9</sup> *Id.* at 449-50, 327 N.E.2d at 668. See also Note, *The Impact of A Sliding-Scale Approach To Due Process Of Capital Punishment Litigation*, 30 SYRACUSE L. REV. 675 (1979).

<sup>10</sup> 367 Mass. at 449-50, 327 N.E.2d at 668-69.

<sup>11</sup> 369 Mass. at 242, 339 N.E.2d 676 (1975).

<sup>12</sup> The judgment imposing the death sentence was reversed by a *per curiam* order of the Supreme Judicial Court. *Id.* Chief Justice Tauro concurred in an opinion which relied on an analysis emphasizing the fundamental right to life, an approach he believed was required by both the due process guarantees of the Declaration of Rights and the prohibition of cruel and unusual punishments in art. 26 of the Declaration of Rights. *Id.* at 244-73, 339 N.E.2d at 677-93 (Tauro, J., concurring). Justice Hennessey concurred in this analysis. *Id.* at 274-75, 339 N.E.2d at 693-94 (Hennessey, J., concurring). Apparently, these Justices chose to base their decision solely on the Massachusetts Constitution, avoiding reliance on a fundamental right to life analysis under the fourteenth amendment of the United States Constitution. (In *O’Neal I*, the Court had relied on the fourteenth amendment as well as on the Massachusetts Constitution. See 367 Mass. at 447-48 n.5, 327 N.E.2d at 667, n.5). Justices Wilkins and Kaplan concurred in the result in *O’Neal II*, relying solely on art. 26. 369 Mass. at 276-79, 339 N.E.2d at 695-96 (Wilkins, J., concurring and Kaplan, J., concurring). Justice Braucher concurred in the result, but on the basis of statutory construction. On the constitutional issue, Justice Braucher joined the dissenting opinions of Justices Reardon and Quirico. *Id.* at 279-83, 339 N.E.2d at 696-98 (Braucher, J., concurring in the result).

For an analysis of *O’Neal II*, see Comment, *Constitutional Law*, 1976 ANN. SURV. MASS. LAW § 13.5, at 397.

<sup>13</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 169-73 (plurality opinion of Stewart, J.).

<sup>14</sup> “We elect instead to adopt an approach free from the abundant commentary and exhaustive material surrounding the Fourth Amendment route.” 367 Mass. at 447, 327 N.E.2d at 667. *But see* note 12 *supra*.

Court essentially imposed upon the state the burden of proving that the death penalty contributed more to accomplishing a legitimate state purpose, such as deterrence or retribution, than the less drastic punishment of life imprisonment. It was this burden that the state failed to meet in *O'Neal II*.<sup>15</sup>

Two years after the *O'Neal* cases, the Supreme Judicial Court was asked to render an advisory opinion to the House of Representatives on the validity under the state constitution of a bill providing for capital punishment in first degree murder cases.<sup>16</sup> The bill was modeled generally after the Georgia statute upheld on federal constitutional grounds in *Gregg*.<sup>17</sup> The proposed legislation provided for a trial with separate guilt and penalty stages; consideration by the sentencing body of extenuating, mitigating, and aggravating circumstances; and automatic review by the Supreme Judicial Court to guard against arbitrary infliction of the death penalty and to ensure consistency in application of punishment.<sup>18</sup> The Court's advisory opinion recognized the same state constitutional deficiencies in the bill which it had found earlier in *O'Neal II*. Specifically, the Court held that the Commonwealth failed to meet its burden of proving that a legitimate state purpose would be promoted better by the imposition of the death penalty than by a sentence of life imprisonment.<sup>19</sup> Perhaps foreshadowing the result in *Watson*, the Court stressed in the advisory opinion that it would not accept a legislative determination of the efficacy of capital punishment based on speculation that there was no less restrictive alternative.<sup>20</sup>

With the guidance provided by these opinions, and in response to what it perceived to be the sentiment of a large segment of the Commonwealth,<sup>21</sup>

<sup>15</sup> 369 Mass. at 243, 339 N.E.2d at 677.

<sup>16</sup> Opinion Of The Justices To The House of Representatives, 372 Mass. 912, 364 N.E.2d 184 (1977).

<sup>17</sup> *Id.* at 920, 344 N.E.2d at 188.

<sup>18</sup> *Id.* at 913-16, 364 N.E.2d at 184-86.

<sup>19</sup> *Id.* at 917, 364 N.E.2d at 186-87.

<sup>20</sup> *Id.*

<sup>21</sup> The legislature not only acknowledged that its capital punishment bill was in response to its assessment of the wishings of the state's voting population, but also used that opportunity to address its stance on the separation of judicial and legislative powers:

[T]he ability of the people of the commonwealth to express their preference through their duly elected representatives must not be shut off by the intervention of the judicial department on the basis of a constitutional test intertwined with an assessment of contemporary standards and that the judgment of the general court [the legislature] weighs heavily in ascertaining such standards in this commonwealth. It is hereby further declared that in a democratic society, legislatures, and here, in this commonwealth, the general court, is the body constituted to respond to the will of the people. It is hereby further declared that the declarations set forth above include and reflect the declarations already made by the highest court of the land which express that this subject of whether there be or not be capital punishment in any state is peculiarly questions of legislative, not judicial decision, and, in this commonwealth, that question is one for the general court to decide. . . .

the legislature set out once again to draft a capital punishment law to satisfy the constitutional requirements of *O'Neal II*. In 1979, the legislature enacted "An Act Providing for Capital Punishment"<sup>22</sup> and, thus, set the stage for *Watson*. A brief summary of the provisions of chapter 488 follows.

Section 1 of the statute contained the only indication that the legislature addressed the pivotal question posed by the Supreme Judicial Court, whether the death penalty served a state interest not served by life imprisonment. In section 1 the legislature declared that the appropriateness of capital punishment is a "complex factual issue" best resolved by the legislature (and inferentially, not by the Supreme Judicial Court).<sup>23</sup> After examining statistical studies, the legislature determined that capital punishment is "most probably an effective deterrent" to certain crimes and certain criminals (and inferentially, a more effective deterrent than life imprisonment).<sup>24</sup> The legislature further declared that capital punishment represents society's legitimate manifestation of retribution against certain criminals and that, in the previous nine years, Congress and at least 35 states enacted capital punishment laws.<sup>25</sup>

In section 2 of chapter 488, the legislature made first degree murder punishable by death,<sup>26</sup> while in section 3, the legislature set out the procedures by which the death penalty may be imposed.<sup>27</sup> Section 3 contained the requirement that after a verdict of guilty, the defendant's trial would resume before the same jury for sentencing purposes and that any evidence in extenuation, mitigation, or aggravation would be considered.<sup>28</sup> To impose death, the jury first must have found beyond a reasonable doubt at least one of the enumerated statutory aggravating circumstances.<sup>29</sup> The jury

1979 Mass. Acts, c. 488.

<sup>22</sup> 1979 Mass. Acts, Chapter 488, § 3 amended G.L. c. 279 and provided for the death penalty only if the jury found at least one of the statutory aggravating circumstances existed. These statutory circumstances included: 1) A murder of a police officer, 2) a murder committed by one who had been convicted previously either of first degree murder or of any felony involving the use or threat of personal violence, and 3) a murder committed in connection with a rape or rape attempt. *Id.* Furthermore, the jury could make a binding recommendation that the death penalty not be imposed. Although the statute listed some statutory mitigating circumstances for the jury to consider, the jury could recommend that the death sentence not be imposed even absent a finding that there were mitigating circumstances. *Id.*

<sup>23</sup> *Id.*, § 1.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* For discussion of the relevance of public opinion, see Thomas, *Eighth Amendment Challenges to the Death Penalty: The Relevance of Informed Public Opinion*, 30 VAND. L. REV. 1005 (1977); Glaser, *Capital Punishment—Deterrent or Stimulus to Murder? Our Unexamined Deaths and Penalties*, 10 U. TOL. L. REV. 317 (1979).

<sup>26</sup> 1979 Mass. Acts c. 488, § 2.

<sup>27</sup> *Id.*, § 3.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

must have set out in writing the circumstance or circumstances it found, and the jury must have unanimously recommended death.<sup>30</sup> The judge was then required to impose the death sentence.<sup>31</sup> Section 3 further provided for automatic review of a death sentence by the Supreme Judicial Court.<sup>32</sup> The statute directed the Court to examine the propriety of the death sentence in order to ensure that its imposition was not the product of prejudice or other arbitrary factors.<sup>33</sup> The Court also was directed to compare the propriety of the imposition of the death sentence with similar cases it has decided.<sup>34</sup>

The constitutionality of the new law was presented to the Court in the *Watson* case soon after chapter 488 became law. The *Watson* case arose as a request for declaratory and other relief by the district attorney for the Suffolk district.<sup>35</sup> In examining the constitutionality of this new law, the Supreme Judicial Court reviewed the judicial history of capital punishment in the United States Supreme Court as well as in the Supreme Judicial Court.<sup>36</sup> It determined the constitutionality of chapter 488, however, solely under the state constitutional prohibition against cruel or unusual punishments contained in art. 26 of the Declaration of Rights.<sup>37</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> The procedural posture of the *Watson* case was unusual. Unlike the typical appeal by a defendant who had been found guilty and sentenced to death, *Watson* was an original civil action commenced directly in the Supreme Judicial Court by the district attorney for the Suffolk district. *Id.* at 2231-32, 411 N.E.2d at 1275. The plaintiff sought a declaratory judgment under G.L. c. 231A, § 1 to determine the constitutionality of chapter 488, or, alternatively, an interpretation of the statute's constitutionality through the exercise of the Supreme Judicial Court's power to superintend the administration of justice in all courts (G.L. c. 211, § 3). Named as defendants were the Commonwealth and the judges of the Superior Court. *Id.* Later, four men awaiting trial in first degree murder cases subject to Chapter 488 were substituted as defendants. *Id.* at 2232, 411 N.E.2d at 1275. Although acknowledging that declaratory relief is generally unavailable during the course of a criminal prosecution, the Court held that *Watson* presented an exceptional circumstance where declaratory relief *prior to* conviction would be appropriate in order to preserve the orderly administration of criminal justice. The court found that the district attorney was obligated to enforce the procedural requirements of the new law and that declaratory relief would resolve the many problems that defendants would confront in preparing a defense in light of chapter 488. 1980 Mass. Adv. Sh. at 2242-43, 411 N.E.2d at 1280-81.

<sup>36</sup> *Id.* at 2238-41, 411 N.E.2d at 1278-80.

<sup>37</sup> Mass. Const. pt. 1, Art. XXVI reads in its entirety: "No magistrate or court of law, shall demand excessive bail or sureties, impose excessive fines, or inflict cruel or unusual punishments."

The Court apparently attached no significance to the fact that the state constitutional provision is phrased in the disjunctive, while the cognate eighth amendment provision is phrased in the conjunctive. See Comment, *Constitutional Law*, 1976 ANN. SURV. MASS. LAW § 13.5, at 388-89 n.13; see note 67 *infra*.

Focusing on the meaning of the term “cruel” as used in art. 26, Chief Justice Hennessey’s majority opinion noted that, like the interpretation of the eighth amendment to the United States Constitution, the meaning of cruelty under art. 26 does not turn on defining what punishments were deemed cruel at the time of its adoption.<sup>38</sup> Rather, the Court indicated, art. 26 reflects a standard that should grow and evolve as moral standards in society change. Like its federal counterpart, the Massachusetts article “ ‘must draw its meaning from evolving standards of decency that mark the progress of a maturing society.’ ”<sup>39</sup> Therefore, according to the Court, the constitutionality of the death penalty under the state constitution must turn on a determination whether such punishment is acceptable today. In deciding that capital punishment was not acceptable, the Court relied upon several different factors, including policy determinations as well as constitutional interpretations.

The first basis in support of the Court’s conclusion that the death penalty is unconstitutional was found in society’s reaction to the imposition of death.<sup>40</sup> Although acknowledging that public opinion on the issue was inconclusive, the Court perceptively differentiated between society’s responses to public opinion polls on the legitimacy of capital punishment and society’s actions in carrying out imposed death sentences.<sup>41</sup> The Court noted that no defendant had been executed in Massachusetts since 1948, and that, furthermore, there had been numerous executive commutations or reductions of death sentences during the period following the last execution.<sup>42</sup> “The complete absence of executions in the Commonwealth through these many years indicates that in the opinion of those several Governors and others who bore the responsibility for administering the death penalty provisions and who had the most immediate appreciation of the death sentence, it was unacceptable.”<sup>43</sup> It appears that the Court, in making this observation, had concluded that, although society was willing to adopt a death penalty law, it hesitates to perform the final act of “throwing the switch.”<sup>44</sup>

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<sup>38</sup> 1980 Mass. Adv. Sh. at 2243-44, 411 N.E.2d at 1281. At the time of its adoption in 1780, art. 26 clearly was not intended to forbid capital punishment. *Id.*

<sup>39</sup> *Id.* at 2244, 411 N.E.2d at 1281 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

<sup>40</sup> 1980 Mass. Adv. Sh. at 2245, 411 N.E.2d at 1282.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> In a similar fashion, one may speculate whether it may be politically expedient for a legislature to *pass* a capital punishment law, as long as no individual legislator actually *imposes* the death sentence on a defendant or *carries out* its command.

Similarly, Justice Marshall has observed: “And while hundreds have been placed on death row in the years since *Gregg*, only three persons have been executed. Two of them made no effort to challenge their sentence and were thus permitted to commit what I have elsewhere



The second consideration which buttressed the Court's conclusion was the finality of the death penalty. Because a death penalty is irrevocable, any future change in the law or discovery of new evidence favorable to a defendant would be of little help to the defendant *after* execution of a death sentence.<sup>45</sup>

The third justification proffered by the Court in its determination that the death penalty was unconstitutionally cruel was the "unparalleled effect on all the rights of the person condemned"<sup>46</sup>—the loss of all human rights. Although it did not explain fully how this loss of all rights rendered the death penalty unconstitutionally cruel, the Court's language is reminiscent of the due process, fundamental right to life analysis of *O'Neal I.*<sup>47</sup> The Court may have been convinced that the evidence in favor of the death penalty simply did not rise to the high level required to justify state interference with the fundamental right to life.

Finally, the Court concluded that the death penalty was unacceptably cruel because of "its unique and inherent capacity to inflict pain."<sup>48</sup> The mental agony that is part of our system of carrying out the death sentence as well as the physical pain involved was, in effect, judicially noted.<sup>49</sup>

The Court, however, in invalidating chapter 488, did not rest solely on a determination that the death penalty violated contemporary standards of

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described as 'state-administered suicide.' " *Godfrey v. Georgia*, 446 U.S. 420, 439 (1980) (Marshall, J., concurring) (footnotes and citations omitted).

<sup>45</sup> The Court commented: "While this court has the power to correct constitutional or other errors retroactively by ordering new trials for capital defendants whose appeals are pending or who have been fortunate enough to obtain stays of execution or commutations, it cannot, of course, raise the dead." 1980 Mass. Adv. Sh. 2246, 411 N.E.2d at 1282.

Again, the Court's language reflects the desire to avoid arbitrariness, a desire which permeates the judicial analysis in the death penalty area. For example, Justice White, in his concurring opinion in *Furman v. Georgia*, 408 U.S. 238 (1972), remarked "that there is no meaningful basis for distinguishing the few cases in which . . . [the death penalty] is imposed from the many cases in which it is not." *Id.* at 313 (White, J., concurring). So, too, the Supreme Judicial Court's analysis suggests that there is no meaningful basis to distinguish between capital defendants who are fortunate enough to have obtained judicial or executive stays of execution and become the beneficiaries of favorable new case law, and those who are not. *See, e.g., Evans v. Bennet*, 440 U.S. 1301 (1979) (Rehnquist, J., Circuit Justice) (granting stay of execution based in part on irreversible nature of death penalty).

<sup>46</sup> 1980 Mass. Adv. Sh. at 2246, 411 N.E.2d at 1282.

<sup>47</sup> See text and notes at notes 6-15 *supra*.

<sup>48</sup> 1980 Mass. Adv. Sh. at 2246, 411 N.E.2d at 1283.

<sup>49</sup> *Id.*, 411 N.E.2d at 1283, and cases cited. The Court rejected the argument that the mental agony may be attributable in part to delay caused by a defendant's exercise of appellate rights. The Court was unable to accept such an argument in a system which treasures due process and the right to pursue all judicial avenues of relief from an illegal or unjust capital sentence. *Id.* at 2246-47, 411 N.E.2d at 1283.

decency under art. 26. It held also that chapter 488 violated art. 26 because the death penalty had been administered in Massachusetts in an arbitrary and discriminatory fashion.<sup>50</sup> The Supreme Judicial Court acknowledged that the provisions of chapter 488 represented an attempt by the legislature to reduce the arbitrariness inherent in the criminal justice capital punishment scheme.<sup>51</sup> Nevertheless, the Court concluded, “[i]t is inevitable that the death penalty will be applied arbitrarily.”<sup>52</sup> Even if chapter 488 satisfied the eighth amendment requirement that the jury’s sentencing discretion be “guided” by standards which set out factors to be considered in imposing the death penalty,<sup>53</sup> the Supreme Judicial Court concluded that a sentencing jury simply would not be able to apply guidelines which attempted to distinguish between the types of murders and the types of defendants for which capital punishment was appropriate and those for which it was not.<sup>54</sup> Consequently, the Court held that such unconstrained discretion violated the cruel or unusual punishment clause of the Massachusetts constitution.<sup>55</sup>

Even if chapter 488 had been found to have eliminated the arbitrariness inherent in the jury sentencing process, the Supreme Judicial Court concluded that the statute did nothing to contain the discretion that is present in other aspects of the criminal process. It was important to the Court that our criminal justice system vests almost unreviewable discretion in police of-

<sup>50</sup> *Id.* at 2247-48, 411 N.E.2d at 1283.

<sup>51</sup> *Id.* at 2248-49, 411 N.E.2d at 1284.

<sup>52</sup> 1980 Mass. Adv. Sh. at 2247, 411 N.E.2d at 1283.

<sup>53</sup> *Gregg v. Georgia*, 428 U.S. 153, 193-95 (1976). See note 1 *supra*.

<sup>54</sup> 1980 Mass. Adv. Sh. at 2249-50, 411 N.E.2d at 1284. Justice Harlan expressed similar views in *McGautha v. California*, 402 U.S. 183 (1971):

To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability . . . It is apparent that . . . criteria [in aggravation and mitigation] do not purport to provide more than the most minimal control over the sentencing authority’s exercise of discretion.

*Id.* at 204, 207.

This view, however, led Justice Harlan to a position contrary to that taken later by the Supreme Judicial Court in *Watson*: “In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the [federal] Constitution.” *Id.* at 207 (citation omitted).

Of course, the *McGautha* view was rejected later by the holding of the 1976 death penalty cases that the eighth amendment forbids unrestrained discretion on the part of the sentencing body to impose death. See generally, *Gregg v. Georgia*, 428 U.S. 153 (1976); *id.* at 193, n.43.

<sup>55</sup> 1980 Mass. Adv. Sh. at 2249-50, 411 N.E.2d at 1284.

ficers,<sup>56</sup> prosecutors,<sup>57</sup> defense counsel,<sup>58</sup> and to a certain extent, even in the trial judge.<sup>59</sup> The Court noted that, “[i]n the totality of the process, most life or death decisions will be made by these officials, unguided and uncurbed by statutory standards.”<sup>60</sup> Leaving these crucial decisions to “chance and caprice” was found to be unsatisfactory. The Court restricted the scope of its analysis to death penalty cases, however, anticipating an attempt to apply the reasoning in *Watson* to non-capital sentences. The Court held that “chance and caprice” were prevented constitutionally from influencing the sentencing process only in death penalty cases.<sup>61</sup>

Justices Braucher, Wilkins, and Liacos all concurred in Chief Justice

<sup>56</sup> A police officer may exercise discretion by simply deciding not to arrest a suspect.

<sup>57</sup> As the Court stated:

For reasons which may be valid in the context of his duties, but which do not assist evenhandedness, the prosecutor in a homicide case may forego a first degree murder indictment and seek an indictment for . . . a lesser charge. Also, in a first degree murder case, . . . the prosecutor may in his uncurbed discretion nol prosee that part of the indictment which charges murder in the first degree.

1980 Mass. Adv. Sh. at 2250-51, 411 N.E.2d at 1285.

<sup>58</sup> An attorney’s particular choice of defense strategy, which may result in a conviction and a capital sentence, has elements of chance and vagary.

<sup>59</sup> The trial judge has almost unreviewable discretion in accepting a plea bargain of a lesser included offense and dismissing the first degree murder charge. 1980 Mass. Adv. Sh. at 2251, 411 N.E.2d at 1285.

<sup>60</sup> *Id.* at 2250, 411 N.E.2d at 1285. The Court also noted that capital punishment was imposed on defendants in Massachusetts in a racially discriminatory fashion. *Id.* The Court recognized that the disproportionate impact of capital punishment fell on the poor, on blacks, and on members of unpopular groups. *Id.* The Court also cited various post-1976 statistical studies confirming the discriminatory application of the death penalty. *Id.* at 2251, 411 N.E.2d at 1285.

In a similar fashion, Justice Douglas, taking the position that an “equal protection” theme was implicit in the eighth amendment, has remarked: “Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.” *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring).

<sup>61</sup> 1980 Mass. Adv. Sh. 2251, 411 N.E.2d at 1285. The United States Supreme Court also has restricted the impact of some of its decisions to death penalty cases. The Court has recognized that the possibility of a death penalty may require more stringent procedures than those used in cases in which the death penalty is not available. (See, e.g., *Gregg v. Georgia*, 428 U.S. 153 (1976); *Lockett v. Ohio*, 438 U.S. 586 (1978). Such an approach has been used by the United States Supreme Court also in determining whether the procedure leading to the death penalty violates the fundamental fairness required by the due process clause of the fourteenth amendment. See, e.g., *Gardner v. Florida*, 430 U.S. 349 (1977) (capital sentencing scheme which allowed the trial judge to impose death based on a *confidential* probation report violative of due process); *Green v. Georgia*, 442 U.S. 95 (1979) (exclusion of relevant hearsay evidence during a capital sentencing hearing violates due process).

Hennessey's majority opinion in *Watson*, although each wrote a separate concurring opinion. Justice Braucher expressed his concern with that part of the opinion holding that the death penalty violates contemporary standards of decency, in particular due to legitimate differences of opinion on the utility of capital punishment.<sup>62</sup> Yet, he readily agreed with that part of the opinion holding that the death penalty has been imposed arbitrarily, often because of executive clemency and federal court "intervention."<sup>63</sup> Furthermore, he agreed that the agonizing delay that occurs between the sentencing and the execution constituted a cruel and unusual method of punishment and thus, violated the Commonwealth's constitution.<sup>64</sup> Justice Wilkins noted briefly that he would have preferred not to have reached the merits of the constitutional issues. Rather, Wilkins would have preferred to await normal appellate review at the request of a defendant sentenced to death under the provisions of the new statute.<sup>65</sup> Justice Liacos wrote a lengthy concurring opinion in which he described the physical and mental torture inherent in the death penalty, which he likened to state-imposed torture, inconsistent with human dignity and spiritual freedom.<sup>66</sup> In addition, Justice Liacos emphasized that the disjunctive phraseology of art. 26<sup>67</sup> required review under the state constitution, as the Court had done, independent of the meaning of the federal constitution.<sup>68</sup>

<sup>62</sup> 1980 Mass. Adv. Sh. at 2254-55, 411 N.E.2d at 1287 (Braucher, J., concurring).

<sup>63</sup> *Id.*, at 2255, 411 N.E.2d at 1287. For an informative overview of litigation techniques by attorneys representing condemned defendants and the use of federal habeas corpus to obtain stays of execution, see J. Greenberg, *CASES AND MATERIALS ON JUDICIAL PROCESS AND SOCIAL CHANGE: CONSTITUTIONAL LITIGATION* 444-46 (1977). For a recent illustration of the use of habeas corpus to postpone a death sentence, see *Potts v. Austin*, 492 F. Supp. 326 (N.D. Ga. 1980).

<sup>64</sup> 1980 Mass. Adv. Sh. at 2255-56, 411 N.E.2d at 1287.

<sup>65</sup> *Id.*, (Wilkins, J., concurring). See note 35 *supra*.

<sup>66</sup> 1980 Mass. Adv. Sh. at 2268, 411 N.E.2d at 1294 (Liacos, J., concurring). Justice Liacos referred to a narrative description of the debilitating mental condition of Henry Arsenault, a convicted murderer on death row. This description came from Arsenault's *pro se* amicus brief submitted to the Court. *Id.* In a dissent, Justice Quirico contended, however, that the use of such a brief, not under oath, for factual conclusions, was unfair: "If . . . [Arsenault's] description of his ordeal while under sentence of death is accurate, it would be appropriate for submission to the Legislature for its consideration of the 'expediency, wisdom or necessity' for capital punishment, but that is not what we are asked to decide in this case." *Id.* at 2283, 411 N.E.2d at 1302 (Quirico, J., dissenting).

<sup>67</sup> See note 37 *supra*. Justice Liacos commented that the Supreme Judicial Court has not decided whether the phrase "cruel and unusual" [in the eighth amendment] and the phrase "cruel . . . [or] unusual" [in art. 26] have the same or a distinct meaning . . . I would go further and state that art. 26 stands on its own footing . . . [and] hold that a punishment may not be inflicted if it be either "cruel" or "unusual."

1980 Mass. Adv. Sh. at 2259, 411 N.E.2d at 1289.

<sup>68</sup> *Id.* at 2258-59, 411 N.E.2d at 1289.

Only Justice Quirico dissented, emphasizing that the Court's invalidation of chapter 488 raised serious separation of powers questions.<sup>69</sup> The propriety of capital punishment, according to Justice Quirico, should be an issue reserved for the legislature, which can best determine contemporary moral standards and public policy.<sup>70</sup> Only in the absence of a rational basis of fact to support the legislative conclusion, Justice Quirico contended, may the Court override the legislative will.<sup>71</sup>

In the *Watson* case, one can detect an effort by the Supreme Judicial Court to avoid a direct confrontation with the legislature over the existence of a compelling state interest in support of the death penalty. A fair reading of the earlier *O'Neal* cases suggested that such a "fundamental right—compelling interest" analysis would be adopted by the Court in order to avoid the controversial debate and "morass" which prior analyses of the eighth amendment had engendered.<sup>72</sup> Even though the death penalty had been upheld under the eighth amendment by the United States Supreme Court in 1976, the Supreme Judicial Court in *Watson* still could have rejected the death penalty by using a "fundamental right" analysis under the *state* constitution. Rather, the *Watson* Court adopted a more traditional, eighth amendment-type approach, although utilizing the stricter standard demanded by art. 26 of the Massachusetts constitution. Insofar as the death penalty was held to violate art. 26 because the penalty is offensive to contemporary standards of decency, the Court has accepted the view already espoused by a minority of the United States Supreme Court interpreting the eighth amendment.<sup>73</sup> Insofar as the death penalty violates art. 26 because it has been imposed arbitrarily, the Court concurs with the United States Supreme Court, which has condemned the unrestrained discretion of a sentencing body in imposing a death sentence.<sup>74</sup> Unlike the United States Supreme Court, however, the Supreme Judicial Court has rejected the solu-

<sup>69</sup> *Id.* at 2270, 411 N.E.2d at 1295 (Quirico, J., dissenting).

<sup>70</sup> Justice Quirico stated that the majority opinion strips the Massachusetts legislature of all power to require the death penalty. *Id.* He indicated that until the Supreme Judicial Court overrules *Watson*, capital punishment may not be imposed by the legislature. *Id.*

<sup>71</sup> *Id.* at 2275, 411 N.E.2d at 1298. Section 1 of Chapter 488 itself lists the "facts" found by the legislature in support of the death penalty. See text and notes at notes 21-25 *supra*. Justice Quirico did not accept the Court's determination in the *O'Neal* cases that recognition of the fundamental nature of life would require *more* than a rational basis test in order to uphold a death penalty law. See note 12 *supra*.

<sup>72</sup> See *Commonwealth v. O'Neal*, 367 Mass. 440, 447, 327 N.E.2d 662, 666 (1975).

<sup>73</sup> See, e.g., *Gregg v. Georgia*, 428 U.S. at 227-31 and 231-41 (1976) (Brennan, J., and Marshall, J., respectively, dissenting).

<sup>74</sup> *Furman v. Georgia*, 408 U.S. 238 (1972), was interpreted by Justice Stewart's plurality opinion in *Gregg*. "*Furman* held that ... [the death penalty] could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. 428 U.S. at 188. See also *Id.* at 169 n.15; Note, *Death as a Penalty for Rape is Cruel and Unusual Punishment*, 1978 Wisc. L. REV. 253 (1978).

tion of guiding sentencing discretion by requiring that the sentencing body consider several statutory factors. The Supreme Judicial Court has deemed that the statutory factors approach is insufficient to decrease the risk of arbitrary imposition of the death penalty by the sentencing body. The Massachusetts Court also has concluded that discretion in other aspects of the criminal justice system, as well as the racial prejudice that is present in capital cases, requires a rejection of the death penalty in Massachusetts.

It is unlikely that *Watson* will be overruled in the immediate future, given the views of six of the seven Justices of the Supreme Judicial Court, as articulated in *Watson*. Therefore, state constitutional amendment appears to be the only available route for those who advocate the death penalty. Further judicial involvement in this field will not be obviated, however, even by an express constitutional amendment permitting the legislature to enact a death penalty law. On the federal level, the United States Supreme Court has been called upon to decide a plethora of death penalty cases since its 1976 opinions specifically upholding the death penalty. As a result, there have been many judicial refinements of the 1976 standards during the past few years.

The *Watson* case highlights a theme mentioned earlier—the attention now being given to state constitutional provisions.<sup>75</sup> In 1927, Justice Holmes remarked that the equal protection clause of the fourteenth amendment was “the usual last resort of constitutional arguments.”<sup>76</sup> During the 1960s and the early part of the 1970s, as constitutional arguments concerning state statutes focused almost exclusively on *federal* constitutional law, one could similarly remark that *state* constitutional provisions were the usual last resort of constitutional arguments. State constitutional arguments have become, however, a productive source of protection for individual rights.

In light of its decision in *Watson* affirming that the meaning of art. 26 of the Massachusetts Constitution is not limited to the meaning of its federal counterpart,<sup>77</sup> the Supreme Judicial Court has indicated that art. 26 will permit more judicial intervention into the legislative prerogative than does the eighth amendment.<sup>78</sup> In so doing, the Court moves the focus of the clash between the judicial role and the legislative role in a democratic society

<sup>75</sup> See text and notes at note 5 *supra*.

<sup>76</sup> *Buck v. Bell*, 274 U.S. 200, 208 (1927).

<sup>77</sup> In determining contemporary community standards in Massachusetts, the Supreme Judicial Court necessarily has a narrower focus than the United States Supreme Court. Disuse of the death penalty in Massachusetts for over 30 years may indeed reflect contemporary standards of the *Massachusetts* community, but does not necessarily reflect contemporary community standards across the country. In determining national community standards under the federal constitution, the United States Supreme Court must therefore take into account widely differing conditions. See generally, Schwartz, *The Supreme Court and Capital Punishment: A Quest for a Balance Between Legal and Societal Morality*, 1 LAW & POLICY Q. 285 (1979).

<sup>78</sup> For example, the United States Supreme Court has held that the eighth amendment also

away from the more familiar themes of federal constitutional law and the proper relationship between the federal government, and in particular, the federal courts, and state legislative power to a different level—separation of powers between the Massachusetts legislature and the state courts, and in particular, the Supreme Judicial Court.<sup>79</sup> Whereas the clash between federal and state power in the capital punishment area has been resolved in favor of federal judicial *restraint*,<sup>80</sup> the *Watson* case tips the balance in favor of state judicial *activism*. The admonition recalled by Justice Quirico in his *Watson* dissent that “‘legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts’ ”<sup>81</sup> has, after *Watson*, a hollow ring as far as capital punishment in Massachusetts is concerned.

**§ 2.3. First Amendment: School Prayers.** The 1980 *Survey* year saw yet another chapter in the confrontation between the Massachusetts legislature and the Supreme Judicial Court over the proper role of religion in the public school classroom.<sup>1</sup> In *Kent v. Commissioner of Education*,<sup>2</sup> the Supreme Judicial Court, relying primarily on the school prayer cases decided by the United States Supreme Court during the 1960s,<sup>3</sup> unanimously held that General Laws chapter 71, section 1A, which provided for prayers in public schools to be offered by student volunteers, violated the establishment

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serves to proscribe punishments that are grossly disproportionate to the nature of the offense committed. *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty disproportionate for crime of rape); *Weems v. United States*, 217 U.S. 349 (1910). However, in 1980 the Supreme Court indicated that “disproportionality” analysis is primarily restricted to capital punishment cases. *Rummel v. Estelle*, 445 U.S. 263 (1980). Therefore, a defendant who is attacking a Massachusetts *non-capital* sentence on the basis that it is disproportionate would be well-advised to rely on art. 26 of the Massachusetts Constitution and to urge adoption of a standard more stringent than that enunciated in *Rummel*. *See generally*, Opinion of the Justices to the House of Representatives, 1979 Mass. Adv. Sh. 1781, 1791, 393 N.E.2d 313, 318-19.

<sup>79</sup> Unlike the federal Constitution, which contains no explicit statement of separation of powers, art. 30 of the Declaration of Rights specifically provides:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

*See generally*, *New Bedford Standard-Times Publishing Co. v. Clerk of the Third Dist. Court of Bristol*, 1979 Mass. Adv. Sh. 515, 522-25, 387 N.E.2d 110, 113-15, and cases cited.

<sup>80</sup> See note 1 *supra*.

<sup>81</sup> 1980 Mass. Adv. Sh. at 2284, 411 N.E.2d at 1302 (Quirico, J., dissenting) (citations omitted).

§ 2.3. <sup>1</sup> For an earlier treatment of this topic, *see O'Reilly, Constitutional Law*, 1971 ANN. SURV. MASS. LAW § 16.1 at 408.

<sup>2</sup> 1980 Mass. Adv. Sh. 803, 402 N.E.2d 1340.

<sup>3</sup> *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). For a discussion of these cases, *see note 23 infra*.

clause of the first amendment.<sup>4</sup> In a later development during the *Survey* year which supports the result of the *Kent* case, the United States Supreme Court, in *Stone v. Graham*,<sup>5</sup> reiterated that the school prayer cases of the 1960s still remain good law.<sup>6</sup> In *Stone*, the Supreme Court held that a Kentucky statute requiring the posting of the Ten Commandments in each public school classroom likewise violated the establishment clause.<sup>7</sup>

The plaintiffs in *Kent* were public school children who brought an original action in the Supreme Judicial Court against various state and local officials<sup>8</sup> seeking declaratory and injunctive relief against the enforcement of the new school prayer law.<sup>9</sup> The school prayer law provided for a daily prayer to be said by a student volunteer, although students who did not wish to participate in the prayer could be excused.<sup>10</sup> The Plaintiffs contended

<sup>4</sup> The first amendment provides in part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I.

<sup>5</sup> 101 S.Ct. 192 (1980).

<sup>6</sup> *Id.* at 193-94.

<sup>7</sup> *Id.* at 194.

<sup>8</sup> The defendants were the Commissioner of Education and the members of the school committees and the school superintendents of the towns in which the children attended school. 1980 Mass. Adv. Sh. at 803-04, 402 N.E.2d at 1340.

<sup>9</sup> The particular version of G.L. c. 71, § 1A at issue was enacted by Acts of 1979, c. 692. A prior version of the statute provided merely for a one-minute daily period of silent meditation or prayer in all public schools. See 1973 Acts c. 621. The former version was held constitutional by a federal district court in *Gaines v. Anderson*, 421 F. Supp. 337, 340 (D. Mass. 1976). See note 25 *infra*.

<sup>10</sup> The statute provided:

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of prayer may be offered by a student volunteer, and during any such period an excusal provision will be allowed for those students who do not wish to participate.

1979 Acts c. 692. The statute became effective on February 5, 1980. After expedited oral argument, the Court issued an order on March 13, 1980, granting the plaintiffs both declaratory and injunctive relief. A full opinion explaining the March 13 order followed within two weeks. Hence, chapter 692 was in effect for over a month prior to the Court's determination that it was unconstitutional. An agreed statement of facts filed in *Kent* provides insight into the operation of the statute in those schools where the statute was followed:

At the commencement of classes each day, teachers in the respective schools announced the period of prayer. In many cases student volunteers offered audible prayers, some denominational (such as the Lord's Prayer or "Hail, Mary"), some clearly religious but not clearly denominational, some for secular objectives (such as the release of the hostages in Iran or victory in a volleyball game). When there were multiple volunteers, the teacher selected the one to offer prayer. Where no pupil volunteered, no prayer was given. Some pupils (including various of the plaintiff children) utilized their excusal rights; in those instances, the pupils were told to go to the corridor or to another part of the classroom apparently out of hearing of the prayer. Teachers in some schools excused themselves from listening to pupils' prayers. No disturbances on account of the implementation of § 1A were reported to the Commissioner up to February 14. There was no evidence that pupils of any age were unable to comprehend that school prayers



that section 1A violated both the establishment clause of the first amendment, as applicable to the states through the fourteenth amendment, and cognate provisions of the Massachusetts Constitution.<sup>11</sup> The Court did not reach the Massachusetts constitutional issues, however, because the first amendment to the United States Constitution provided adequate grounds for the Court's decision.<sup>12</sup>

The Court began its examination of the statute by determining that section 1A required that a religious activity be performed in the public schools. Thus, the statute implicated the "establishment of religion" component of the first amendment.<sup>13</sup> The Court noted that section 1A required a "prayer," which by its nature is intrinsically religious.<sup>14</sup> The prayer required by section 1A was part of a program sponsored and implemented by the state in the public schools every day.<sup>15</sup> Teachers had a direct role in the program by announcing the prayer period and by selecting the volunteer.<sup>16</sup> The Court found that although the prayer could be characterized as voluntary in nature—a student could be excused from participation—this voluntary nature did not insulate the prayer statute from establishment clause attack.<sup>17</sup>

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were not school "lessons" to be learned like other aspects of the school program. 1980 Mass. Adv. Sh. at 805-06, 402 N.E.2d at 1341.

<sup>11</sup> *Id.* at 805, 402 N.E.2d at 341.

<sup>12</sup> *Id.* at 813, n.14, 402 N.E.2d at 1345, n.14.

<sup>13</sup> *Id.* at 806, 402 N.E.2d at 1341-42.

<sup>14</sup> *Id.* at 806, 402 N.E.2d at 1342. The Court differentiated between prayers which "seriously invoke . . . the Deity" and "those customary or traditional references to God which have become merely ceremonial and have lost devotional content." *Id.* (citing *Colo. v. Treasurer and Receiver Gen.*, 1979 Mass. Adv. Sh. 1893, 1905-06, 392 N.E.2d 1195, 1200-01). In *Colo.*, the Court held that employment of chaplains by the Massachusetts legislature and the practice of opening the daily legislative session with prayer did not violate the establishment clause of the United States Constitution or the religion clauses of the Massachusetts Constitution. *Id.* Noting that the United States Constitution does not require complete separation of church and state, the Court commented that "[t]he complete obliteration of all vestiges of religious tradition from our public life is unnecessary to carry out the goals of nonestablishment and religious freedom set forth in our State and Federal Constitutions." 1979 Mass. Adv. Sh. at 1908, 392 N.E.2d at 1201. *Accord*, *Stone v. Graham*, 101 S.Ct. 192, 196 (1980) (Rehnquist, J., dissenting).

For a discussion of the circumstances under which an activity may be considered "religious" for establishment clause purposes, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-6 (1978); see also, *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976) (upholding constitutionality of an earlier version of G.L. c.71, § 1A, which provided for a period of silent "meditation or prayer").

<sup>15</sup> 1980 Mass. Adv. Sh. at 805, 402 N.E.2d at 1341.

<sup>16</sup> *Id.* at 806, 808, 402 N.E.2d at 1342, 1343.

<sup>17</sup> *Id.* at 806, 402 N.E.2d at 1342. The establishment clause is directed at governmental neutrality toward religion, and thus a showing that the government has compelled student involvement in the prayer is unnecessary. See *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Abington School Dist. v. Schempp*, 374 U.S. 203, 224-25 (1963).

As support for its reasoning, the Court examined the similarities between *Kent* and a 1971 Massachusetts case, *Commissioner of Educ. v. School v. Comm. of Leyden*.<sup>18</sup> In *Leyden*, the plaintiff challenged the constitutionality of a local school committee resolution which provided for a five-minute period of voluntary participation “in the free exercise of religion” before the official commencement of the school day.<sup>19</sup> The state commissioner of education sought to enjoin the school committee from implementing the resolution.<sup>20</sup> Although the commissioner of education contended that the resolution violated both the state and the federal constitutions, the Supreme Judicial Court, as it did later in *Kent*, found that applicable Supreme Court cases made resolution of the federal constitutional issue simple:

The Supreme Court thus far has not limited the broad language with which . . . it has held invalid substantially nondenominational and neutral religious observances on public school property. Until and unless such a limitation takes place (even if there is minimal State encouragement of only insubstantial school religious exercises), it would serve no useful purpose to attempt to draw any fine distinction between those observances which have hitherto been proscribed by the Supreme Court and the *Leyden* practices now presented for our scrutiny. We think that, under the applicable First Amendment decisions, neither students nor teachers may be allowed to participate in the well-intended observances on school property authorized by the *Leyden* resolution.<sup>21</sup>

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<sup>18</sup> 358 Mass. 776, 267 N.E.2d 226, cert. denied, 404 U.S. 849 (1971).

<sup>19</sup> *Id.* at 777-78, 267 N.E.2d at 227. The text of the school committee resolution read: On each school day, before class instruction begins, a period of not more than five minutes shall be available to those teachers and students who may wish to participate voluntarily in the free exercise of religion as guaranteed by our United States Constitution. This freedom of religion shall not be expressed in any way which will interfere with another's rights. Participation may be total or partial, regular or occasional, or not at all. Non-participation shall not be considered evidence of non-religion, nor shall participation be considered evidence or recognizing an establishment of religion. The purpose of this . . . [resolution] is not to favor one religion over another nor to favor religion over non-religion, but rather to promote love of neighbor, brotherhood, respect for the dignity of the individual, moral consciousness, and civic responsibility; to contribute to the general welfare of the community and to preserve the values that constitute our American heritage.

*Id.* at 777, n.1, 267 N.E.2d at 226, n.1.

<sup>20</sup> *Id.* at 776-77, 267 N.E.2d at 224.

<sup>21</sup> *Id.* at 780, 267 N.E.2d at 228. The Supreme Judicial Court's language in *Leyden* as well as the following language in *Kent* seems to reflect dissatisfaction with the federal constitutional result: “Neither the diligence of counsel nor our own reading has discovered any ‘limitation’ [referring to the language of *Leyden* quoted in the text] in later Supreme Court decisions so far as concerns the issue of prayer in public schools.” 1980 Mass. Adv. Sh. 809, 402 N.E.2d at 1343. It is an academic question whether the Supreme Judicial Court would be inclined to interpret the Massachusetts Constitution to allow such prayers today, given current interpreta-

In *Kent* the Court found section 1A to be more vulnerable than the *Leyden* resolution, because the prayer period under section 1A took place during official school hours and under the supervision of teachers. In addition, the Court found the religious nature of the exercise under section 1A to be more apparent than the religious nature of the "free exercise of religion" involved in *Leyden*, since under section 1A school officials "were to see that prayer and not something else was offered . . . ."<sup>22</sup>

In analyzing the constitutionality of the statute in *Kent*, the Supreme Judicial Court reiterated the test enunciated by the United States Supreme Court to determine whether a law violates the establishment clause: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>23</sup> In examining the secular purpose behind section 1A, the

tion of the establishment clause of the first amendment. Compare *Spiller v. Inhabitants of Woburn*, 94 Mass. (12 Allen) 127 (1866) and *Commonwealth v. Renfrew*, 332 Mass. 492, 126 N.E.2d 109 (1955) with *Attorney General v. School Committee of North Brookfield*, 347 Mass. 775, 199 N.E.2d 553 (1964) and *Waite v. School Committee of Newton*, 348 Mass. 767, 202 N.E.2d (1964). See generally, Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution*, 14 SUFFOLK U. L. REV. 887, 891-97 (1980). See note 50 *infra*.

<sup>22</sup> 1980 Mass. Adv. Sh. at 808, 402 N.E.2d at 1343 (emphasis added).

<sup>23</sup> 1980 Mass. Adv. Sh. at 809, 402 N.E.2d at 1343, (quoting *Abington School Dist. v. Schempp*, 374 U.S. 203, at 222 (1963)) (emphasis by the Supreme Judicial Court). In *Schempp*, the Court held that the reading of bible verses without comment at the opening of the school day and recitation of the Lord's Prayer under the supervision of school teachers violated the establishment clause. *Id.* at 205. See generally, Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978).

The *Schempp* decision itself relied on another school prayer case decided the previous year, *Engel v. Vitale*, 370 U.S. 421 (1962). In *Engel*, the Court examined the constitutionality of a non-denominational prayer which the New York Board of Regents had required to be recited daily in the public schools. The prayer reads as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg thy blessings upon us, our parents, our teachers and our country." *Id.* at 422. In response to a challenge by parents of children attending the public schools, the Court held that the prayer violated the establishment clause. *Id.* at 424-25. The Court stated that a prayer composed by government officials as part of a government program to further religious beliefs "breaches the constitutional wall of separation between Church and State." *Id.* at 425. Despite the Board of Regents claim that the prayer was non-denominational and that it was based upon our spiritual heritage, the Court was explicit in defining the limits of state action with respect to the establishment clause. The "Establishment Clause . . . does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." *Id.* at 430.

The United States Supreme Court has developed a three-part test for a statute to meet the requirements of the establishment clause: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (citations omitted). See also

Court found that a change in 1979 in the language of section 1A from “silent meditation” to “prayer” was a critical factor compelling invalidation of the statute.<sup>24</sup> The term “prayer” gave the statute a religious meaning, because a prayer is by definition addressed to the Deity.<sup>25</sup> Even if a stu-

McGowan v. Maryland, 366 U.S. 420, 442 (1961).

The Supreme Judicial Court has noted that there appears to be a fourth factor that has been implicitly recognized by the Supreme Court: “whether the challenged practice has a ‘divisive political potential.’” *Colo v. Treasurer and Receiver Gen.*, 1979 Mass. Adv. Sh. 1893, 1904, 392 N.E.2d 1195, 1200 (citation omitted); *Kent v. Commissioner of Education*, 1980 Mass. Adv. Sh. at 809-10, n.11, 402 N.E.2d, at 1344, n.11. If the statute fails any one of the tests, the establishment clause has been violated. In *Kent*, the Court examined only the first two factors of the test. The Supreme Court has used the “excessive government entanglement” test primarily in cases involving public funding of religious activity. The Supreme Judicial Court has indicated that these four factors are also appropriate guides for interpreting the religion clauses of the Massachusetts Constitution. *Kent v. Commissioner of Educ.*, 1980 Mass. Adv. Sh. at 809-10, n.11, 402 N.E.2d at 1344, n.11. See also, *Colo v. Treasurer and Receiver Gen.*, 1979 Mass. Adv. Sh. at 1903-04, 392 N.E.2d at 1200. See generally, Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U. L. J. 183 (1980).

<sup>24</sup> See note 9 *supra*.

<sup>25</sup> 1980 Mass. Adv. Sh. at 810, 402 N.E.2d at 1344. See also note 10 *supra*. The Court distinguished the ordinary meaning of “prayer” from “meditation or prayer,” citing *Gaines v. Anderson*, 421 F. Supp. 337 (D. Mass. 1976). 1980 Mass. Adv. Sh. at 810, 402 N.E.2d at 1344. In upholding the constitutionality of a period of silent meditation or prayer, as was then provided by G.L. c.71, § 1A, the federal district court in *Gaines* noted that “prayer” has a specifically religious meaning and referred to Webster’s definition of the term. 421 F. Supp. at 343, n.8.

Professor Tribe would analyze the problem of prayer versus meditation by classifying that which is apparently non-religious from that which is clearly religious. Under the establishment clause anything that is “arguably non-religious” would not come within the strictures of the first amendment. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 14-6, at 826 (1978). Meditation is arguably non-religious while prayer is clearly religious and, therefore, if offered in public schools, in violation of the establishment clause. *Id.* at 829, n.15.

In contrast to “prayer,” “meditation” connotes serious reflection and contemplation on a subject which may be religious, irreligious, or nonreligious. *Gaines*, 421 F. Supp. at 342. The *Gaines* court noted that the statute, as it then existed, reflected a sensitivity on the part of the legislature. Originally, a draft of the bill had proposed “meditation” and “prayer.” The change to the disjunctive, “meditation” or “prayer,” was a critical factor which rendered the statute neutral and ultimately served as the court’s basis for characterizing the statute as secular in nature. *Id.* at 343-44. *But see*, *DeSpain v. Dekalb*, 384 F.2d 836 (7th Cir. 1967), *cert. denied*, 390 U.S. 906 (1968), where the required reading did not pass the secular purpose test. The Court in *DeSpain* ordered injunctive relief against school officials who required the following to be recited: “We thank You for the flowers so sweet; we thank You for the food we eat; we thank You for the birds that sing; we thank You for everything.” Even though the verse never mentioned the Deity explicitly, the Court reasoned that the secular purposes of the verse were adjunctive and supplemental to its religious purpose. *Id.* at 839. Thus, while school officials argued that the purpose of the verse was to instill in children appreciation and gratefulness for the world around them, the Court held that the main purpose of the verse was the “religious act of praising and thanking the Deity.” *Id.* Admittedly, encroachment on the first amendment appeared to be minor, but citing *Schempp*, the *DeSpain* court maintained that

dent were to offer a "prayer" seeking secular objectives, such as release of the hostages, the Court still would hold the statute to be flawed. "The question is not what a suppliant asks but to whom he addresses his supplication."<sup>26</sup> Because of the deliberate choice of the word "prayer" with its religious connotation, the statute failed to meet the first aspect of the establishment clause test, which requires a secular legislative purpose.<sup>27</sup>

The Court then turned to the second aspect of the establishment clause test, whether the statute has a purpose or effect which advances or inhibits religion. Again, the statute failed to meet the constitutional standard.<sup>28</sup> Rejecting the argument that section 1A could not advance religion both because of its voluntary nature and because of the excusal provision, the Court determined that "the statute lent no small degree of official recognition and sanction to the religious enterprise and welded it into the school day."<sup>29</sup>

Given the applicable Supreme Court precedents in this area, the version of the school prayer law challenged in *Kent* was clearly unconstitutional. The Massachusetts legislature apparently ignored not only the Supreme Court precedents, but also the earlier *Leyden* case and the federal district court decision in *Gaines v. Anderson*,<sup>30</sup> which carefully distinguished between meditation and prayer. By enacting the 1979 amendment to section 1A, the legislature may have responded to what it perceived to be the desires of the populace, regardless of the fate that the statute would face inevitably in the courts.<sup>31</sup> Although the issue of the constitutionality of a proposed statute may not be the primary concern of legislators, a law-making body does a disservice to the public when the lawmaking body enacts a statute such as section 1A, despite overwhelming case law against the statute's validity. By enacting statutes which are patently unconstitutional, on the

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a *de minimis* encroachment is not a defense to a first amendment violation. *Id.* The Massachusetts Supreme Judicial Court in *Kent* followed this reasoning also. 1980 Mass. Adv. Sh. at 811, 402 N.E.2d at 1344. See also, *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965).

<sup>26</sup> 1980 Mass. Adv. Sh. at 810-11, 402 N.E.2d at 1344.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 811, 402 N.E.2d at 1345.

<sup>29</sup> *Id.*

<sup>30</sup> 421 F. Supp. 337 (D. Mass. 1976). See note 25 *supra*.

<sup>31</sup> After the *Kent* decision, the legislature once again amended G.L. c.71, § 1A. As amended by Acts of 1980, c.144, the statute now reads:

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.

The current version of the statute is similar to the version upheld by the federal district court in *Gaines*.

assumption that it is the *judiciary's* responsibility to determine their constitutionality, the legislature ignores its obligation to support the constitution.<sup>32</sup>

Later in the year, the United States Supreme Court in *Stone v. Graham* echoed the Supreme Judicial Court's analysis in *Kent* with respect to the secular purpose of a school prayer law.<sup>33</sup> In *Stone*, the Court held that a Kentucky statute which required the posting of the Ten Commandments in each public classroom was unconstitutional because it failed to meet the secular legislative purpose test under the establishment clause.<sup>34</sup> The state urged the Court to find a secular legislative purpose, pointing to the statutory requirement of "the following notation in small print at the bottom of each display of the Ten Commandments: 'The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States.'" <sup>35</sup> Neither such a self-serving legislative characterization of the purpose of the provision of secular<sup>36</sup> nor the private financing of the purchases of the copies of the Ten Commandments<sup>37</sup> was sufficient, however, to save the statute. Despite the "avowed" secular purpose for posting the Ten Commandments, the Court determined that the purpose for posting was "plainly religious in nature. The Ten Commandments is undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact."<sup>38</sup> The fact that voluntary, private contributions had paid for the copies was also irrelevant under the establishment clause, since "the mere posting of the copies under the auspices of the legislature provides the 'official support of the State . . . Government' that the Establishment Clause prohibits."<sup>39</sup> Nor did the Court

<sup>32</sup> See Satter, *Changing Roles of Courts and Legislatures*, 11 CONN. L. REV. 230, 244-45 (1979).

<sup>33</sup> 101 S.Ct. 192, 193-94 (1980).

<sup>34</sup> *Id.* at 194. *Stone* was a *per curiam* decision, without oral argument or briefs on the merits, in which the Court had granted certiorari and summarily reversed a judgment of an equally divided Kentucky Supreme Court upholding the statute. Chief Justice Burger and Justice Blackmun dissented from the summary reversal, and noted that they would have preferred to give the case plenary consideration. *Id.* Justice Stewart also dissented from the summary reversal, but he noted that the "courts of Kentucky . . . , so far as appears, applied wholly correct constitutional criteria in reaching their decisions." *Id.* at 195. Justice Rehnquist dissented both on the summary reversal as well as the Court's opinion on the merits. *Id.* at 195-96.

<sup>35</sup> *Id.* at 193.

<sup>36</sup> The Court noted that the Kentucky "trial court found the 'avowed' purpose of the statute to be secular." *Id.*

<sup>37</sup> *Id.* at 194.

<sup>38</sup> *Id.* (footnote omitted). The Supreme Court's characterization of the Ten Commandments as religious in nature reflects the same approach used by the Supreme Judicial Court in *Kent* in characterizing the prayer activity of G.L. c.71, § 1A as religious in nature. See note 25 *supra*.

<sup>39</sup> *Id.* (citations omitted).

attach significance to the fact that the Kentucky practice involved a mere posting of the Bible passages on the wall as opposed to recitation of prayer as in the previous Supreme Court cases.<sup>40</sup> The establishment clause is violated, the Court held, by even a minor encroachment against the norm of governmental neutrality demanded by the first amendment.<sup>41</sup>

In dissent, Justice Rehnquist voiced his disagreement with the majority's summary rejection of the secular state purpose articulated by the Kentucky legislature and by the state trial court. He chided the Court for its failure to accord due deference to state governing bodies.<sup>42</sup> "The fact that the asserted secular purpose may overlap with what some may see as a religious objective does not render it unconstitutional."<sup>43</sup> Justice Rehnquist maintained that the majority ignored the secular values of the Ten Commandments and its impact on the secular legal codes of the western world.<sup>44</sup> Further, he contended that the Kentucky Supreme Court decision was consistent with the earlier Supreme Court decision in *Abington School Dist. v. Schempp*<sup>45</sup> because in the two companion cases decided in *Schempp* there had been either a lower court finding that there was a religious purpose or an admission by the state of such.<sup>46</sup>

Although *Stone* indicates that the school prayer cases of the 1960s are still on a firm foundation, it appears that some of the justices are willing to re-examine, or perhaps to limit, the parameters of the earlier decisions. Because the composition of the Court has changed radically since the early school prayer cases, the dissent of Justice Rehnquist and the brief dissent of Justice Stewart<sup>47</sup> in *Stone* suggest that some justices are inclined to allow the states to operate with more autonomy on the school prayer issue. Although Chief Justice Burger and Justice Blackmun did not articulate their views on the merits of the *Stone* issue, their desire to have given the case full con-

<sup>40</sup> *Id.* (citing *Schempp* and *Engel*).

<sup>41</sup> *Id.* (citing *Schempp*).

<sup>42</sup> *Id.* at 195. Justice Rehnquist's dissent sounds the now-familiar theme of federalism and the respect due to the states as sovereigns functioning within the national sphere. See generally, Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

<sup>43</sup> 101 S.Ct. at 195.

<sup>44</sup> *Id.*

<sup>45</sup> 374 U.S. 203 (1963).

<sup>46</sup> 101 S.Ct. at 195. See 374 U.S. at 223, 224.

<sup>47</sup> 101 S.Ct. at 1195 (Stewart, J., dissenting). Justice Stewart was the sole dissenter in 1963 in *Schempp*. Justice Stewart maintained, consistent with his understanding of the framers' intentions, that as long as students were not compelled to participate in school prayers, the decision whether to adopt school prayers should be left to the discretion of each local school committee. 374 U.S. at 316 (Stewart, J., dissenting). For a comprehensive examination of the framers' intentions, see Kurland, *The Irrelevance Of The Constitution: The Religion Clauses Of The First Amendment And The Supreme Court*, 24 VILL. L. REV. 3 (1978).

sideration<sup>48</sup> suggests that they did not believe that a reversal of the Kentucky Supreme Court was clearly warranted by the earlier Supreme Court precedents.

The impact of *Stone v. Graham* on future Massachusetts Supreme Judicial Court decisions regarding school prayer is unclear. Unlike the nearly unanimous decisions of the earlier school prayer cases, *Stone* may signal a changing attitude by some members of the Court in this area, toward the notion of state autonomy. Even if the states were given autonomy, however, the Supreme Judicial Court may reaffirm the *Leyden* and *Kent* results by resting its decision on state constitutional provisions. On the other hand, the Supreme Judicial Court may choose to adopt a state constitutional approach consistent with the dissenting view of Justice Rehnquist in *Stone*, or a more flexible approach which would permit “substantially nondenominational and neutral religious”<sup>49</sup> exercises in the public schools.<sup>50</sup> Unless the *Stone* decision indeed signals a retreat from prior school prayer cases, however, the Supreme Judicial Court likely will continue to find resort to the Massachusetts Constitution unnecessary.

<sup>48</sup> See note 28 *supra*.

<sup>49</sup> 358 Mass. at 780, 267 N.E.2d at 228.

<sup>50</sup> The proposition that the Supreme Judicial Court may be willing to adopt a more flexible approach under the state constitution may find support in the language used by the Court in 1971 in *Leyden*. The Court appears to express dissatisfaction with its invalidation of the *Leyden* school committee resolution, a result compelled by federal constitutional precedent:

The Supreme Court thus far has not limited the broad language with which (as in *Schempp* case) it has held invalid substantially nondenominational and neutral religious observances on public school property. Until and unless such a limitation takes place (even if there is minimal State encouragement of only insubstantial school religious exercises), it would serve no useful purpose to attempt to draw any fine distinction between those observances which have hitherto been proscribed by the Supreme Court and the *Leyden* practices now presented for our scrutiny. We think that, under the applicable First Amendment decisions, neither students nor teachers may be allowed to participate in the well-intended observances on school property authorized by the *Leyden* resolution.

358 Mass. at 780, 267 N.E.2d at 228. In addition, unlike other areas where the Supreme Judicial Court has construed the Massachusetts Constitution to provide more protection than the federal constitution, the absence of an “establishment clause” in the Massachusetts Constitution may lead the court to be more tolerant of a voluntary, nondenominational prayer if free to decide the issue without regard to federal constitutional law. For a discussion of the lack of religious neutrality, which was part of the history of the Massachusetts Declaration of Rights, see Wilkins, *Judicial Treatment of the Massachusetts Declaration of Rights in Relation to Cognate Provisions of the United States Constitution* 14 SUFFOLK U. L. REV. 887, 891-97 (1980). *But see* *Kent v. Comm’r of Educ.*, 1980 Mass. Adv. Sh. at 809-10 n.11, 402 N.E.2d at 1344, n.11 (establishment clause guidelines used to interpret the Massachusetts Constitution). The “anti-aid” amendment to the Massachusetts Constitution also prohibits appropriation or use of taxpayer money or property to support religious institutions. MASS. CONST. amend. art. 18, § 2. See generally, *Bloom v. School Comm. of Springfield*, 1978 Mass. Adv. Sh. 2110, 379 N.E.2d 578.



**§ 2.4. Right to Refuse Medical Treatment.** During the *Survey* year, the Supreme Judicial Court once again considered the ramifications of the constitutional right to refuse life-prolonging medical treatment.<sup>1</sup> In the 1977 landmark case of *Superintendent of Belchertown State School v. Saikewicz*,<sup>2</sup> the Court held that incompetent persons have such a right. During the *Survey* year, in *Matter of Spring*,<sup>3</sup> the Court further explained the procedure by which an incompetent's right may be exercised. In so doing, the Court has "fine-tuned" its earlier *Saikewicz* opinion, providing further elaboration of the "right to die" to physicians who deal with terminally ill patients and to attorneys who provide legal advice to the health care industry.

In *Saikewicz*, the Court held that a competent person generally has a constitutional right to refuse medical treatment.<sup>4</sup> The Court also recognized that an incompetent person has this same constitutional right.<sup>5</sup> In determining how an incompetent person could exercise this right, the Court adopted a "substituted judgment" test, designed to ensure that the decision to terminate life-supporting treatment would be the same decision that the incompetent would make, if he were competent.<sup>6</sup> In addition, the *Saikewicz* Court held that for an incompetent who is a ward of the state, the officials of the state institution where the incompetent is a patient properly invoked the jurisdiction of a Massachusetts Probate Court to determine whether treatment should be terminated under the "substituted judgment" test.<sup>7</sup> In light of the reaction to, and the confusion about,<sup>8</sup> the 1977 decision, the *Spring* case provided the Court with an opportunity to analyze the *Saikewicz* case further.<sup>9</sup>

Earle Spring was an incompetent adult with an advanced and irreversible kidney disease that required hemodialysis, a blood-filtering treatment, three times per week. He also suffered from permanent senility.<sup>10</sup> Although the hemodialysis treatments might have kept him alive for months, and possibly even for years, the treatment did nothing to improve his mental condition. Yet, Spring would have died without treatment.<sup>11</sup> Spring's son, as Spring's

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§ 2.4. <sup>1</sup> For an analysis of earlier cases dealing with this issue, see Perlin, *Constitutional Law*, 1979 ANN. SURV. MASS. LAW § 7.5, at 233-39.

<sup>2</sup> 373 Mass. 728, 370 N.E.2d 417 (1977).

<sup>3</sup> 1980 Mass. Adv. Sh. 1209, 405 N.E.2d 115.

<sup>4</sup> 373 Mass. at 759, 370 N.E.2d at 435.

<sup>5</sup> *Id.* at 739-40, 370 N.E.2d at 424.

<sup>6</sup> *Id.* at 750-51, 370 N.E.2d at 430-31.

<sup>7</sup> *Id.* at 755-57, 370 N.E.2d at 433.

<sup>8</sup> See note 46 *infra*.

<sup>9</sup> For discussion of a prisoner's right to refuse medical treatment, see *Commissioner of Corrections v. Myers*, 1979 Mass. Adv. Sh. 2523, 399 N.E.2d 452, discussed in Perlin, *Constitutional Law*, 1979 ANN. SURV. MASS. LAW § 7.5, at 233-39.

<sup>10</sup> 1980 Mass. Adv. Sh. at 1212, 405 N.E.2d at 118.

<sup>11</sup> *Id.*

temporary guardian, and Spring's wife, filed a petition in a Massachusetts Probate Court requesting that Spring's physician be ordered not to continue to administer life-prolonging medical treatment. Specifically, the petitioners requested that the physicians be ordered to cease hemodialysis treatment.<sup>12</sup> The Probate Court found that, if Spring were competent, he would choose not to receive the life-prolonging treatment.<sup>13</sup> Consequently, the probate judge ordered Spring's son to refrain from authorizing any further life-prolonging treatments.<sup>14</sup> On the motion of the guardian ad litem, however, the original order was stayed.<sup>15</sup> The probate judge then entered an order allowing Spring's physician, his wife, and his son to decide whether treatment should continue.<sup>16</sup>

On an appeal filed by Spring's guardian ad litem, the Appeals Court affirmed the Probate Court order which had vested final authority in the incompetent's family and physician.<sup>17</sup> Under the Appeals Court's reading of *Saikewicz*, the courts were not required to make all medical decisions for incompetents. Rather, the Appeals Court interpreted *Saikewicz* as requiring that the decision-maker choose the treatment that the incompetent would choose for himself. The Appeals Court felt that this substituted choice could be made by the family and the medical staff; courts should be called upon only when the decision is uncertain. Therefore, since Spring's family and doctor were capable to decide what Spring would want, the Appeals Court affirmed the judgment of the Probate Court.<sup>18</sup>

On application of the guardian ad litem, the Supreme Judicial Court granted further appellate review.<sup>19</sup> The Court reversed and remanded, ordering the Probate Court to enter "a new judgment ordering the temporary guardian to refrain from authorizing any further life-prolonging treatment except by further order of the Probate Court."<sup>20</sup> In effect, the Court instructed that the Probate Court's original order should be

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<sup>12</sup> *Id.* at 1210, 405 N.E.2d at 117.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 1211, 405 N.E.2d at 117.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 1211, 405 N.E.2d at 118.

<sup>17</sup> *Matter of Spring*, 1979 Mass. App. Ct. Adv. Sh. 2469, 399 N.E.2d 493.

<sup>18</sup> *Id.* at 2484, 399 N.E.2d at 502-03.

<sup>19</sup> Due to the life and death issues involved, the Supreme Judicial Court expedited appellate proceedings. The application for further appellate review was filed on December 31, 1979, and was granted on January 3, 1980. *Matter of Spring*, 1980 Mass. Adv. Sh. 135. Oral argument was heard on January 10, 1980, and on January 14, 1980, the Supreme Judicial Court entered an order reversing the Probate Court judgment on the ground that the Probate Court improperly left the decision to terminate to Spring's physician and family. 1980 Mass. Adv. Sh. at 1211, 405 N.E.2d at 117. In its order, the Court indicated that a full opinion would follow later.

<sup>20</sup> *Id.* at 1210, 405 N.E.2d at 117.

reinstated. Thus, the Court held that the family and physician could not decide the incompetent's fate, once a court opinion had been requested.

In its opinion, the Supreme Judicial Court first recounted the substantive rules of law which had been recognized in *Saikewicz*. The Court reiterated that, absent a countervailing state interest, a competent person has a constitutional right to refuse medical treatment.<sup>21</sup> This right is based upon the constitutional right to privacy<sup>22</sup> and upon the right of a person to resist unwanted infringements on bodily integrity.<sup>23</sup> An incompetent person, too, has a right to refuse treatment, but "[t]he decision should be that which would be made by the incompetent person, if he were competent, taking into account his actual interests and preferences and also his present and future incompetency."<sup>24</sup>

Having reaffirmed the right of an incompetent person to refuse treatment, the Court then discussed the appropriate procedures by which an incompetent may exercise this right. Noting that *Saikewicz* had been read by some to require a *judicial* proceeding before the termination of an incompetent's life-prolonging treatments,<sup>25</sup> the Court utilized its decision in *Spring* to correct this misinterpretation.<sup>26</sup> The *Spring* opinion specifies that not every termination of life-supporting treatment requires judicial intervention.<sup>27</sup> Once judicial intervention has been requested, however, the court must make the ultimate decision. The court may not delegate the respon-

<sup>21</sup> *Id.* at 1214, 405 N.E.2d at 119.

<sup>22</sup> In *Saikewicz*, the Supreme Judicial Court recognized that the rights of bodily integrity, human dignity, and self-determination were rooted both in Massachusetts law and in the federal constitutional right of privacy. 373 Mass. at 738-39, 370 N.E.2d at 424. The individual's rights are not absolute, however, and they must be balanced against countervailing state interests.

For the instance where the state interest in proper administration of its prison system was held to outweigh the individual's rights and served to justify coerced medical treatment of an inmate, see *Commissioner of Corrections v. Myers*, 1979 Mass. Adv. Sh. 2523, 399 N.E.2d 452.

<sup>23</sup> 1980 Mass. Adv. Sh. at 1214, 405 N.E.2d at 119.

<sup>24</sup> *Id.*

<sup>25</sup> Some authorities interpreted *Saikewicz* as requiring a judicial proceeding, even when brain death had occurred. See, e.g., Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminally Ill Incompetent*, 4 AM. J. L. MED. 367, 387 (1979). The Supreme Judicial Court has defined brain death in the context of a homicide prosecution as death based on accepted medical standards. *Commonwealth v. Golston*, 373 Mass. 249, 252, 366 N.E.2d 744, 747 (1977), cert. denied sub nom. *Golston v. Massachusetts*, 434 U.S. 1039 (1978).

<sup>26</sup> 1980 Mass. Adv. Sh. at 1214, 405 N.E.2d at 119.

<sup>27</sup> *Id.* at 1216, 405 N.E.2d at 120. It is in this regard that one may be justified in characterizing the *Spring* case as having "fine-tuned" the *Saikewicz* opinion. The Court in *Saikewicz* did not, to be sure, require, in *haec verba*, judicial authorization prior to termination of treatment. Rather, the Court stated:

The Probate Court is the proper forum in which to determine the need for the appointment of a guardian or guardian ad litem. It is also the proper tribunal to determine the best interests of a ward. . . . Because the individual involved was thought to be incompe-

sibility for the decision back to the family.<sup>28</sup> The Court suggested that, in determining whether a court order *should* be obtained, various circumstances should be considered, including:

the extent of impairment of the patient's mental faculties, whether the patient is in the custody of a State institution, the prognosis without the proposed treatment, the prognosis with the proposed treatment, the complexity, risk and novelty of the proposed treatment, its possible side effects, the patient's level of understanding and probable reaction, the urgency of decision, the consent of the patient, spouse, or guardian, the good faith of those who participate in the decision, the clarity of professional opinion as to what is good medical practice, the interests of third persons, and the administrative requirements of any institution involved.<sup>29</sup>

Thus, the family and physician of an incompetent should consider the totality of the incompetent's circumstances, in determining whether his life should be terminated.

The Court also discussed the legal consequences of terminating treatment without obtaining judicial approval. The Court intimated that a doctor

tent to make the necessary decisions, the officials of the State institutions properly initiated proceedings in the Probate Court.

373 Mass. at 756, 370 N.E.2d at 433.

Other passages in *Saikewicz*, however, could reasonably lead one to conclude that a judicial procedure *was* necessary. Rejecting an argument that medical panels, rather than courts, should determine whether life-prolonging treatment should be withheld from an incompetent, the Court noted:

Rather, such questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created. Achieving this ideal is our responsibility and that of the lower court, and is not to be entrusted to any other group purporting to represent the "morality and conscience of our society," no matter how highly motivated or impressively constituted.

*Id.* at 759, 370 N.E.2d at 435. Thus, before *Spring*, *Saikewicz* could be interpreted as requiring judicial authorization for withholding life-prolonging treatment.

<sup>28</sup> 1980 Mass. Adv. Sh. at 1210, 405 N.E.2d at 117.

<sup>29</sup> 1980 Mass. Adv. Sh. at 1216-17, 405 N.E.2d at 121. If one were to apply these criteria to the *Saikewicz* case, it would appear that the decision to apply for a court order was sound. *Saikewicz* was a severely retarded ward of a state institution; he had no family interested in becoming involved; no life-saving treatment had yet begun; and there was a need for speedy resolution of the issue. *Saikewicz*'s state custodians apparently felt that judicial involvement was desirable, in particular due to the severe pain that would have resulted from treatment. *See* 373 Mass. at 729-30, 370 N.E.2d at 419.

In contrast, application of these criteria to *Spring*'s case may lead to the conclusion that hemodialysis treatment could have been terminated without court order and without liability. *Spring*'s wife and son, both of whom had been acquainted with the wishes and attitudes of *Spring* for many years, requested termination. His condition was poor, and indeed hopeless; the hemodialysis treatment itself was quite uncomfortable. 1980 Mass. Adv. Sh. at 1211-12, 405 N.E.2d at 118.

would not incur criminal liability for terminating the incompetent's life as long as the life-preserving treatment was terminated based on "a good faith judgment that is not grievously unreasonable by medical standards."<sup>30</sup> The Court also noted that the doctor's risks would be minimized by the prosecutors' discretion whether to bring a criminal charge.<sup>31</sup>

Turning to potential civil liability, an issue likely to be of greater concern both to physicians and to hospitals,<sup>32</sup> the Court commented that the law of negligence would govern the liability of a doctor who failed to act in a manner required by good medical practice.<sup>33</sup> There can be no negligence, the Court stated, solely on the basis that a physician failed to seek court authorization to terminate treatment, if the court would have granted approval to terminate.<sup>34</sup> Furthermore, a doctor who "acts on a good faith judgment that is not grievously unreasonable by medical standards" likely will be protected.<sup>35</sup> The Court also acknowledged, however, that prior court approval would "serve the useful purpose of resolving a doubtful or disputed question of law or fact, but it does not eliminate all risk of liability."<sup>36</sup>

Having thus digressed to discuss the necessity of a court hearing, when the propriety of action taken without a hearing was not at issue, the Court then returned to the issue actually presented in *Spring*—whether the probate judge and the Appeals Court had erred in allowing Spring's physician and family to determine his fate. Applying the "substituted judgment" test, the Court indicated that the Probate Court's original finding, that Spring, if competent, would have rejected the treatment, was warranted by the evidence.<sup>37</sup> As support for this finding, the Court noted that Spring's wife and son, who had been close to Spring prior to his illness, believed that he would have chosen to terminate the dialysis.<sup>38</sup> The Court also noted there was no hope for improvement in the ward's mental state.<sup>39</sup> Given the discomfort and pain of dialysis treatment and the enormous intrusion on one's body caused by the blood-filtering procedure,<sup>40</sup> the Court determined

<sup>30</sup> *Id.* at 1217, 405 N.E.2d at 121.

<sup>31</sup> *Id.* This may prove to be of little comfort to a doctor who must go through the exposure and expense associated with a charge of criminal conduct, even though vindicated by a prosecutor's later decision not to proceed to trial.

<sup>32</sup> See, e.g., Annas, *Reconciling Quinlan and Saikewicz: Decision Making for the Terminal Ill Incompetent*, 4 AM. J. L. MED. 367 at 372, 394 (1979) [hereinafter cited as Annas].

<sup>33</sup> 1980 Mass. Adv. Sh. at 1218-19, 405 N.E.2d at 122. The Court also discussed the tort of battery in the context of consent to treatment. *Id.*

<sup>34</sup> *Id.* at 1219, 405 N.E.2d at 122.

<sup>35</sup> *Id.* at 1217, 405 N.E.2d at 121.

<sup>36</sup> *Id.* at 1219, 405 N.E.2d at 122.

<sup>37</sup> *Id.* at 1210, 405 N.E.2d at 117.

<sup>38</sup> *Id.* at 1220, 405 N.E.2d at 122.

<sup>39</sup> *Id.*, 405 N.E.2d at 123.

<sup>40</sup> *Id.*, 405 N.E.2d at 123.

that the probate judge's application of the "substituted judgment" test was correct. Furthermore, there were no state interests, such as protecting dependents of the patient, preventing suicide, or maintaining ethical standards of the medical profession, sufficient to outweigh Spring's "substituted" determination to die, especially where there was no hope of recovery.<sup>41</sup> Therefore, the Court concluded that the Probate Court should have enforced Spring's "decision" to die by ordering that dialysis be terminated. Accordingly, the Court ordered that a judgment be entered in the Probate Court, ordering the guardian not to authorize any further dialysis treatments.<sup>42</sup> Finally, the Court noted that in the future, court hearings in such matters always should be conducted in an expedited fashion.<sup>43</sup>

The significance of the *Spring* case lies in the Court's analysis of the methodology by which decisions to terminate life-prolonging treatment are to be made. The Court clarified that resort to a Probate Court is not always required.<sup>44</sup> If an application is presented to a Probate Court seeking authority to terminate treatment, however, the judge *must* make a determination whether the treatment should be terminated or not. Although a private decision may be made by the patient's family, physician, and hospital, a Probate Court which is asked to make a decision may *not* delegate that decision to those same people who, on their own, could have made a private decision to terminate treatment.<sup>45</sup>

In "fine-tuning" the *Saikewicz* opinion, the Supreme Judicial Court has stated that *Saikewicz* should not be read as requiring resort to the judicial system in all cases.<sup>46</sup> A guardian of an incompetent may apply to a court to obtain "immunity" in deciding to terminate treatment,<sup>47</sup> but the guardian is not required to do so. Without judicial authorization, however, the guard-

<sup>41</sup> *Id.* at 1220-21, 405 N.E.2d at 123.

<sup>42</sup> *Id.* at 1210, 405 N.E.2d at 117. Spring died between the time of the original Supreme Judicial Court order and the issuance of the Court's opinion. *Id.* at 1211, n.1, 405 N.E.2d at 118, n.1. The order, however, left open the possibility that further evidence might be brought to the attention of the Probate Court which would reveal a change in conditions. Hence, the Court left it open to the lower court to revise its findings, if necessary.

<sup>43</sup> *Id.* at 1222, 405 N.E.2d at 123-24.

<sup>44</sup> This aspect of the *Spring* opinion is *obiter dicta*. The *Spring* litigation could have been resolved by a determination that the Probate Court had misapplied the "substituted judgment" test. Perhaps the Court believed that the time had come to clarify the *Saikewicz* opinion. See note 27 *supra*.

<sup>45</sup> 1980 Mass. Adv. Sh. at 1210, 405 N.E.2d at 117.

<sup>46</sup> Apparently, the precise meaning of the *Saikewicz* opinion was unclear to doctors and to lawyers, resulting in confusion and in hospital demands that Probate Court approval be obtained in all cases prior to the withholding of life-supporting medical treatment to incompetent adults. See generally, Annas, *supra* note 32, at 385-94. Some of the overly broad language in the opinion may have contributed to this confusion. See note 27 *supra*.

<sup>47</sup> Of course, court authorization to terminate would offer no immunity from negligence in implementing the court order. 1980 Mass. Adv. Sh. at 1219, 405 N.E.2d at 122.

ian, physician, or hospital who terminates treatment takes the risk of civil or criminal liability for a wrong decision. Perhaps the Probate Court forum may be avoided in the clear case where the likelihood of recovery for a "hopeless" patient is remote, where the family members who have been close to the patient are all in agreement, where the attending physician advocates termination, where there are no other persons who have an interest in the decision, where the proposed treatment would be painful, and where there is nothing in the patient's history which would indicate that the patient would prefer to live. Under these circumstances, it truly can be said that "the state can *never* demonstrate an interest compelling enough to outweigh the patient's constitutional right to refuse treatment as exercised by a legal guardian. Therefore, there is no reason to require that the legal guardian seek court approval before exercising the incompetent's right to refuse treatment. . . ."<sup>48</sup>

The *Spring* case may be of little comfort, however, to those who must decide whether to terminate treatment when it is not clear that all of these criteria have been met. Despite the *Spring* case, guardians, physicians, and hospitals may determine that court approval *should* be obtained, if only to avoid the risk of an erroneous decision where the consequences are so serious. Factors such as good faith and prosecutorial discretion<sup>49</sup> are of minimal value under such circumstances. Because the decision to terminate treatment is so risky for the guardians and so serious for the patient, courts will continue to be the ultimate decision-makers in the majority of cases.

The *Spring* case represents yet another example of the meticulous and slow process by which courts define the contours of complex constitutional rights. Broad constitutional principles,<sup>50</sup> such as those established in *Saikewicz*, demand continued examination and refinement in the courts as the issues become more sophisticated. The "fine-tuning" of *Saikewicz* in *Spring* represents a necessary consequence of the vast power of courts in shaping policy through case law. It is likely that judicial "fine-tuning" in this sensitive area of medical treatment will continue for many more years.

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<sup>48</sup> Annas, *supra* note 32, at 383-84 (emphasis original).

<sup>49</sup> See text accompanying notes 32-35 *supra*.

<sup>50</sup> For example, although *Roe v. Wade*, 410 U.S. 113 (1973) may have established a constitutional right to abortion, courts since 1973 have been wrestling with cases which concern the scope of this right. There has been a broad range of issues arising from the *Roe* case. For example, courts have been called upon to consider governmental funding of abortions, *see, e.g.*, *Beal v. Doe*, 432 U.S. 438 (1977) and parental consent requirements for a minor to obtain an abortion. *See, e.g.*, *Bellotti v. Baird*, 443 U.S. 622 (1979).