Prison Furloughs — Only a Pawn in Their Game?

...also Archibald Cox: On Judicial Reform in Massachusetts
The Suffolk University Law School Journal

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The ADVOCATE is a publication of Suffolk University Law School. Our current circulation of 7,500 is centered in the New England area. The ADVOCATE is published three times a year: orientation, fall and spring issues. The orientation issue is distributed to law students only.

The objectives of The ADVOCATE are to publicize the activities and outstanding achievements of the Law School and to present articles by students, faculty and guest writers on timely subjects pertaining to the law.

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Why in Massachusetts do we refer to the inmates of our correctional institutions as residents? Most significantly, who decides when these inmates are properly prepared for re-entry into our society by the Massachusetts Furlough Program? While the people of our State live in constant fear of crimes contra pacem et omnes gentes; while the crime rate in Massachusetts continues to increase, it appears to me that our criminal justice system is weighted heavily in favor of the defendant against the victim.

The Omnibus Prison Reform Act became law in Massachusetts on November 6, 1972. Thus, the Furlough Program was created by Chapter 777, of the Acts of that year. This Attorney was at that time Vice Chairman of the House Ways and Means Committee and like many of my colleagues we supported the legislation to achieve prison reform, specifically, diagnosis evaluation for all inmates, prerelease work programs, and improved educational and vocational training. All of these are programs that would improve the odds in favor of rehabilitating the criminal and diminishing the recidivism rate in the Massachusetts Correctional Institutions — not an indiscriminate and premature releasing or furloughing of serious criminals to the streets without safeguards for the protection of the people.

In discussing the Furlough Program there are many issues: the intent of the Furlough Program; revisions of the law by each Corrections Commissioner to conform to his or her expectations; furloughs being granted according to the Commissioner’s standards and not by statutory law; and the escape rate of all prisoners, particularly those who are sentenced for more serious offenses. Although we will direct our remarks to the failure of the Furlough Program, we would agree that the Omnibus Prison Reform Bill was a necessity in that a properly administered prerelease and limited furlough program is desirable. Nevertheless, the Furlough Program must be implemented slowly and cautiously, with foremost in mind the lives and safety of the law abiding citizens of this State. The Honorable Louis H. Glaser, presiding Justice of the First District Court of Eastern Middlesex, stated, “The Furlough Program has not been successful in Massachusetts. It would be desirable to have more professionals, more community involvement, naturally more participation from those in law enforcement in the selection process of furloughes.” Judge Glaser went on to say, “The notification procedure must be improved and information surrounding the furlough and furlougher must be provided to the involved community.”

As we discuss the Furlough Program, we must understand the following law and regulations concerning the furloughs.

Continued on page 4.
In coming to a discussion of prisoner furlough programs, it is necessary at the outset to make some general definitions of the issues involved and set some limits to the range of concerns which the discussion will cover. First, it must be clear that what I consider to be a furlough is the unaccompanied absence of a prisoner from a correctional facility to which he or she must return, for any purpose consistent with that person’s reintegration into the community, including the maintenance of family ties, obtaining a job, and finding a residence for use upon release. Although the letter of Massachusetts law authorizing furloughs additionally grants discretionary power to the Commissioner of Correction to insist that a prisoner be accompanied on a furlough by an employee of the Department of Correction, and also authorizes furloughs specifically for such purposes as to attend the funeral of a relative, to visit a critically ill relative or to obtain medical or other social services which are not available at the correctional facility, such authority has traditionally been given commissioners of correction, although this authority has been sparingly used. A visit by a prisoner, in the presence of a guard, to a critically ill relative is neither innovative nor worthy of discussion.

Second, it must be clear that this article will be concerned only with adult offenders and will not specifically deal with juveniles, although many or most of its conclusions might be applicable to anyone — adult, juvenile, man, woman, prisoner, or mental patient — who is institutionalized by the state.

This article will not be, in the strictest sense, a defense of the use of furloughs, nor will it argue for the validity of furloughs in the corrections process. Furloughs of one kind or another have been used by corrections administrators for many years. Furlough programs which have emerged in many jurisdictions recently as the result of liberal, reformist concern with prisons and corrections policy, almost invariably show extremely high “success” rates. A furlough is treated as successful if the prisoner returned to the prison at the end of or within a reasonable time after the end of the scheduled furlough period. Most states with furlough programs register rates above 90%; many are above 95%; and in Massachusetts the rate exceeds 98%. Clearly, the public fear, frequently stirred by the more reactionary media and political leaders, that furloughed prisoners will escape and/or commit crimes while free is unfounded. Although some crimes are committed (and generally made very visible in the press) and some prisoners do take advantage of furlough to escape confinement, these incidents are rare. Furloughs are a statistical success. At the same time the success of furloughs is marked in other ways by the widespread appreciation of them

Continued on page 10.
In Section 18 of Chapter 777 of the Acts of 1972, a furlough may be authorized and granted for only these purposes: (A) to attend the funeral of a relative; (B) to visit a critically ill relative; (C) to obtain medical, psychiatric, psychological or other social services when adequate services are not available at the facility and cannot be obtained by temporary placement in a hospital under §§117; 117A, and 118 of c.127; (D) to contact prospective employers; (E) to secure a suitable residence for use upon release on parole or discharge; (F) for any other reason consistent with the reintegration of a committed offender into the community. The total time permitted for furlough is not to exceed 14 days during any twelve month period, nor more than seven days at any one time. This is as stated in the 1972 Acts.

Presently, the furlough program is being operated by a different set of standards. These new guidelines were developed by the present Commissioner and became effective in May 1975. Inmates (or residents, as they are now called) are eligible for furloughs according to these new rules. They are:

8.1(b)(2) A resident shall be eligible to be considered for a furlough under the following conditions: (A) a resident serving life sentences or death shall be required to serve five years from the effective date of sentence, except for emergency furloughs under escort; (B) a resident serving life sentences except those serving sentences for murder in the first degree on a sentence of death shall be required to serve three years from the effective date of sentence, except for emergency furloughs under escort; (C) a resident who upon initial commitment to the care and custody of the department is within eighteen months of parole eligibility shall be eligible immediately for furlough; and, (D) all other residents shall be required to serve twenty percent of the time between effective date of sentence and their parole eligibility date, but no more than three years, except for emergency furloughs under escort. Residents who have successfully completed a furlough without an escort or residents whose applications for initial furloughs without an escort have been approved by the Superintendent or in a case of special offenders, the Commissioner, as of the effective date of these regulations shall continue to be eligible to receive a furlough under the conditions set forth in 8.1(a)(1) of D.C.4670.1, Furloughs, Rules and Regulations, August, 1973.

What is the significance of the above regulation? It means that the present Commissioner’s rules will be treated as law until a successor is appointed; and since the law is ambiguous, the Commissioner of Corrections, and most recently the Commissioner of Mental Health, also have excessive latitude that carries with it tremendous responsibility for their actions. Fortunately for Massachusetts, Commissioner of Corrections, Frank Hall, has far greater control over his department than his predecessor.

How does an inmate receive a furlough in Massachusetts? Since the law provides that everyone and anyone can be furloughed, the process is presently based on the Commissioner’s recommendations. The inmate files an application with a Furlough Coordinator: the Coordinator is appointed in each facility by the Superintendent. After having the application in hand the Furlough Coordinator then prepares an authorization sheet; all data, reports, communications and evaluations are gathered by the Furlough Commission. These materials and others are then forwarded to a Furlough or Institutional Classification Commission. After review the Commission votes and informs the Superintendent, the Furlough Coordinator, and the inmate, of any recommendation, in writing; including reasons for approval, denial, or deferral of application. Some review and approval is then expected by the Superintendent and Commissioner.

A more recent provision permits an inmate to receive certification from the Commissioner for a full year. The inmate who has been so certified may have his or her furlough approved and granted by the Superintendent without being processed on each occasion by the Commissioner’s office. Although this cuts into the overwhelming red tape of the Federal and State bureaucracy, it seems to this writer that a minimum of additional paper work to safeguard the granting of each furlough would serve to protect the public interest. Clearly the effect of these new guidelines, if nothing else, is that they illustrate the effectiveness of the Prison Reform Act. The Correctional Department seemingly is exercising too much autonomy, especially in the granting of furloughs.

Through 1973 almost any criminal confined to our correctional institutions could receive the privilege of furlough at the program’s inception. It was very dangerous. The former Commissioner saw fit to disregard the most significant reforms of Chapter 777 of 1972 and instead, without proper formulation and without administrative guidelines, carelessly and negligentely furloughed criminals to the streets of Massachusetts. Nineteen Hundred and Seventy-three was a violent year. The City of Boston set an all time record of 135 homicides in 1973, with a State high of 256 murders.

A recent report by the Special Commissioner Relative To The Effects Of The Prisoner Furlough Program on The Citizens Of The Commonwealth stated, “It is the opinion of this Commission that each furlough is a serious gamble, and should be made with all pertinent information available.” Perhaps the gamble should be taken, but the risk must be diminished in favor of the law abiding public.

In an effort to gather information, Commissioner Hall’s regulations provide for notification of police. Remember, the following provisions are included in the rules and regulations but are not written into any law. They may be subject to change by a future Commissioner. The provision includes:

11.3(A) At least one week prior to the release of a resident on an approved furlough, the furlough coordinator shall notify the Chief of Police of the community which the resident designated as his destination and the Department of Public Safety, 1010 Commonwealth Avenue, Boston, Massachusetts, by means of the designated notification form.

11.3(B) In case of emergency furloughs, emergency furloughs under escort, or in any other case where time does not permit, notification shall be made by telephone and followed by written notice.

11.3(C) Notification to a district attorney of the Commonwealth or a law enforcement agency other than those set forth in 11.3(A) of these regulations, of the approval of a furlough for a particular resident may be provided.
only after a request, in writing, from such district attorney or law enforcement agency has been received and approved by the Commissioner. When information is provided to a district attorney or law enforcement agency under this section, a record, in writing, including the date, the name and address of the individual or agency requesting this information and the reason for requesting such information shall be maintained. The Commissioner or his designee shall maintain a list of the name(s) of the resident and the agency requesting the information. This author proposed the above legislation in 1973, but extreme liberalism prevailed over a slightly less progressive, but much more levelheaded attitude.

Once the information is gathered and collated, a furlough is granted. If a law enforcement agency or district attorney disapproves of a furlough it has little effect. The Commissioner has the final word. Therefore, if an inmate is a bad risk he may still be furloughed. One may ask, what if the inmate doesn't return from furlough? Are there provisions for escape?

Currently, furlough escapees are prosecuted under Chapter 168, Section 16 of the Massachusetts General Laws Annotated, which governs all escapees from correctional institutions.

However, Commissioner Hall has developed his own regulations governing escape. They are:

11.4 Abuse of Furlough Privilege
11.4(a) Failure of a resident to adhere to the conditions of his furlough shall be deemed an abuse of the furlough privilege, and the resident may be subject to disciplinary action or criminal prosecution and such abuse shall be considered in future furlough requests.

11.4(b) Failure of the resident to return to the state correctional facility at his designated time shall automatically result in the filing of a disciplinary report for being out of place, regardless of prior notification to the facility by the resident of his reasons for being late. Current departmental procedures for processing disciplinary reports shall be followed. It shall be the responsibility of the shift commander to insure that the reporting officer has prepared his disciplinary report prior to the termination of the shift.

11.4(c) Failure of a resident to return to the state correctional facility within two hours of his designated time of

### Offenses Allegedly Committed by Furloughees on Escape

<table>
<thead>
<tr>
<th>Offenses Against the Person</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder, 1st Degree Pending</td>
<td>1</td>
<td>(4.3)</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>13</td>
<td>(56.6)</td>
</tr>
<tr>
<td>Armed Dangerous Weapon w/intent to Rob 15cc</td>
<td>1</td>
<td>(4.3)</td>
</tr>
<tr>
<td>Assault w/Intent to Murder</td>
<td>1</td>
<td>(4.3)</td>
</tr>
<tr>
<td>Assault w/Intent to Rob 8-10</td>
<td>1</td>
<td>(4.3)</td>
</tr>
<tr>
<td>Kidnapping</td>
<td>1</td>
<td>(4.3)</td>
</tr>
</tbody>
</table>

### Other Offenses

<table>
<thead>
<tr>
<th>Offense</th>
<th>N</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unlawful Possession Weapon</td>
<td>2</td>
<td>(8.7)</td>
</tr>
<tr>
<td>Larceny 6 mos. F&amp;A, ss 2 yr. prob.</td>
<td>1</td>
<td>(4.3)</td>
</tr>
<tr>
<td>Possession Marijuana 2½ yr.</td>
<td>1</td>
<td>(4.3)</td>
</tr>
<tr>
<td>Operating w/o Authority 6 mos. F&amp;A H. of C.</td>
<td>1</td>
<td>(4.3)</td>
</tr>
</tbody>
</table>

**Total** 23 (100.0)

Of these twenty-three cases, twelve have resulted in convictions and new sentences. A list of the new sentences is given in the following table. In addition, four individuals are presently serving time in other states and the remaining seven cases have not yet been adjudicated.

### Sentences Received by Offenders Convicted of Crimes Committed While on Escape from Furlough

<table>
<thead>
<tr>
<th>Offense</th>
<th>Sentence</th>
<th>No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Armed Robbery</td>
<td>20-25 yrs., Forthwith</td>
<td>1</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>12 yrs., cc</td>
<td>1</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>6-9 yrs., cc</td>
<td>1</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>5-20 yrs., F&amp;A</td>
<td>1</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>5-7 yrs., cc</td>
<td>1</td>
</tr>
<tr>
<td>Armed Robbery</td>
<td>2½-5 yrs., cc</td>
<td>2</td>
</tr>
<tr>
<td>Armed Dang. Weapon w. Intent to Rob</td>
<td>15 yrs., cc</td>
<td>1</td>
</tr>
<tr>
<td>Assault Int. Rob</td>
<td>8-10 yrs., cc</td>
<td>1</td>
</tr>
<tr>
<td>Larceny</td>
<td>6 mos. F&amp;A, ss 2 yr. prob.</td>
<td>1</td>
</tr>
<tr>
<td>Possession Marijuana</td>
<td>2½ yrs.,</td>
<td>1</td>
</tr>
<tr>
<td>Oper. w/o Authority</td>
<td>6 mos. F&amp;A, H. of C.</td>
<td>1</td>
</tr>
</tbody>
</table>

**Total** 12

### Legal Outcome of Escape from Furlough Cases November 6, 1972 Thru June 28, 1975

<table>
<thead>
<tr>
<th>Disposition</th>
<th>No.</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Prosecuted</td>
<td>120</td>
<td>38.6</td>
</tr>
<tr>
<td>Not Guilty</td>
<td>3</td>
<td>1.0</td>
</tr>
<tr>
<td>Probation</td>
<td>33</td>
<td>10.6</td>
</tr>
<tr>
<td>New Sentence, Concurrent</td>
<td>20</td>
<td>6.4</td>
</tr>
<tr>
<td>New Sentence, From and After</td>
<td>43</td>
<td>13.8</td>
</tr>
<tr>
<td>New Sentence, Forthwith</td>
<td>2</td>
<td>.6</td>
</tr>
<tr>
<td>Sentence Suspended</td>
<td>3</td>
<td>1.0</td>
</tr>
<tr>
<td>Case Pending</td>
<td>20</td>
<td>6.4</td>
</tr>
<tr>
<td>In Custody, Out-of-State Facilities</td>
<td>10</td>
<td>3.2</td>
</tr>
<tr>
<td>Resident Deceased</td>
<td>1</td>
<td>.3</td>
</tr>
<tr>
<td>At Large</td>
<td>52</td>
<td>16.7</td>
</tr>
<tr>
<td>Disposition Unknown</td>
<td>4</td>
<td>1.3</td>
</tr>
</tbody>
</table>

**Total** 311 100.0
return shall be considered an escapee, regardless of his reasons for being late. The superintendent or his designee shall notify, forthwith, appropriate law enforcement officials of the escape.

What do all these rules and regulations mean? The current furlough program is failing. The law is full of loopholes which increase the opportunity for negligence and crime. Most inmates are never punished for tardiness. As usual, the people and taxpayers are the only ones that suffer. One very important purpose of the law is to protect people. The furlough system as it is currently in law and presently administered, affords anything but protection. Witnesses, victims, and the public expect to see a serious criminal offender prosecuted and if convicted, confined for rehabilitation and punishment. Presently, in Massachusetts it is easier to gain admission to college than to be sentenced to jail. A first offense (which is actually not the first offense, but truthfully the first apprehension of the defendant by the law), places the defendant before the bar. In many instances the cases are continued without a finding at the discretion of the Court. This author believes that justice is best served by preserving this discretion in our judiciary. Second and third offenses may carry with them probation and/or suspended sentences. Later, most often too late, is one sentenced for incarceration. I strongly believe that shorter sentences at the earlier stage of the defendant’s activities is a better approach to criminal justice than prison reform.

In evaluating the furlough program in Massachusetts we must remember that these inmates were not sentenced for stealing candy. Having previously stated that the furlough program was a complete disaster at its implementation stage, how successful is the current furlough program? The only statistical data available is that proposed by the Corrections Department. We are not impressed by overly progressive liberals who make figures dance deceptively in favor of their social programs. It is interesting to note, however, that the Corrections Department reports its escape percentages from the total number of furloughs granted, not by the number of individuals furloughed. By implementation of the newly adopted regulation the Commissioner can provide furlough certification for an entire year. Thus, these furloughees are not included among the escape percentages. Since this is the case, how does one effectively measure offenses allegedly committed by furloughees? One cannot, and statistics cannot show these crimes. There can be mistakes, and these mistakes can be very costly errors of judgment that lead to a taking of the public’s property and life.

The Co-Chairmen of the Special Commission investigating furloughs, Representative Peter Y. Flynn of Bridgewater and Senator Arthur Lewis of Boston, conducted a limited phone survey of correctional facilities. They determined that four furloughed escapees, who were still at large, were not listed in the Department’s monthly statistical report. This certainly casts a cloud of suspicion over the credibility of the contention of the Department of Corrections.

If an inmate on furlough commits a crime and returns to the prison, how will he be caught? He isn’t going to tell anyone about the crime. If an inmate is serving a life sentence, he doesn’t care about committing another crime. If he commits murder, what are the Courts going to do — give him another life sentence? If they do under the present administration, he will soon be eligible again for a furlough. Hence, the criminal is better protected in the institution than the average citizen.

And what happens to inmates who commit offenses while on furlough? Apparently, not much. As aforementioned, escapees are prosecuted under the Massachusetts law. But the following tables illustrate what occurs.

The Department of Corrections has not updated these tables since May of 1974, despite the Commission’s repeated requests.

The Commission’s files indicate that additional offenses have occurred.

In my judgment it appears the Commission members have become acutely aware that in no way do numbers tell the real story of the successes and failures, and especially, the fallacies of this program.

One must remember that the furlough program is a privileged system that involves convicted offenders, who have already wronged society and in several cases have used this program, championed as humane and progressive, to again destroy people and property. The table speaks for itself.

It is my contention that any furlough is a reward, a privilege extended to those inmates who have demonstrated by exemplary behavior that they are deserving of this custodial opportunity. Proper administration of the furlough program would have it serve as a prerelease system geared to slowly re-integrating the inmate into society. The laws governing furloughs should be amended. Quite obviously the whole program is deficient. Even the most liberal person acknowledged something was wrong when former Governor Sargent signed an Act for more stringent penalties for inmates who failed to return from furlough. Many inmates have been successful furloughees, and judiciously speaking, one cannot deny the rights of the accused and the convicted; however, the pendulum has swung too far in promulgating the rights of the defendant beyond our responsibilities to the victim. Therefore, we must eradicate the deficiencies of the furlough program by tightening the rules and regulations and eliminate the ambiguities in the law by amending legislation.

One of many who believes that the system should be tightened is
Representative Peter Y. Flynn, who states, "As House Chairman of A Special Commission studying the Furlough Program in the Commonwealth of Massachusetts, I have found a system that smacked of error and great potential harm for all citizenry and one that must be tightened up for the safety and security of the people of Massachusetts." This must be accomplished if the furlough system is to survive.

In 1973 I met with the acting Superintendent of Walpole, M.C.I., George Bolinger, then Superintendent at Norfolk, M.C.I., Doug Vinzant, Superintendent at Concord, M.C.I., and Ms. Chase, Superintendent at Framingham, M.C.I., all recent appointees of former Governor Sargent and former Commissioner of Corrections, John Boone. All of them agreed that the Furlough Law should be amended. Furthermore, they concurred with conclusions of fact that an inmate should be required to serve a definite period of time before the said inmate would become eligible to request a furlough. They concurred that the period of time to be served should be based on the severity of the crime, the length of the sentence, and the behavior of the inmate at the Institution. These were the so-called experts in the field of correction and they, too, immediately recognized the need for change.

Without unduly worrying about semantics, the furlough program should be referred to as custodial temporary absence and pre-release furlough. Most furloughes, if not all, should be in custody while they are absent from the Institution. By law we require parolees or people on probation to report in person to a Court agency, but not the furloughee. In many instances those parolees who have served their sentence and paid their debt to society continue to be under the supervision of the Court; the furloughee must have at least the same obligation. How often does the furloughee return to the community from which he or she was convicted; how often does the furloughee commit an undetected crime?

A very technical constitutional question may be raised at this point. Under the separation of powers we have three independent governmental bodies; the Executive, Legislative, and the Judicial branches. As of late, many have alleged that the Federal judiciary has far exceeded its authority. Without digressing, we pose the question as to whether or not the Executive and Legislative branches of government can in fact interrupt the sentence imposed by the Court. Keeping in mind that pardons, paroles, and probationary periods have statutory authorization to diminish sentence, the altering, by temporary absence, of the inmate's confinement only occurs by way of a furlough. Query, as to whether this law is contra legem terrae.

Since it is not our desire to destroy the furlough program, what proposals can be adopted which will provide sensible prison reform accompanied by safeguarding the public safety? The recommendations made by the Special Commission is a good place to start:
1. That at least two correctional officers sit on a five member furlough committee. (Throughout the hearings and deliberations it was agreed that those who know the prisoners best are the correctional officers. Correctional officials, officers and inmates agree to this.)

2. That a mandatory "from and after" sentence of not less than three and not more than ten years and forfeiture of good time deductions be imposed on any furlough escapee who fails to return to the institution within six hours. (Records show that of the 311 escapees as of June, 1975: only 10% received a new sentence; only 13% received a "from and after" sentence; and, that over 93% of "from and after" sentences were for six months or less.)

3. That it be mandatory for an inmate to be an active regular participant in a program in order to be considered for furlough.

4. Requiring notification of certain police and law enforcement agencies and allowing for their objections prior to release of an inmate on furlough. (The need to obtain more information has been recognized by most, including Commissioner Hall.)

5. That offenders become eligible to apply for a furlough according to a set time schedule that takes into consideration existing laws, the crime or crimes, prior commitments and the inmates eligibility for parole.

5a. First-time offenders of minor, non-violent crimes; that is, any violation for which, if held under a sentence containing a minimum sentence, the offender would be eligible to receive a parole after serving one-third of that minimum sentence, shall be required to serve twenty percent (20%) of the time required to be eligible for parole before becoming eligible to apply for a furlough.

5b. First-time offenders who have committed serious, violent crimes, violations of Sections 13, 13B, 14, 15, 15A, 15B, 16, 17, 18, 18A, 19, 20, 21, 22, 22A, 23, 24, 25, 26, of Chapter 265 or Sections 17, 34, 35, or 35A of Chapter 272 and including convictions of possession of controlled substances with intent to sell, or any violation for which if held under a sentence requiring a minimum time served, the offender would be eligible to receive a parole after serving two-thirds of that minimum sentence, shall be required to serve fifty percent (50%) of the time required to be eligible for parole before becoming eligible to apply for a furlough.

5c. Repeat offenders, those with a prior commitment to a correctional institution or house of correction, must be within four (4) months of parole eligibility in order to be eligible for a furlough.

5d. Inmates with a "from and after" sentence must be serving the time required on their second sentence before they are eligible for the furlough program.

5e. Inmates serving a sentence for first degree murder are not to be eligible for participation in the furlough program.

5f. Offenders receiving a life sentence for second degree murder or other crimes shall be eligible to apply for a furlough after twelve (12) years of their sentence.

5g. An offender sentenced or committed to any facility or institution pursuant to Massachusetts General Laws, Chapter 122A, shall not be eligible for a furlough until that offender has received clearance that he or she is not a sexually dangerous person.

5h. A committed offender may apply for emergency furloughs under escort immediately following commitment for reasons (a), (b), (c), as stated in Section 90A of Chapter 127.

6. That a judge upon sentencing of a prisoner may impose further restrictions than those provided for by existing laws or regulations for furlough eligibility.

The above recommendations can save the furlough program.

However, these recommendations should not be construed as a panacea. In fact, a new problem is arising from Massachusetts law enforcement officers, and the eminent jurists of the Superior and District Courts of this Commonwealth. Very possibly, adjustments could be made before a more conservative voice is heard and these laws are repealed. To repeal the law may be a tremendous step backwards, as it would deny those deserving a chance to prove they are worthy of rehabilitation. In conclusion, we seek not to "return to the good old days," but rather to effectuate successful and progressive prison reform with common sense, always keeping as a priority the protection of those who choose to behave — to do what is right.
expressed by correctional administrators and prisoners alike, albeit most likely for vastly different reasons. Furloughs are a critical success among both the participants and the administrators. The validity of furloughs in the corrections process is practically undeniable. Therefore, this article assumes that no defense is needed on either score.

Instead, what will be brought into question, briefly, is the administrative and policy rationale behind the use of furlough programs — how furloughs are used by corrections managers. More than that, it will deal with the issue raised so dramatically by the existence of the successful furlough programs themselves; the issue of the need to incarcerate at all the many thousands of men and women we currently do. These are the fundamental areas of furlough program operation which must be examined as we explore the larger, and more pressing issues facing us; as we attempt to bring justice and equity to our devastatingly unjust and ineffective criminal justice and corrections processes.

Furloughs, as they are commonly known today, are largely held to be a tool in the correctional process of rehabilitation; a treatment in the cure of criminal behavior in convicted offenders. At best, however, they are a compromised "rehabilitative" tool. On the one hand, furloughs offer a taste of freedom: no walls, no guards, a chance to breathe. On the other, it is only temporary freedom and even then circumscribed by regulations governing when and where they occur. Furloughs offer the possibility of maintaining contact with a community, a neighborhood; to maintain emotional ties with family and friends; to find a job and prepare for life outside of prison; and, within the rehabilitative scheme, they offer a chance to prove readiness to return to the free world. They give the inmate the opportunity to demonstrate the quality of responsibility and willingness to go straight that counts so highly in present correctional practice. Furloughs also offer a unique opportunity to correctional managers. They offer a very attractive carrot to be dangled from the correctional stick. Furloughs can and are used as methods of institutional control. They are used to pacify prisoners into behaving according to the desires of the administration of the institution or the system. If a prisoner behaves properly, he or she might receive a furlough. It is a powerful method for coercing behavior, especially since in most corrections systems, furloughs represent the best there is about being in prison; the best thing many prisoners have to look forward to. Furlough days can be rationed out (in Massachusetts, 14 furlough days per year is the legal limit, each furlough being authorized by the Commissioner of Correction on the recommendation of 5 institutional level Department employees), a Pavlovian reward for an acceptable performance. Furlough programs can be used in either, or perhaps inevitably, both, ways. How they are used rests solely within the discretion of each individual correctional administrator. And too frequently in the criminal justice and corrections process, when an official is given wide discretionary authority, the use of that authority has produced more injustice than justice.

The question of furloughs, and for that matter any of the other reform-stimulated rehabilitative programs, such as work and education release, which have come into vogue in recent years, quickly reduces to whether they will be used to maintain the institutional prison system by attempting to make it work, or whether they will be used as beginning instruments in an effort to depopulate and close existing prisons. What is clear is that the institutions are under increasing pressure from a number of sources. From within, the men and women entering prison today are, for many reasons, less willing to accept the traditional role of a convict; less amenable to acting in the manner prescribed for them by prison administrators and older prisoners. These men and women are demanding that their rights did not cease when they entered prison; that they deserve to be and must be treated as human beings. Increasingly, these attitudes have found collective expression through prisoner organizations, committees and unions which frequently have managed to find the basis for a working alliance between Black, White and Spanish prisoners; a difficult enough task in the free world, let alone in a prison community where such racial taboos have historically been so intense. From a strictly management point of view, such prisoner organization has made operation of the prisons exceedingly difficult for many traditionalist corrections professionals.

Additionally, the penal institutions are increasingly coming under the scrutiny of the courts, with virtually every aspect of corrections policy and practice now receiving judicial review. The courts have recently handed down decisions on everything from the health and safety conditions existing in the prison environment to the rights of prisoners in every aspect of prison life, including the right to treatment and the right not to be treated. The overall effect of many of these rulings has been to acknowledge the dismal and neglected condition which exists in most of this country's prisons, and to place an enormous burden on the state in the requirements of remedying the situation. In short, in order to meet court ordered improvements in penal institutions, improvement needed to bring the institutions merely to an acceptable level, states will be required to spend enormous sums of money. The recent decision in an Alabama class action suit brought for prisoners of that state by the National Prison Project is but one example. Alabama officials, faced with creating habitable living conditions in its prisons for the first time as a result of a court order, have admitted that sufficient state funds to do so simply do not exist. The same is true in most jurisdictions, where budget reductions rather than increases in human service/welfare/corrections agencies are being made.

Finally, the prisons have come more into the public view than ever before, and consequently more and more people have begun to realize the waste and destruction which occurs in them. This attention, in part due to increased media interest, in part to organized groups of correctional reform advocates, serves only to increase the pressure facing administrators of prisons.

Within this setting, correctional managers are attempting to operate their programs and pursue their policy, of which furloughs are but one aspect. Because the prisons have become increasingly difficult to manage, because the institutional system has begun to be subjected to growing challenge and criticism, there has been increased interest in and use of furlough, work and education release programs in many jurisdictions. In most cases where these
programs have been implemented there has been no attendant drop in prison populations, no closing of institutions, and the conclusion that they have been used primarily for the pacification of prisoners is practically unavoidable. Since prisons and penitentiaries were first built in this country as the liberal answer to the horrors of corporal and capital punishment, the administrators of those prisons have shown an uncanny ability to adapt to each successive challenge. When penitent reflection was shown to be ineffective in reforming prisons as the first prison administrators had hoped, enforced work in prison industries was promoted as the answer to the problem. The institutions remained. When work also proved an ineffective treatment, counselling and other in-prison education, training and therapy programs were said to promise the answer. As we began to challenge even these liberal, humanistic concepts, we have found furloughs, work and education release, implemented from an institutional base. As dissatisfaction with these grows we hear about behavior modification, aversion therapy, psychotherapy, drugs, and even the suggestion that smaller, less regimented prisons built closer to the areas from which prisoners come are the answer. And yet it is all the same thing. A prison is a prison, large or small and no prison can be improved. The history of incarceration in this country has proved at least one thing; that our prisons are incredibly resilient institutions, capable of resisting substantial change even in the face of obvious failure.

Ironically, furloughs, and the other programs which release prisoners from the prisons, even temporarily, could be utilized as viable tools to bring change to the institutional system. Although that use does indeed depend upon the personal philosophy and persuasion of the individual administrator, when used by someone committed to change, committed to depopulating prisons and creating a real network of community service and treatment programs, furloughs do provide leverage. In some ways, the mere existence of furlough programs is an indirect admission that the prisons have failed; that the prison cannot provide what is necessary either to successful rehabilitation (even though rehabilitation is probably not what is required) or reintegration into the community. Prisons kill all those qualities in a person which make them best adapted to life in the free community. Instead they create men and women who will inevitably return to prison.

In the hands of committed rehabilitative administrators, furloughs have been used in an evaluative manner. They are used to give prisoners a chance to demonstrate an ability to make it on the outside, which in turn can provide the evidence required by those who ultimately decide when that prisoner will return to the community without having to return to the institution. The problem with this approach, and with the entire rehabilitative model in corrections and its attendant agencies, including parole and probation, is that it rests on the faulty assumption that certain of us are able to 1) “cure”
someone of criminal behavior and 2) predict at some point during that "cure," when a person is likely not to commit crime again. Unfortunately our omniscience in this regard has proven to be less than perfect. Our rehabilitative schemes show little sign of working properly. But what is equally unfortunate is that the now popular response to this failure of rehabilitative efforts has been to pursue legislation for mandatory sentences, for everything from second offense shoplifting to car theft to more serious offenses, or to devise a system in which prisons are used to assure swift, certain punishment following a speedy, if not necessarily a good, trial.

These temporary release programs can, however, be used in yet another way. They can be used to tear down the misconceptions surrounding the prisons, to counteract the destructive nature of prisons on a person’s spirit, and eventually to tear down the prisons themselves. Much of the value of furlough programs can be seen in what they do, for the most part, in reshaping the stereotype images which much of the general public holds regarding prisons and prisoners. It is unfortunate that we still cling to such 1930’s Hollywood misconceptions as that of “Mad Dog” Dutch Schultz and his gang of hardened, homicide-bent cretins who plan daring escapes, torment and murder the “screws” and eventually must be subdued by the kindly, tough-but-fair, warden. The image is clumsy and degrading for all concerned. Furloughs tend to open up the prisons, at least in a modest sense. Furloughs can expose prisoners to the public as human beings, with families, friends, feelings and abilities. To a great extent, this kind of re-education process must preceed any more substantial effort to change the prison system. We have to begin to learn that the labels we have used for so many years have been more destructive than beneficial.

Furloughs also provide prisoners a chance to escape the brutalizing and dehumanizing prison environment; an environment that will remain essentially the same even if the size, shape and location of the prisons change. The process of prisonization, institutionalization, is an inescapable phenomenon in any place where people are held against their will. The process does no more than to create permanent wards of the state which, in the most practical sense, tends only to aggravate the public financial burden. It is not an uncommon prison occurrence for a man or woman to commit an obvious crime upon release just to get back inside. Furloughs offer the possibility of interrupting this process.

Finally, furloughs provide a starting point for a policy dedicated to breaking the heavy investment of corrections in institutional confinement, and institutionally-based programs of service and treatment. Because of the huge human and financial expense involved in preserving the institutions, as well as the historical failure of the institutions to serve any meaningful purpose, such a policy would seem warranted. The key to such an approach is based on one’s conceptual regard of furloughs and other release programs. Most administrators regard these programs as a privilege, to be doled out in sparing doses to those who conform to a strictly defined code of behavior (a code which more often than not bears the unmistakable bias of the white, middleclass managers who produce them). If, on the other hand, furloughs are seen as a prisoner’s right, our options become more significant. We are then forced to deal more meaningfully with the realities of incarceration. One of those realities is that upwards of 70% of those currently incarcerated have been convicted on non-violent crimes, crimes against property. Another is that has been accepted almost by consensus among correctional managers; that 80%-90% of those currently incarcerated do not require, nor do they benefit from, such confinement. We are going to enormous expense to confine and restrain a vast prison population which most administrators would rather not have in their institutions. These are men and women who, all but the most reactionary among us would agree, pose no real danger to the personal, physical safety of the public. For the most part, these are people who are presently going out of prison on furloughs and other release programs, and if they can be trusted to do that “successfully” the conclusion that they could be released permanently follows naturally. If our decisions regarding the release of prisoners were governed primarily by questions of dangerousness, rather than on more faulty predictions of future criminal potential, the populations of the prisons would be drastically reduced. We would then be in a position to close many of the prisons, to consolidate our resources, and to provide the kind of adequate, just and humane confinement required for those who would, for the present, have to remain behind bars.

Clearly the situation is not a simple one with simple solutions. Corrections cannot operate in a vacuum. Just as the criminal justice process is in need of change in every aspect, from the patrol car to the parole office, so are the social and economic processes of this country, which function so inequitably, in need of substantial reshaping. But for anyone interested in bringing justice to this system, regardless of the level at which they work or the specific nature of their expertise, a beginning can be made.

In corrections, we need to develop a responsive system to provide the kind of basic services that people need in order to function successfully in our society. We must provide jobs, vocational training, educational and counselling opportunities, on a voluntary basis, outside of prison, for men and women who acknowledge their need for such services. Within the courts, specifically the sentencing process, we must also seek alternatives to our present approach. Many of the recent proposals for severe limitations on judicial discretion as the use of incarceration as a criminal sanction deserve attention. Clearly the needs of public safety are not served by incarcerating to the extent that we presently do. Imprisonment sentences must be shorter and given only to the most dangerous offenders, while at the same time utilizing a wide variety of non-institutional alternatives for the majority of those who pass through the courts.

The guiding principle in all of this, however, must be to do as little harm as possible, with the least amount of injustice. While we will be forced to operate for the present under the most compromised and difficult of situations, a situation that will not be relieved without long-term commitment to the achievement of social and economic equality, we must begin to make the criminal justice system even-handed. And at the very least, we can not continue to make the same mistakes.
Archibald Cox: On Judicial Reform in Massachusetts

Advocate: Professor Cox, would you provide us with a general assessment of the condition of the judicial system of the Commonwealth and the dimensions of case backlog and delay that plagues our courts?

Cox: I think the most serious problem is indeed that of case backlog and delay, but it must be remembered that this affects the public in many ways, not just the litigant, although I don’t mean to minimize the importance to the litigant. It affects witnesses, on the complaining parties in criminal actions, the police, and ultimately confidence in the system of justice.

At the present time six Massachusetts counties appear to be among the 12 courts of general jurisdiction in the United States which are the slowest in reaching personal injury cases for jury trial. Middlesex is the slowest in the country, Norfolk comes next among the Massachusetts six; then Hampden, followed by Suffolk, Essex and Worcester.

In addition, there is an indication that the length of time in disposing of criminal cases in the Superior Court is much, much too long. In Plymouth County for example, the median number of days between entry and final disposition in the Superior Court is more than a year and a half, 571 days. In Essex, it’s a year. In Middlesex it is between eight and nine months. Suffolk and Norfolk have improved recently, but there it is still six months — and remember that is the median, that means that some cases take very much longer. Indeed the time has been reduced, I think, in Suffolk chiefly through the Serious Offenders Program, which means in a way that many smaller offenses are being pushed even farther and farther into arrears. I think it has to be remembered that the delay in criminal cases is not only a threat to the public in leaving those that are guilty unpunished and often on the streets, but it is also a grave source of concern and worry to those who were injured by the crime and fear injury through future crimes.

Advocate: Professor Cox, understanding of course that the Committee on Judicial Needs at this stage is not very far along in its study, still could you provide us with a few thoughts as to what is the central question that faces your Committee?

Cox: I think the central question is, how far should the Commonwealth move toward a unified court system. By unified court system, I mean one that has a single court of general jurisdiction and one in which there is central responsibility for case flow, management, including personnel management and the assignment of judges, budgeting and financing. Nearly all the states that have made the most progress — many of them have made progress while Massachusetts fell behind — have moved in the direction of a unified court system. It provides three principal advantages. First, of course, it avoids the expense of wasted time in debating jurisdictional questions. Second, it seems to provide far more flexibility and efficiency in the use of resources. I mean all the resources: judges, courtrooms, clerks and other supporting personnel. Third, it provides trained management that is constantly responsible for the smooth and effective flow of cases. It is important to have someone who is charged with that very practical concern which is often
"Faced with delays of five years in our Superior Court, there is no kind way of putting it — justice is being denied with each passing day in Massachusetts..." 
Governor Michael S. Dukakis

forgotten if responsibility is diffused over a group of people.

You will note that I said the question is, how far should the Commonwealth move toward a unified court system. I did not mean to imply that we would recommend either that the Commonwealth go the whole way or that we would recommend retention of the present system. Perhaps one could get the advantages of a unified court system while preserving some of the benefits of our two tier system (that is, the Superior Courts and the District Courts) and some of the advantages of the decentralized tradition, and a measure of local responsibility.

This will be the central question for us.

Advocate: Professor Cox, is it reasonable to expect the Supreme Judicial Court to handle its heavy caseload and at the same time effectively carry out its Constitutional responsibility of supervising and directing the entire state judicial system?

Cox: Well I think that depends on the extent to which the whole court undertook to exercise the responsibility and, conversely, upon the extent to which the court delegated the responsibility to the Chief Justice — to the Chief Justice aided, of course, by an administrator of the judicial system or the Executive Secretary.

There are a number of places in which you could focus the ultimate responsibility. I'm now thinking of ultimate responsibility for management. One is to give it to the Chief Justice of the Supreme Judicial Court. Another is to give it to a committee perhaps consisting of the chief justices of the Supreme Judicial Court, the Superior Court and the District Courts, assuming that the three tier system is to be preserved. A third would be to leave it in the Supreme Judicial Court as a body but the court would of course have to look to the Chief Justice of the Supreme Judicial Court or to the three chief justices to exercise a great deal of the responsibility under its general control.

Much of the actual administrative work must of course go to an office headed by one who has made his profession the administrative management of courts, either to a beefed up office of the Executive Secretary or to a new administrative office of the Massachusetts Courts. It is there that all the day to day responsibility would be centered for things ranging from standards for caseflow to budgeting, and personnel management, subject to the ultimate policies made by the chief justice or the court.

Advocate: If the Office of the Executive Secretary is to function as the Judiciary's central administration office, does it presently possess the strong research and planning capabilities necessary to fulfill its role?

Cox: It is quite clear that if we are to have the benefits of better management that the administrative office that provides it, the office to which the Executive Secretary's office now nearly corresponds, must have greater facilities and stronger personnel and better records and other tools of management. I might add that it seems certain that any additional funds spent in that sort of improvement could and would be provided by far more efficient management and economies in the use of court personnel all over the state. The change would also eliminate great waste to litigants, witnesses, police and other citizens. In both respects I think, there surely would be a net saving even though you invested more money and personnel in central management.

Advocate: Is the gradual assumption by the Commonwealth of the cost of operating the entire court system, within the framework of an integrated budget, a viable step toward a unified court system?

Cox: Well, certainly if one did recommend a unified court system, he would recommend along with it that the Commonwealth take over the entire cost of operating the judicial system. We haven't reached even tentative conclusions as to whether we should recommend this. It has been the trend in other states, and it is the direction which all those who have carefully studied judicial reform have recommended. But it is a mistake to assume that that would be what the Committee is going to recommend.

I think it is an entirely viable proposition. The Commonwealth today contributes very little to the expense of administering justice. Less than one half of one percent of the total budget is allocated to the courts, with an additional allocation coming from the county, which is a burden upon them. It is interesting to note that if the Commonwealth were to assume the total cost of financing the administration of justice — which does seem to be a responsibility of all the people — still, less than 2 percent of the total Commonwealth budget would go to the courts and the supporting personnel. It is shifting the task of appropriating the funds that would permit the efficiencies that I referred to earlier. It would also relieve the taxpayers of the counties of some of their property taxes. At the least, it would relieve them of a call upon the property taxes, and one would hope that some of the savings could actually be passed back to him and not spent by the counties for something else. It would provide for more uniformity throughout the Commonwealth.

I think, too, that centralized budgeting and financing goes along with the more flexible and efficient use of judicial resources such as courtrooms, courthouse and supporting personnel. If each locality is financing these resources, then there are problems in transferring their use from one to another; there are problems of management, and of making the resources available for the overall purposes of the Commonwealth. And if the Commonwealth is going to insist upon the kind of flexibility that comes from centralized management, then it would seem to be only fair that the Commonwealth should do the overall financing.

But the Committee has not reached
any conclusion on this. Really, in stating some of the advantages, I do not mean to imply that I have reached any conclusions myself.

_Advocate:_ Regarding the status and role of the Chief Justices of the Trial Courts, is there any present reconsideration of the status and role of the Chief Justices to facilitate a centralized approach to judicial administration?

_Cox:_ Well, consideration of their powers and role is of course an inevitable part of considering the movement toward a more conscious, centralized management of the administrative aspects of the judicial system. I would expect that opportunities for clarifying and defining the role of the Chief Justices would come up even if we were to retain the present two-tier system. Perhaps there should be some greater uniformity as between the role of the Chief Justice of the Superior Court and the Chief Justice of the District Court and some more formal provision for consultation and joint decision, perhaps aided by the Chief Justice of the Supreme Judicial Court, on matters that concern the two courts. I do want to add one point. While clarification of the administrative powers of the Chief Justices may be useful, they have, both Chief Justice Walter McLaughlin and the late Chief Justice Franklin Flaschner, had quite rightly stressed their conviction that improvement in both courts in the handling of the administrative aspects of the cases, must be a mutual undertaking of all the judges on those courts and viewed their function as to lead, to persuade and to initiate and to thus enlist the cooperation of all the others. I think the important thing is that there has to be someone who is charged with the duty of thinking all the time about the administrative aspects of justice, of making suggestions and recommendations to his colleagues along those lines. But while one can focus the responsibility for the administrative aspects of the administration of justice, or for the management of the judicial system, of course that doesn't reduce the dependence in the end upon the individual judges.

_Advocate:_ Professor Cox, in line with developing modern management procedures, would you comment on the viability of the proposed judicial data processing center?

_Cox:_ Well, I have to respond to that in very general terms. A preliminary inquiry suggests that at the present time the information about dockets, caseflow, and other things of that kind available to the Chief Justices and to the office of the Executive Secretary, is really quite inadequate. The data is not always uniform, it isn't always up to date; it isn't capable of being broken down into the categories one would wish to have. For example, while we talk about the enormous backlog particularly on the civil side in some of the Superior Courts, we really don't know just what that consists of. So I think it is a very fair assumption that one of the needs is a major
"Interminable and unjustifiable delays in our courts are today compromising the basic legal rights of countless thousands of Americans and, imperceptibly, corroding the very foundations of government in the United States."

Chief Justice Earl Warren

improvement in making more information, more data, available as a tool of management. I would also suppose that data processing, in the sense of putting it on a computer, is the modern and most effective way of getting and keeping data available.

There was recommended to Chief Justice McLaughlin a criminal case management system, which he and his aides believed would be a great improvement. I am not expert enough on data processing to have an individual opinion, but it would seem to me that there was every reason to think this judgement was entirely right. The Chief Justice of the Superior Court has a vital need for that kind of information. Unhappily the system hasn't yet been installed, although the plans are all completed. Everything is ready to go, but it hasn't been financed yet. As I understand it, there is hope that it might be financed through the Federal Law Enforcement Assistance Administration, but that it is hung up on what to an outsider looks like a silly jurisdictional quarrel over who would have the ultimate responsibility.

Advocate: Professor Cox, turning our attention to the Superior Court, if there is any tribunal within the Commonwealth which cries out for correction — it is the Superior Court. Over the last ten years the backlog of undisposed criminal cases in the Superior Court has risen from 3,578 to 34,336 — nearly a ten-fold increase. On the civil side of the Superior Court, case backlog has risen from approximately 54,000 to a figure in excess of 80,000 over the same period. Your comments please.

Cox: Let's talk about reducing the criminal caseload generally first, and then focus more particularly on the Superior Court. I think one has to ask whether there are matters now treated as criminal which really should be handled in some other way. For example, shouldn't all the less serious motor vehicle offenses be decriminalized and treated as administrative matters within the jurisdiction of the Registry of Motor Vehicles? Shouldn't many domestic matters, non-support and illegitimacy cases for example, be removed from the criminal jurisdiction to the jurisdiction of the Probate Courts? Perhaps complaints of domestic assault and battery ought to be handled in some other way. Indeed, I believe in Dorchester or Roxbury, a form of mediation has been established informally and the Committee certainly should consider whether putting this on some more formal basis would be an improvement. Again, one ought to ask, I think, whether the size of the criminal caseload couldn't be reduced and the quality of justice in our courts improved by instituting some sort of screening process before criminal charges are actually filed in the court. Two possible steps come to mind. One would be vesting responsibility for criminal charges exclusively with the district attorney. Another would be legislation discouraging resort to the criminal process for matters which are essentially civil, such as bad check charges in cases that are really matters of debt collection.

Advocate: Professor Cox, realizing that your Committee has not had adequate time to make final findings concerning
trial de novo, still, could you make a
comment as to what the effect of the
two-tier trial de novo system has on the
quality of justice in the Superior and
District Courts in this Commonwealth?

Cox: Trials de novo in the Superior
Court represent about half the criminal
cases heard by the Superior Court. The
elimination of those cases would greatly
reduce the volume of business that the
Superior Court justices have to handle.
At the present time, because of recent
legislation, we seem to have an
increased number of District Court
judges who are thoroughly qualified to
deal with this kind of case, whose
services are underutilized. There are two
possibilities, therefore. One would be to
eliminate the trial de novo and to
provide that the defendant may elect, if
he wishes to plead not guilty, to be tried
in the District Court without a jury or
to be tried by the District Court with a
jury. Let this be the only trial, with an
appeal on questions of law. The other
possibility is to continue the practice of
allowing an appeal to a trial de novo;
but to have the trial in the District
Court, before a six or twelve man jury,
thus making much greater use of the
available facilities of the District Courts
and the available judge power in the
District Courts. This would not only
relieve the Superior Court but would
greatly reduce the time between the
charge and final disposition. Most cases
in the District Courts are disposed of
within a matter of weeks. If there is a
trial de novo, it takes at a minimum 5
or 6 times as long.

Advocate: Does it appear, Professor,
that the principal purpose in utilizing de
novo appeal is not to obtain a new trial
by jury, but merely a device for counsel
to secure a disposition of the case more
favorable to his client?

Cox: One of the consequences of the
trial de novo system is the knowledge
that the case can always be tried again.
This encourages rough and ready justice
in some of the District Courts. I have
the conviction that the quality of justice
in the District Courts has been steadily
improving. I confess that I had the sort
of initial reaction, that having two trials
is a waste of effort. One has to
remember that every time there are two
trials, the witnesses have to appear
twice, the police have to appear twice;
if the office of the District Attorney is
involved, the lawyers from that office
have to appear twice. It would seem
that the better way to do it is to
perform the task right the first time. A
large number of states in recent years, I
think it is ten, have abolished trial de
novo.

One must recognize however, that
this is an issue with responsible opinion
on both sides and the Committee will
have to consider it very carefully.

Could I add one final word. I think
that this is a good point at which to
mention the measures that the
Governor’s Committee on Judicial Needs
has already recommended to the
Governor and indirectly to the
legislature. One would provide for the
conduct of de novo trials now in the
District Courts, on an emergency two
year basis. This is a matter of the
utmost importance because it would
enable us to make use of the increasing
number of full time District Court
judges and of the courtrooms which are
standing idle a good deal of the time,
while the courtrooms of the Superior
Courts of many counties are
overcrowded.

Advocate: Professor, it would appear
that other countries have developed
workable alternatives to the traditional
trial method in certain areas of civil
dispute. Has the Committee looked into
any of these areas?

Cox: Well, the Committee will be
considering the encouragement of
methods resolving civil disputes
alternative to full judicial proceedings.

In some Scandinavian countries there
has been experience with a formal kind
of mediation as an alternative to court
proceedings. In the case of many minor
disputes, that would seem to be a
desirable way to have people proceed.
Perhaps it is something which people
should be encouraged to do, although
you can’t fairly force it upon them.

In Michigan, there is an interesting
form of mediation with recommendations
for settlement, which is conducted in the
courthouse under the auspices of the
court in which suit is filed. As I
understand the system, after hearing
from the attorneys from the parties on
both sides in a very informal way, the
panel makes a recommendation for the
settlement of the case. If the parties don't accept it, the one who refuses it is subject to paying rather heavy court costs, including the fee of the attorney for the other side, unless the ultimate verdict or judgement is substantially above or below the recommended settlement. I think this is something we should consider.

In addition, arbitration is certainly a viable alternative to litigation, one which industry has found to be a great improvement over court proceedings. The Committee will undoubtedly be reviewing our statutes and court rules to see whether submissions to arbitration couldn’t be encouraged, made effective and summarily enforced if necessary.

Advocate: Professor Cox, apart from the broad jurisdictional and organizational changes we have discussed, are there other measures which should be recommended to expedite the flow of cases in the Commonwealth’s courts?

Cox: One can’t help but believe that the handling of the trial lists needs scrutiny, that the policy or practice, if you will, of governing the granting of continuances should be a matter of more conscious thought and perhaps uniformity of treatment, under standing orders or court rules. I think one of the things that has become clearer to the legal profession in recent years is that we must not think of court proceedings as a matter of concern only to us, and perhaps our immediate clients. As I mentioned before, a tremendous amount of the burden of every continuance, the burden of every delay, falls on all kinds of ordinary citizens: the complaining witnesses, other witnesses, police officers (incidentally the overtime involved can be a very great expense), the jurors and all the people who are indirectly affected. It isn’t just a matter of burden on them. It must leave a very bad impression of the way justice is administered in the mind and feelings of the persons who have been called for nine o’clock in the morning to testify in a case, and then told at one o’clock they weren’t needed that day. In the end, a system of justice depends upon the public’s sense that it is just and that it is concerned with the welfare of people. I think that with that focus, a new look at the whole business of case scheduling, continuances and the handling of the docket and the rules of procedure and

the like, might reveal many little ways which cumulatively would greatly reduce wasted motion and expedite the handling of judicial business. Incidentally, this is something on which the Committee depends upon suggestions from those who are constantly appearing in the trial court. There are some members of the Committee who have very active trial practices, both civil and criminal, but I’m hopeful that we will hear from all kinds of other trial attorneys.

Advocate: Professor Cox, would you enlighten us as to the present stage of development of the Select Committee on Judicial Needs and what future steps the Committee will take?

Cox: We’ve been meeting for roughly two hours once a week. We heard first from the Chief Justices of the Supreme Judicial Court, the Superior Court and the District Court. We have now identified what we think are the central questions for our consideration. We reduced these to a rather lengthy agenda. We propose to distribute it widely and to elicit in writing comments and recommendations from Bar Associations, District Attorneys, judges, and other organizations, like the Massachusetts Defenders. We’ve asked for recommendations in writing because, from the Committee’s point of view, this is the most expeditious way of handling the material. In addition to being expeditious, it will provide information and comments in an enduring form. It would be enormously expensive both in time and money to have elaborate hearings and a transcript of everything that was said. Also, if anyone, any organization or person has something really useful and important to say, then it is useful enough and important enough to be put in writing. As we proceed to formulate tentative notions, then we will no doubt wish to have further comments from those who have been most immediately concerned with that aspect of the administration of justice. For example, the clerks, and deputy clerks in the various courts clearly have the best understanding of the problems of record keeping, of handling the docket, and similar matters. In due course, we will prepare perhaps one final report, but quite possibly we will have some further interim measures to recommend, just as we recommended last week five emergency but temporary measures which will help to alleviate the immediate problem.

Advocate: Professor Cox, on behalf of myself and the Advocate, we thank you and along with the legal community in general, look forward to the release of your final recommendations. Thank you.

“... to perform effectively their constitutional and statutory mandates... the courts must have general public support. Unfortunately, our courts do not now enjoy this essential support — a fact plainly evident in the apathy with which many efforts at judicial reform are met.”

Hon. G. Joseph Tauro, Chief Justice, MSJC
Euthanasia: The Court's Struggle for an Answer

Euthanasia is the "act or practice of painlessly putting to death persons suffering from incurable and distressing disease."¹

The above definition describes an intentional act resulting in someone's death. The fact that the death was painless or that the victim was suffering from an incurable disease does not negate the legal effect of putting that person to death. The legal result of such an act is premeditated murder, no matter what the motive of the actor is or what the desires of the victim are.

The definition of murder is the "unlawful killing of a human being by another with malice aforethought either express or implied."² One might argue that the intention of the actor was to put another human being out of his or her pain and anguish, and that it was without malice, but the legal definition of murder does not leave room for such an act. The definition of malice aforethought, "is a predetermination to commit an act without legal justification or excuse."³ The fact that the victim wanted to die and requested the actor to act is not recognized today as a legal justification for murder.

In the case of People v. Conley, the court said,

One who commits euthanasia bears no ill will toward his victim and believes his act is morally justified, but he none the less acts with malice if he is able to comprehend that society prohibits his act regardless of personal belief.⁴

In the case of State v. Mally, the court said,

In the eyes of the criminal law, if a person hastens death such person is considered the cause of the death. Though a person may be at the threshold of death, if the spark is extinguished by a wrongful act it is sufficient for a conviction.⁵

Still, the courts are reluctant to find actors guilty of first degree murder in such "mercy killing" cases. In one case, Robert Watkins shot his mother three times in the head. She had been suffering from leukemia and had begged her son to shoot her. Previous to this incident she had tried to commit suicide. On January 24, 1969, a jury found the son not guilty of murder because he was insane at the time of the act. They found that he was sane at the time of the trial and he was released.⁶

In another case, Harold Mohr in Pennsylvania was convicted of manslaughter for killing his blind cancer-stricken brother. He was sentenced to 3-6 years in prison and fined $500.00.⁷

Cases such as those above serve to exemplify the dilemma faced by our society.

We live by a strict code of law enforced by a cumbersome and slow legal process. These rules of law have been developed over the centuries and are steeped in tradition. On the other hand, our society is faced with legal, medical, and moral problems our forefathers did not have. Because our legal system is slow to change we have found ourselves dealing with today's and tomorrow's medico-legal problems with yesterday's law. This situation has forced courts to resort to the type of legal reasoning they did in the case of Robert Watkins.

We have the ability today to keep a terminal patient alive much longer than we have ever been able to before. A patient in a coma can be kept alive on a respirator for an indefinite period of time. An example of such a case received national publicity last fall when Joseph Thomas Quinlan went to court to request it to adjudge his daughter, Karen Ann Quinlan, mentally incompetent and appoint him as guardian with the express power of authorizing discontinuance of all extraordinary means of sustaining the vital processes of her life.⁸ The court refused Quinlan's request on the grounds that his daughter was not dead and that to turn the respirator off would constitute murder.

The case served to focus world attention on the question of euthanasia. Not only was euthanasia discussed, but

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Euthanasia is equated by some people with murder, suicide, the horrors of Nazi Germany, Communist plots, and science fiction stories where only the best and the brightest are allowed to live.

Subjects such as death with dignity, and the quality of life were brought into the open.

Euthanasia is equated by some people with murder, suicide, the horrors of Nazi Germany, Communist plots, and science fiction stories where only the best and the brightest are allowed to live. To others it is part of the answer to the question of what can be done for a terminal patient who would like to exercise his or her "right to die" with dignity.

Euthanasia and Related Terms

The term euthanasia comes in many different packages. Active or positive euthanasia are used to infer a direct act which will cause death. This act could take the form of an injection of a deadly drug, or an overdose of some other drug which will cause death. Negative or passive euthanasia is the omission of an act which will prolong the life of the patient. For example a patient who is dying will not be put on a respirator, but will be allowed to die. Voluntary euthanasia is requested by the patient whereas involuntary euthanasia is at the request of the legal guardian or next of kin.

Opponents of active euthanasia say that passive euthanasia is ethically permissible, whereas active euthanasia is not. But aren't these acts really the same, morally and ethically?

Assume that a patient has terminal cancer. If a doctor and the patient's family decide that they will withdraw the use of a respirator which will prolong the patient's life, have not these individuals acted in a positive manner which will lead to this individual's death? The only difference between this type of passive action and the intentional injection of a deadly drug is the fact that the patient possibly will suffer longer.

Opponents of euthanasia, and especially active euthanasia, feel that injecting a deadly drug usurps God's Will and Province. He is the only one who should take and give life. But those in favor of euthanasia argue that we have made the decision to take life by not putting the patient on the respirator. We have made the decision in the past to take life by abortions, if one believes that life begins at conception. We are now creating life in test tubes and we are limiting the conception of life by the use of contraceptives. All of these acts are examples of man controlling elements of his life which were once left up to providence, chance or the will of God. So why should the timing of our own death be out of our reach?

These arguments and definitions show that the concept of euthanasia is complex and that the lines between the different terms are not clear cut. To further complicate the discussion one must consider euthanasia in the context of different medical situations in which the decision to live or die must be met.

Should babies beyond the time of abortion be allowed to live if they will be born severely defective?

Another case is the patient who is terminally ill and wants to die. This patient might want his death finalized by the injection of a deadly drug, or the mere "pulling of the plug" so that death will be allowed to come.

Another problem arises with the terminally ill patient who is unable to communicate his or her feelings about euthanasia but is suffering and is being kept alive solely by the use of machines. His or her next of kin have asked that the machine be turned off or that an active form of euthanasia take place.

Each case poses different problems both legally and morally. To say that there is one complete decision is to ignore the many problems that euthanasia poses because it affects religious beliefs, morals, ethics, and the laws by which we live.

Definition of Death

One of the most discussed problems raised by the use of electroencephalogram should be used to determine if there are any brain waves being produced by the patient. If the EEG is flat (no brain waves being produced by patient) then the patient should be pronounced dead. But people with flat EEGs for several hours have recovered.

In 1966 the French Academy of Medicine said that death occurred when the cerebral function of the brain had failed, even though a state of artificial function was being maintained by mechanical means. The group felt that the cerebral cortex may cease functioning long before there is a flat EEG. They felt that if the cerebral cortex was not functioning it indicated that the person would not be able to function as a human person capable of communication with others.

In 1970 Kansas became the first state to enact legislation defining death. The legislation read:

... absence of spontaneous respiratory and cardiac function and because of the disease or condition which caused death... 

Since 1970, Virginia has also enacted similar legislation. One of the most controversial definitions of death was presented by the Ad Hoc Committee of the Harvard Medical School in 1968. This definition has raised criticisms from within the bar...
and the operating room. Surgeons feel that in cases where transplant organs are needed, the amount of time it takes to determine the death of the victim under the Ad Hoc Committee's report could ruin the organ being used for the operation. The definition is broken up into four parts:

a. Unreceptivity and Unresponsivity—A total unawareness to externally applied stimuli and inner need and complete unresponsiveness.

b. No Movements or Breathing — Observations by a physician covering the period of one hour are sufficient to satisfy the criteria. If the patient is on a respirator it must be turned off for three minutes to see if the subject tries to breathe spontaneously.

c. No Reflexes — The pupils should be dilated. There should be no ocular movement with head turning or irrigation of the ears with ice water.

d. Flat Electroencephalogram — No electrical activity present in the brain.

All of these tests should be done twice during a 24 hour period.

All of the definitions deal with death by setting forth what seem to be clear-cut black letter rules which the physician or lawyer can refer to, to determine if the patient is legally dead. But, these rules deal in absolutes. What about the person who has an occasional brain wave, but no other responses? By definition this person is not dead. But is that person really alive? Is the quality of such a life worth the sacrifice made by those who assist in the life extending process? All of the other doctors who testified in the Quinlan case felt that Karen is in a persistent vegetative state. In the Judge's opinion, he summarized by saying that:

... During the examination she went through awake and sleep periods but mostly awake. The eyes move spontaneously. She made stereotyped cries and sounds and her mouth opened wide when she did so. Cries were evoked when there was noxious stimulation. She reflexed to noxious stimuli. Her pupils reacted to light, and her retinas were normal.

... She is described as having irreversible brain damage; no cognitive or cerebral functioning; chances for useful sapient life or return of discriminative functioning are remote... All agree that she is not brain dead by present known medical criteria and that her continued existence away from the respirator is a determination for a pulmonary internist.

The Quinlans felt that there was no hope for Karen's recovery and signed a release on July 31, 1975 authorizing Dr. Robert Morse to discontinue all extraordinary measures, including the use of the respirator. But Dr. Morse did not agree with the cessation of the respirator. He felt that termination would not be in accordance with standard medical practice, and that it would involve ascertaining the "quality of life," something he would not do.

The court in its opinion concurred with Dr. Morse. It felt that there is a duty to continue the life assisting apparatus if within the treating physician's opinion it should be done.

The court felt that there was no justification to remove the nature, extent, and duration of care from the physician and place it with the courts.

Thus the Quinlan case has resolved none of the problems our society is confronted with concerning euthanasia. The medical profession and society have...
looked to the courts for some concrete guidelines as to the definition of death and the legality of "turning off the respirator," so that medical decisions can be made in an atmosphere of certainty, and not in fear of a malpractice suit. But the courts continually look to the past and to the medical profession for some guidance. Thus, we as a society are left with antiquated and conflicting legal guidelines in a world which is changing faster than its moral, ethical and legal foundation.

**Japanese Court Action**

In Japan in 1963 the High Court of Nogoya Toichi Kobayashi formulated guiding principles to distinguish euthanasia from culpable homicide. The case involved a man who gave poison to his incurably ill father upon his urgent request to die. The court said that for euthanasia to be legal, six conditions must be satisfied:

1. The victim must be suffering from an illness not curable by modern medicine.
2. The victim must be suffering unbearable pain obvious to any observer.
3. The purpose of the doctor must be the relief of pain.
4. The victim's consciousness must be clear and he or she must have seriously requested or approved the mercy killing.
5. Wherever possible the means of inducing death must be administered by a physician.
6. The method of inducing death must be morally acceptable.

The defendant was found guilty of "homicide upon request" because he failed to meet the last two conditions that would make the homicide legal euthanasia. The defendant's sentence was reduced from three years to one year and then suspended with a three year period of probation.

The guidelines prescribed by the Japanese court are a good example of what our courts must do. We must reexamine our present guidelines and try to distinguish true homicide cases from cases of euthanasia, whether it be active or passive, voluntary or involuntary.

Still, proponents of euthanasia feel that the process of changing the law via the court system is too lengthy and feel that legislation is the route to follow. The living will creates a false sense of security in the patient. The will does not force doctors to follow the patient’s wishes.

**Dr. Walter Sackett — Florida Legislation**

One of the most outspoken proponents of euthanasia is Dr. Walter Sackett, Jr., a physician and legislator in Florida. Dr. Sackett feels that 75% of all doctors practice euthanasia. He claims that he has personally let 200-300 of his patients die.

In 1969 Dr. Sackett submitted a bill to the Florida State legislature to amend the state Constitution's Declaration of Rights to include the right to be permitted to die with dignity. The legislation required that:

1. The patient must be irreversibly terminal. The disease must be incurable within the definition of the then current state of medical technology.
2. An individual can let it be known under what circumstances he wishes to die before the fact. The patient needs the consent of two doctors.
3. The family can exercise the right when a patient cannot. They also need the consent of two doctors.
4. If there is no family, the Doctor can exercise the right if there are three doctors who agree.
5. A physician who relies on a document authorized by section 1, 2, 3, or 4 to refuse medical treatment, or who makes a determination of terminal illness, or injury, shall be presumed to be acting in good faith, and unless negligent shall be immune from civil or criminal liability that otherwise might be incurred.

This legislation failed to pass.

Other suggested legislative measures have dealt with amending the suicide laws so that suicide would no longer be a crime. and broadening homicide statutes to differentiate between homicide and euthanasia.

In 1969 the British Government passed the Voluntary Euthanasia Bill which provided that in certain circumstances euthanasia would be administered to those who were suffering from an irremediable condition. These people would be able to request in advance the administration of euthanasia if they should be suffering at a later date. The bill contained explicit definitions of all the medical terms in the document. It also included a form of a Living Will, which could be signed by the patient authorizing euthanasia.

**Living Wills**

Living wills have become popular as vehicles for patients to exercise their desire to refuse extraordinary medical treatment. A living will is a document which an individual drafts directing a physician to cease all extraordinary medical procedures in certain specified medical situations. Generally the document must be witnessed by two other people. The document must be carried on the person at all times, and can be revoked at any time by any clearly communicated act.

An example of such a will is as follows:

I declare that I voluntarily subscribe to the code set out under the following articles.

A. If I should at any time suffer from a serious physical illness or impairment reasonably thought in my case to be incurable and expected to cause me severe distress or render me incapable of rational existence I request the administration of euthanasia at a time or in circumstances to be indicated or specified by me or if it is apparent that I have become incapable of giving directions, at the discretion of the physician in charge of my case.

B. In the event of my suffering from any of the conditions specified above, I request that no active steps should be taken, and in particular that no resuscitative techniques should be used to prolong my life or restore me to consciousness.

C. This declaration is to remain in force unless I revoke it, which I may do at any time by any clearly communicated act, and any request I may make concerning action to be taken or withheld in connection with this declaration will be made without further formalities.
I wish it to be understood that I have confidence in the good faith of my relatives and physicians and fear degeneration and indignity far more than I fear premature death. I ask and authorize the physician in charge of my care to bear these statements in mind when considering what my wishes would be in any uncertain situation.36

The problem with the living will is that it creates a false sense of security in the patient. The will does not force doctors to follow the patient's wishes. Many physicians would like to comply with the patient's wishes but feel that they do not have the legal authority to do so, fearing criminal and civil reprisals.

One suggested proposal is to change living wills to antidysthanasia contracts.37 The definition of antidysthanasia is the failure to take positive action to prolong life.38 A clause in the contract would direct the physician to discontinue treatment when it is deemed to be artificial prolongation of life.39 The contract could even contain a list of diseases to which the document would apply.40

The proponents of this type of document feel that it creates a contractual relationship between the doctor and the patient and should be included in the contract which the patient and the physician have established for medical services. If the physician refuses to follow the stipulation, the patient or his family could bring a cause of action against the doctor for breach of contract.41 Again such a contract will not preclude the criminal sanctions which could be levied against the doctor.

The Right to Die — The Heston Case

To further clarify patients' rights, an Amendment to the United States Constitution to include a right to death as well as life, liberty, and the pursuit of happiness has been suggested.42 But is there such a right?

In the 1971 case, Palm Springs General Hospital v. Martinez, the court said that a person has the right not to suffer pain.43 But in John F. Kennedy Memorial Hospital v. Heston, the judge felt that it was correct to say that there is not a constitutional right to choose to die.44

The Heston case involved a 22-year-old woman who was taken to the hospital after being severely injured in an automobile accident. It was determined that an operation had to be performed on the patient and that she would need a blood transfusion during the course of the surgery. Miss Heston and her family were Jehovah's Witnesses and believed as a part of their religion against the administering of blood transfusions. The hospital made application to the superior court for a guardian who would allow the hospital to administer blood to the patient. The guardian was appointed over the objection of her family. The operation was performed, blood was administered, and Miss Heston survived the surgery.45

Even though the issue was moot, the court decided to rule on the legality of administering the transfusions to Miss Heston. The court felt that there was no constitutional right to die, and that there was no constitutional right established by adding factors from one's religious faith.46 The court stated that, ... unless the medical option itself is laden with risk of death or of serious infirmity the State's interest in sustaining life in such circumstances is hardly distinguishable from its interest in the case of suicide.47

The court felt that when a patient is placed in a hospital involuntarily (i.e., emergency surgery), and the hospital's interests are placed against the patient's beliefs, the conflict should be resolved by permitting the hospital and its staff to pursue their functions according to their professional standards. The solution sides with life, the conservation of which the court feels is a matter of state interest.48

The courts in both the Heston and the Quinlan case say that they are going to look to the medical profession for guidelines to follow. But the guidelines given by the medical profession have not been followed by the courts.

Guidelines from the Medical Profession

In April 1973 the House of Delegates of the Connecticut State Medical Society approved a statement regarding a patient's right to die in dignity. They approved a standard living will form for use by persons wishing to express their desires in the event they could no longer do so orally, and to provide a means for permitting their deaths to occur.49

In the report, "The Physician and the Dying Patient," The American Medical Association adopted the following resolution on December 5, 1973.

The intentional termination of the life of one human being by another — mercy killing — is contrary to the policy of the AMA.

The cessation of the employment of extraordinary means to prolong the life of the body when there is irrefutable evidence that biological death is imminent, is the decision of the patient, and/or his immediate family. The advice and judgment of the physician should be freely available to the patient and/or his immediate family.50
The AMA draws the distinction between active euthanasia, the intentional termination of life, and passive euthanasia, the cessation of the employment of extra-ordinary means to prolong life. It seems that the AMA has the same opinion of active euthanasia. But the courts in Quinlan and Heston feel that the cessation of extraordinary medical procedures is not a decision which a family, patient, or doctor can freely make without legal consequences.

Informed Consent Doctrine

The final decision as to terminating life should lie with the patient and his family, but with certain safeguards that would insure that a patient or family would have to get a physician’s consent to have the extraordinary treatment terminated.

The idea that the patient should have the final say in refusing extraordinary medical treatment is the natural extension of the informed consent doctrine. The informed consent doctrine requires that a patient should receive enough information concerning the proposed medical procedure so that he can either consent to or refuse the procedure. It would seem only logical that the patient should receive all the information necessary so that he can make the decision to accept or refuse extraordinary medical treatment.

The law seems to draw a distinction between the dying patient for whom death is both imminent and inevitable and the dying patient for whom death is only imminent. For the patient whose death is only imminent it seems to have the right to refuse extraordinary medical treatment.

But the patient whose death is only imminent will be compelled to live if his death would produce undesirable effects upon society; such as producing an unreasonable hardship upon his family. It could be argued that by forcing the patient to live the courts are creating a hardship which nature would have taken care of.

Conclusion

Where does the solution to the problem lie? Both the legal and medical professions are slow to move in reforming their laws and practices. The legislature, because of the emotional appeal of the issue is going to find the topic politically sensitive, especially in an election year. But the legislature is the best vehicle for change in this area.

Through the legislation a euthanasia bill dealing with all of the different areas of euthanasia, could be realized, whereas a court would only be able to decide one area at a time. Proposed legislation must deal with the definitions of death, murder, and malice aforethought. It must outline the area of limited liability for physicians, and determine who should have the authority to make the decision to terminate life. Most importantly the legislation must supply guidelines as to when medical procedures should be terminated.

Euthanasia is being practiced today in hospitals by the best of physicians. Abuses occur when there are no guidelines for a system to follow. The evidence showing the need for legislation is overwhelming. Legal changes in euthanasia are only going to come about when we as prospective patients begin to demand to be treated as human beings who have the right to choose the method of care, and the right to die with dignity.

**Author’s Note:**

On March 31, 1976 the New Jersey Supreme Court in a unanimous decision declared that Joseph Quinlan as guardian of his comatose daughter has the right to have her respirator turned off if he can (1) find doctors willing to remove her life-sustaining respirator and (2) have the action approved by the “Ethics Committee” or a similar panel at St. Claire’s Hospital.

The court said that they were giving new powers to the father as guardian because they feel that the father should be able to find other doctors who agree to terminate the respirator if the present doctors refuse. Although the unanimous decision is a bold step in the area of euthanasia there are still many questions unanswered. The most important of these questions is whether other state courts will follow the reasoning of the New Jersey Court.

**Footnotes**

2Id. at 1170.
3Id. at 1110.
6Case cited in Joseph Sanders, “Euthanasia: None Dare Call It Murder,” Journal Of Criminal Law, Criminology and Police Science 60 No. 3, (1969) at 351.
7103 University of Penn. L.R. 354 (1954)
11Id. at 21.
13Id. at 16.
14Id. at 16.
15Freedom at 30.
17See Freedom supra note 9 at 299.
18Id. at 297.
19People v. Conoly supra note 4, State v. Mally supra note 5.
20Superior Court of New Jersey, Chancery Division, Morris County Docket No. C-201-75.
21See Quinlan supra note 6 at 548.
22Id. at 566.
23Id. at 548.
24Id. at 540.
25Id. at 550.
26Id. at 552.
27Id. at 560.
28Id. at 559.
29Id. at 253.
30Id. at 253.
31772 (D.C. Cir. 1977).
34See Freedom supra note 9 at 294-295.
35Id. at 265-266.
36Id. at 291-293.
3710 California Western L.R. 613, 626 (1973-74).
39Id. at 739.
40Id. at 742.
41Id. at 746.
42Id. at 742.
43See Freedom supra note 9 at 264.
44Palm Springs General Hospital v. Martinez.
46John F. Kennedy Memorial Hospital v. Heston,
47Id. at 670.
48Id. at 670.
49Id. at 673.
50Id. at 673.
52Id. at 22.
53See notes 27, 28, 44, 48.
56Id. at 40.
57Id. at 39-40.

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6Williams, Robert H., To Live And To Die, Springer-Verlag, N.Y. (1973).
In June of 1975, the Supreme Court in *Mullaney v. Wilbur* 421 U.S. 684 (1975), unanimously held unconstitutional the doctrine of implied malice as applied by the courts of Maine for over a century. Maine recognized one crime of felonious homicide, the intentional and unlawful killing of one human being by another. The doctrine of implied malice compelled the trier of fact to presume malice from proof beyond a reasonable doubt that the killing was intentional and unlawful. If the defendant was unable to persuade the trier of fact that the killing was accomplished without malice, he was sentenced to a mandatory life term. If successful, he was fined less than $1,000 or imprisoned for "not more than 20 years."  

The rationale employed by the *Wilbur* Court fastens on two observations: 1) that a significant difference in penalties exists, and 2) that malice is the sole fact determining which of the penalties applies. The Court cited *In re Winship*, 397 U.S. 358, (1970), for the proposition that in a criminal proceeding, the prosecution must prove beyond a reasonable doubt the existence of every fact necessary to constitute the crime with which the defendant is charged. Because *Winship* is concerned with substance and not form, the Court concludes that malice must be proved to sustain the application of the life sentence. More precisely, because Maine acknowledges certain circumstances which mitigate malice if present, the prosecution seeking the life sentence in a homicide trial must prove beyond a reasonable doubt the absence of these circumstances whenever the issue is fairly raised.  

The rationale of *Wilbur* porports to measure a presumption, such as Maine's doctrine of implied malice, against the Due Process standard of proof beyond a reasonable doubt of every fact necessary to constitute the crime with which the defendant is charged. The primary focus of the *Wilbur* rationale is on who must bear the burden of producing evidence regarding the fact at issue. This is not a dispositive consideration. The test enunciated in *Winship*, four years after *Wilbur*'s trial, is proof beyond a reasonable doubt. The focus should be on whether the presumption satisfies this standard of proof, and not the procedure by which it might or might not. What is required is an examination of the effects of a presumption on the trial process. If the presumption affects the trial so that the trier of fact may return a verdict which does not satisfy the standard of proof, then Due Process is violated. If the presumption does not affect the trial process in such a manner, then Due Process is not violated.  

It is submitted here that there are two key considerations to be made in measuring a presumption against the Due Process standard: 1) the convenience of the innocent defendant in obtaining proof of his innocence, and 2) the strength of the inference involved. The *Wilbur* rationale treats the first of these considerations, but fails to isolate and treat the second. Without considering the strength of the underlying inference, the rationale cannot consider whether the Due Process requirement of proof beyond a reasonable doubt is satisfied.  

**Burdens and Inferences:**  
**Some Definitions**  
The nature of a criminal proceeding rarely admits of evidence which bears directly and conclusively on all issues of fact. To assist the trier of fact in his function, courts have developed and allocated specific burdens of proof regarding particular facts at issue. The concept of a burden of proof is often viewed as three component parts: 1) the burden of pleading the fact, 2) the burden of introducing evidence regarding the fact, and 3) the burden of persuading the trier of fact at the conclusion of the evidence. The first element is easily satisfied and presents no problem. The second two elements, however, do affect the decisions reached by a trier of fact.  

Each burden of proof has a corresponding standard of proof which
The party must meet in order to satisfy his burden. Where the party has not demonstrated evidence sufficient to meet the required standard of proof, the court may find as a matter of law that reasonable persons could not disagree, and the issue will not go to the trier of fact. If reasonable persons might disagree, then the issue is left to the trier of fact, who must decide if the party bearing the burden of persuasion has convinced him to such a degree that the standard of proof is satisfied. If so, then the fact is found favorable to the party bearing the burden of persuasion. If not, then the trier of fact must find otherwise.

Of the various standards of proof, "proof beyond a reasonable doubt" is the highest standard. Most definitions assert that it is not absolute proof, but proof to a "moral certainty." It is uniformly held not to be "conjecture, surprise, and suspicion." One court found that it was "a direction to the jury, not a rule of evidence ... it operates on the whole case and not on separate bits of evidence each of which need not be so proven, and it cannot be accorded a quantitative value other than as a general cautionary admonition." Perhaps the most graphic definition is "proof which would cause the jurors to act in matters of the greatest importance relating to their own affairs, or in terms of doubt which would cause them to hesitate to act."

Proof by a preponderance of the evidence is the next quantum of proof, and is generally held to be the greater weight of the credible evidence.

The law allows the trier of fact to rely on certain expectations of common experience in the form of inferences. The trier of fact may find one fact from proof beyond a reasonable doubt of the existence of other facts which the law deems closely associated with the fact being inferred. These inferences aid the parties in satisfying their respective burdens of proof by filling in gaps in the direct evidence and orienting the trier of fact to the more probable explanation of a diverse set of facts established at trial.

In some instances, as with the doctrine of implied malice, an inference is raised procedurally to the level of a presumption. A presumption is a "legal device which imposes the burden of introducing evidence as to a given issue upon the opponent of the party who has the burden of persuasion as to that issue." The doctrine of implied malice created a presumption of malice from proof beyond a reasonable doubt that the defendant intentionally and unlawfully killed. This presumption shifted the burden of producing evidence onto the defendant, though the prosecution still remained the party bearing the burden of persuasion. If the defendant did not present evidence sufficient to satisfy the "preponderance of the evidence" standard showing that he killed without malice, then the trier of fact was compelled to find malice and the defendant received the mandatory life sentence.

Two Key Considerations
In a criminal prosecution, it is generally held that the defendant enjoys a "presumption of innocence." This means that the prosecution must prove every fact necessary to constitute the crime with which the defendant is charged. Where felonious homicide consists of (1) an intentional, (2) unlawful killing of (3) another human being with (4) malice aforethought, the trier of fact begins with the assumption that there was no killing of a human being, that it was neither intentional nor unlawful, and that it was not accomplished with malice. The prosecution must then convince the trier of fact as to the existence of each of these facts of the crime. It calls witnesses and presents the available evidence, relying on inferences to fit the various bits of evidence into its theory of what occurred.

In a jurisdiction without a presumption of malice, the inference of malice from proof of the intentional and unlawful killing would still be available to the prosecution to help persuade the trier of fact as to the existence of malice. The inference would operate as an expectation of common experience, and it would have whatever subjective weight the individual trier of fact assigned to it.

In a jurisdiction with a presumption of malice, the jury would be compelled to find the existence of malice from proof of the intentional and unlawful killing. The trier of fact must find malice in this situation even if the prosecution can present no other evidence indicating that malice was present.

Two things are altered in the typical trial situation when a presumption operates: 1) the defendant is required to affirmatively assert the absence of some fact necessary to constitute the crime charged, and 2) the defendant is deprived of the trier of fact's response to the strength of the inference.

An innocent defendant will not be affected by the use of a presumption if he is able to affirmatively assert the absence of one of the facts of the crime. Only in those cases where the defendant is unable to provide evidence of his innocence will there be an injustice worked. In all others, the defendant, by definition, will be able to establish his innocence and so, will be unaffected. Thus, the first key consideration in measuring a presumption against the Due Process standard is the defendant's convenience of proof. Where proof of innocence is conveniently available to all innocent defendants, a presumption must satisfy this aspect of Due Process. The innocent defendant will be able to establish his innocence so that only the guilty are convicted. These convictions will all satisfy the "beyond a reasonable doubt" standard regarding the presumed fact, since, by definition, all innocent defendants are able to establish their innocence.

A defendant will not be affected by the use of a presumption if the inference which is the basis of the presumption is completely correlative. Only in those cases where the inference is not correct, and an innocent defendant is found guilty on the strength of the inference, will there be injustice. Thus, the second consideration in measuring a presumption against the Due Process standard is the strength of the underlying inference. If the fact presumed always occurs whenever the proved facts are present, then there is an absolute correspondence between the facts proved and the fact presumed. In terms of satisfying the proof "beyond a reasonable doubt" standard, this means that any doubt as to the existence of the presumed fact must arise as doubt in the proved facts. But where the proved facts are proved beyond a reasonable doubt, the presumed fact must also be present beyond a reasonable doubt.

These discussions consider only completely correlative inferences and situations where all innocent defendants are able to prove their innocence. The nature of trial and the standard of proof "beyond a reasonable doubt" itself indicate that such total certainty is not
required. The question is, how close must the considerations approach the absolute in order to satisfy Due Process?

Context and Trial
Prior to Wilbur's trial in 1966, the Supreme Court had refused to extend the proof "beyond a reasonable doubt" standard to the States.\textsuperscript{10} Instead, the Court had focused on the "rational connection" between the fact presumed and the facts proved when measuring a presumption against the Due Process standard.

The leading case involved a presumption of acquisition in interstate commerce from proof that a person previously convicted of a crime of violence was in possession of a gun.\textsuperscript{11} The Court rejected two earlier tests concerning legislative power\textsuperscript{12} and convenience of proof.\textsuperscript{13} The Court held that to satisfy Due Process, the presumption must involve a rational connection between the facts proved and the ultimate fact presumed. Though the Court would hold valid a presumption "created upon a view of relation broader than that a jury might take in a specific case,"\textsuperscript{14} the Court was unable to find sufficiently rational the connection between proof of possession by a person previously convicted of a crime of violence and the fact of acquisition of the gun in interstate commerce. Guns may be made and sold within a single state. A solitary workman might make a gun for his own use. The connection was not rational because acquisition might be had through several mutually exclusive means, not all of which involved interstate commerce. It is this inability of the inference to distinguish between particular acts of possession and particular acts of acquisition, and then to relate those of each group which are closely associated, that causes the presumption to fail the rational connection test. If all guns were obtained in interstate commerce, then the presumption would satisfy the "rational connection" test. As the number of instances of possession achieved in a manner other than in interstate commerce increases, the strength of the inference decreases and the connection becomes less rational.

In 1965, the Court reaffirmed the "rational connection" test in a case involving an inference of "carrying on" the business of operating an illegal still from proof of presence at the still.\textsuperscript{15}

Again, though the Court was officially considering the rationality of the connection, they looked at the secrecy surrounding the still and the possible situations in which presence would have any explanation other than that the defendant was "carrying on" the business of operating the still. Since there were few such situations, the Court found that the inference was sufficiently rational to satisfy Due Process. Clearly, what was being considered was the strength of the inference.

In 1966, Stillman E. Wilbur, Jr. was convicted of the murder of Claude Herbert. In a statement introduced by the prosecution at trial, Wilbur claimed that he had attacked Herbert in a rage brought about by Herbert's making a homosexual overture while the two men were drinking in Herbert's hotel room. The evidence indicated that Herbert had been beaten to death. The defense offered no evidence at trial, choosing instead to argue that because criminal intent was lacking, the killing was not unlawful. In the alternative, the defense argued that the killing occurred in a "heat of passion," which occurs when the deceased's actions are such as to provoke a reasonable man in similar circumstances, and the defendant was so provoked at the time of the killing. Under Maine law, proof of circumstances of "heat of passion" would mitigate malice.

In accord with accepted state practice, the trial court instructed the jury on the doctrine of implied malice and "heat of passion." If the prosecution established beyond a reasonable doubt that the killing was both intentional and unlawful, then malice was to be presumed.\textsuperscript{16} If the defendant could establish by a preponderance of the evidence that he acted in a "heat of passion," then malice would be mitigated and the defendant would receive the lesser penalty. The jury returned a verdict finding malice. Wilbur appealed his conviction, but before the case could be heard, the Supreme Court decided \textit{In re Winship}, which extended the proof beyond a reasonable doubt standard to state criminal prosecutions.

In \textit{Winship}, a New York Family Court found a 12 year old boy guilty of entering a locker and stealing some money. Because the court was not considered a criminal court in the harsh sense of the term, the preponderance of the evidence standard was used. It was felt that the court was providing guidance and not administering punishment. The Supreme Court disagreed. They placed much emphasis on the fact that the defendant had important interests in his liberty and reputation which entitled him to require the prosecution to prove every fact necessary to constitute the crime with which the defendant was charged. The Court also pointed to society's interest in the reliability of verdicts to support its decision.

The trial judge had stated that the conviction in \textit{Winship} might not be had if the "beyond a reasonable doubt" standard were employed. On this basis, the Court reversed the conviction and concluded forcefully that "lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt if every fact necessary to constitute the crime with which he is charged."\textsuperscript{17}

Shortly after the \textit{Winship} decision, Wilbur's appeal was heard and denied by the Supreme Judicial Court of Maine.\textsuperscript{18} The court considered the assignment of error despite the fact that no objection to the challenged instruction had been made at trial. It found that the trial court had correctly stated the doctrine of implied malice and justified that doctrine on the basis of public policy. The court then mistakenly held that \textit{Winship}'s extension of the proof "beyond a reasonable doubt" standard to the States would not affect reductive factors such as "heat of passion,"\textsuperscript{19} and would not be applied retroactively in any event.\textsuperscript{20} Later cases provided the basis for habeas corpus, which was granted in 1972.\textsuperscript{21} The federal courts' enthusiasm to apply the principles of \textit{Winship} caused some problem,\textsuperscript{22} but ultimately resulted in the Supreme Court holding that Maine's doctrine of implied malice was unconstitutional.

The Wilbur Rationale
The \textit{Wilbur} Court concentrates on the disparity in the possible penalties and the fact that malice distinguishes between the application of the respective penalties. If \textit{Winship} entitles a juvenile threatened with a possible six year
sentence to the requirement of proof beyond a reasonable doubt, then certainly a defendant such as Wilbur, who is contemplating the difference between twenty years and life is similarly entitled. Moreover, the issue in Winship was the standard of proof the prosecution must meet. In Wilbur, the burden of producing evidence has been shifted completely from the prosecution and placed on the defendant.

The State of Maine raises the traditional arguments concerning legislative power and convenience of proof. The Court responds predictably, dismissing them. Unpredictably, however, the Court does not consider the "rational connection" test. There is little rational connection between the means of acquisition of a gun and the fact of possession of that gun by a person previously convicted of a crime of violence, but the same cannot be said for the presumption of malice from proof of presence at the still, since the Court has previously held that the inference of operating an illegal still from proof of presence at the still, satisfies Due Process, it should distinguish the former case from Wilbur.

The principle of Winship is that proof beyond a reasonable doubt is required for every fact necessary to constitute the crime charged. The Wilbur rationale considers the shift in the burden of producing evidence and confuses the concept of a burden of proof with the concept of a standard of proof, in this case the "beyond a reasonable doubt" standard. The Court should directly confront the question of whether the inference of malice is sufficiently strong that the presumption of malice satisfies the Due Process requirement of proof beyond a reasonable doubt.

Weight of Inferences Affecting Quantum of Proof
In the final paragraph of the Wilbur opinion, Mr. Justice Powell observes that "a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves the significantly lesser sentence." The complete argument seems to be that under the doctrine of implied malice, a defendant might establish circumstances which would mitigate malice by proof as likely as not, but which is not capable of satisfying the preponderance of the evidence standard. This defendant would be sentenced to the mandatory life term when there existed evidence that, as likely as not, one of the facts necessary to constitute the crime charged is not present. It is argued that this apparent contradiction in terms, that malice may at once be present beyond a reasonable doubt and absent as likely as not, mandates the Court's decision. This explanation fails because it does not examine the calibration of belief or the arithmetic of inferences.

Professor Wigmore poses the rhetorical question: "Is there any tangible and certain measure, known and accepted by all, for measuring degrees of belief?" He answers in the negative. The thrust of his discussion is that belief is subjective by nature, and personal to each individual. Where it might be possible to agree upon which things should be believed, there would still remain the problem of assigning and communicating the degree of belief to be held. Each individual relates his intensity of belief to some fact from his personal experience. Without some standardization of these related events
and experiences, there can be no accurate communication of the intensity of belief.

Further, there is no calculus of the psyche within which arithmetic formulas of belief may be drawn. To subtract a belief more likely than not from the totality of belief may leave a remainder of belief less than as likely as not in the simple situation, but certainly no such arithmetic applies in a more complex situation. Proof beyond a reasonable doubt applies to the whole case and not the separate bits of evidence. A defendant who is able to amass plausible evidence on several theories cannot prevent the trier of fact from believing any one of his theories or the prosecution's theory intensely enough to satisfy the "proof beyond a reasonable doubt" standard. The several smaller quanta of belief simply do not always add so as to form a belief great enough to represent a reasonable doubt.

Thus, though the defendant may establish the absence of malice by evidence sufficient to satisfy the "more likely than not" standard, the trier of fact in a criminal proceeding looks to the case as a whole and may well find the presence of malice beyond a reasonable doubt if all the other evidence would justify this finding. The trier of fact is limited by the evidence and the strength of the inferences to be drawn therefrom, not by some artificial calculus of belief.

The Presumption of Sanity
In a concurring opinion in the Wilbur decision, Mr. Justice Rehnquist distinguishes an earlier case, which dealt with the presumption of sanity, Leland v. Oregon, 343 U.S. 790, (1952). It is difficult to understand how Justice Rehnquist can agree with the Wilbur rationale, Leland should be entitled to have the prosecution establish beyond a reasonable doubt the fact of his sanity for precisely those reasons that entitle Wilbur to have the prosecution prove the absence of "heat of passion."

Despite this analysis, Mr. Justice Rehnquist, joined by Chief Justice Burger, finds "no inconsistency between that holding [Wilbur] and the holding of Leland v. Oregon." The opinion stresses the fact that before the jury could consider the issue of sanity, it must first find all of the facts necessary to constitute another crime, e.g. murder. The opinion maintains that the mens rea element of murder, malice, is wholly separate from the issue of sanity. Though the evidence concerning each may be similar, the two facts themselves are distinct. But this is very much the same thing that Maine attempts in calling malice a reductive element, and the fact that sanity distinguishes between significantly different penalties makes sanity a fact necessary to constitute the crime which carries the higher penalty.

Not considering the strength of the inference involved results in this inconsistent analysis. Perhaps what Mr. Justice Rehnquist is saying is that the presumption of sanity is based on an
Whether that is an accurate assessment involves the question of whether a presumption of innocence is sufficient to satisfy the Due Process requirement of proof beyond a reasonable doubt. Whether that is an accurate assessment of the strength of the inference may be questioned, but these questions aside, such an assessment provides the grounds for reconciliation of Justice Rehnquist's apparent inconsistency. He may well decide that the inference of malice from proof of an intentional and unlawful killing is not sufficiently strong to satisfy Due Process, and vote as he does in Wilbur. Yet, if the inference of sanity is stronger, then Leland may be distinguished and this seeming contradiction in holdings reconciled.

Conclusion

Due Process requires the prosecution in a criminal proceeding to prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant is charged. A presumption shifts the onus to the innocent defendant to affirmatively assert the absence of some fact necessary to constitute the crime charged, if he is to prove his innocence. This violates Due Process if it results in a verdict based on a fact not proven beyond a reasonable doubt. Two considerations are controlling: 1) the defendant's convenience and ability in obtaining proof of his innocence, and 2) the strength of the inference on which the presumption is based.

The Wilbur opinion focuses on the shift in the burden of introducing evidence, and to that extent considers the defendant's convenience of proof. It fails to isolate and treat the second consideration, the strength of the underlying inference. But it is this inference that malice is present when the killing is intentional and unlawful, that was the proof of malice. In Wilbur's trial Due Process requires that this proof satisfy the "beyond a reasonable doubt" standard. The question must be whether the inference satisfies that standard. Without considering the strength of the inference, the Wilbur rationale cannot focus on this requirement.

Footnotes

1R.S. 1954, c.130 §1; 89 M.R.S.A. §2651.

2Me. Rev. Stat., Title 17, §2651 provides that "Whoever unlawfully kills a human being with malice aforethought . . . shall be punished by a fine of not more than $1,000 or by imprisonment for not more than 20 years."


4State v. Morton, 142 Me. 254, 49 A.2d 907, 909, (1946).

5United States v. Valenti, 134 F.2d 362, 364, (2d Cir. 1943).


9Id. at 180.

10Leland v. Oregon, 343 U.S. 790, (1952), where the Court refused to extend Davis v. United States, 160 U.S. 469, (1895), (holding that the prosecution must prove sanity beyond a reasonable doubt) to the States.


12See Ferry v. Ramsey, 277 U.S. 88, (1928), where Justice Holmes reasoned that because the legislature could legitimately make criminal the act of a bank director in accepting a money deposit when the bank was insolvent, the defendants rights were not infringed if the legislature instead made lack of knowledge of insolvency a defense which would exonerate the defendant if proved. But see United States v. Roman, 382 U.S. 136, (1965), where this reasoning is rejected. Also, Tot, supra., p. 472.

13In Morrison v. California, 291 U.S. 82, (1934), the Court states that "the decisions are manifold underlying inference. But it is this reasoning is rejected. Also, Tot, supra., p. 472.

14In Tot, supra., note 9, which substituted the "rational connection" test after rejecting these earlier arguments.

15Id. at 172.


17In reviewing the appeal of a juvenile defendant convicted by a New York court, the Supreme Court ruled that Winship would apply retroactively, Ivan v. City of New York, 407 U.S. 203, (1972).


19In re Winship, 397 U.S. 358, 364.

20Interestingly, only two months after the Maine court's ruling, the Supreme Court of Hawaii decided a similar case and found Winship controlling, State v. Cuevas, 488 P.2d 322, (1971).


22The district court in Robbins, note 21, had rejected the interpretation of Maine law handed down by the Supreme Judicial Court of Maine. This was affirmed on appeal, Wilbur v. Mulaney, 473 F.2d 943, (1st Cir. 1973). The Maine court responded, challenging the federal courts right to interpret state law, State v. Lafferty, 300 A.2d 647, (1973). The issue went before the Supreme Court which remanded to the First Circuit for reconsideration in light of Maine law as interpreted by the Supreme Judicial Court of Maine, 414 U.S. 1139, (1974).

23Predictable after Tot, supra., note 9, which substituted the "rational connection" test after rejecting these earlier arguments.

24See Tot, supra., note 9.

25See Gainey, supra note 15.

26See Wilbur, supra note 21 at 4701.

27Wilbur, supra note 21 at 4702.
The Lawyer and the Advertising Dilemma

At the beginning of the 20th Century most of the American states adopted stringent prohibitions against advertising by lawyers. In part these restrictions reflected the 19th Century view of the law as a profession. The lawyer was distinct from the tradesman who could advertise his wares at will. The etiquette of a professional required him to wait on the approach of the client rather than seeking out the client. In addition there was genuine fear that advertising would lead to over-reaching by attorneys. The Massachusetts lawyer who was suspended for publishing an ad which read "Advice free in legal matters, specialist in marriage troubles" was the very antithesis of what a lawyer should be. The profession also feared the rise of barratry, the needless stirring up of litigation. Champerty, the buying and selling of law suits, was thought to be the natural consequence of advertising and solicitation. Out-right fraud was a common element in 19th century advertising. Was there any doubt that if lawyers were permitted to advertise fraud and misrepresentation would creep into their publications?

When the American Bar Association undertook to codify the Canon of Ethics in 1964, at the request of then A.B.A. President Louis Powell, Jr., it undertook to incorporate the older advertising restrictions into the new Code of Professional Responsibility. As adopted by the American Bar Association in 1969, the Code contained specific Disciplinary Rules which limit both general and specific advertising by lawyers. Under D.R. 2-101 a lawyer is prohibited from preparing or participating in the use of any public communication that contains professionally self-laudatory statements which are calculated to attract lay clients. Public communications include television, radio, motion picture, newspaper, magazine, or book. In addition, under D.R. 2-101 (B) a lawyer is prohibited from publicizing himself or his associates through public communications except for political advertisements, routine reports for business, civic, professional or political organizations of which the lawyer is a director or officer, or in legal documents or textbooks prepared by him or in response to a request for information from certain legal assistance organizations. Under D.R. 2-102 the contents of a lawyer's professional notices, letterheads, offices, and listing in approved law lists are closely controlled. Thus an attorney may use a professional card, or office sign or letterhead which identifies him by name, address, phone number, and states his earned law degree. But a lawyer may not list himself as a specialist in a given field unless specifically authorized to do so by state law, and may not list other biographical information. A lawyer may provide biographical information and specialty designation to a reputable law list or legal directory. These rules were adopted in some form by all of the states between 1970 and the present.

Forces for Change

In the few short years since the American Bar Association adopted the Code of Professional Responsibility there has grown a tremendous movement which aims at permitting lawyers to advertise. In part this movement is related to similar developments intended to permit lawyers to designate their practice by specialty, to provide group legal services for large masses of people, to require continuing legal education of lawyers, and to broaden the rules as to solicitation of legal business. While these concurrent developments are certainly of interest, the thrust of this article is limited to a discussion of the advertising aspect.

The most significant force for change in respect to advertising by lawyers has come from the consumer movement. Such diverse groups as the A.F.L.-C.I.O., Consumers Union, the Family Service Association of America, the N.A.A.C.P., the National Council of Senior Citizens, and others are committed to making more available to the public information about lawyers.
The old American saying is harsh, but true. And there's nothing we can do about the truth of the matter. But we can help you soften the harshness.

We're Leighton, Samuels & Jensen, attorneys at law. And we're experienced in making out tax forms, drawing up wills, probating estates. The law is our career. The client is our concern.

There is a belief today that consumers have a right to a maximum amount of information before buying a product or service. Thus, the potential client should have access to a maximum amount of information about a lawyer he may wish to consult. On the other hand, lawyers are prohibited by the Code from making such information generally available to the public. In short, there appears a direct conflict between the restrictions of the Code and a basic premise of the contemporary consumer movement.

In a number of states consumer groups have filed suit against the bar to have the advertising restrictions of the Code declared unconstitutional. These cases have not yet reached an appellate level, but when they do they promise to give rise to an analysis of basic issues regarding both the rights of consumers and the profession of law. The consumer's argument is premised on a First Amendment contention of a right to receive information. This argument has been given a somewhat favorable reception by the Courts in regard to other professions. For example, a federal district court in California recently declared unconstitutional a state's statute which prohibited advertising of services by licensed optometrists. The Court squarely ruled that the public has a right to receive truthful information of comparative prices and other data from various optometrists under the First Amendment. The Court said it is "Now well established that the Constitution protects the right to receive information and ideas." A recent decision of the United States Supreme Court seems to buttress that contention. In Bigelow v. Virginia the Court declared unconstitutional a Virginia statute which makes it a misdemeanor to circularize abortion advertisements. The Supreme Court suggested that the right of the state to control even commercial advertising is limited by the First Amendment if such ads contain information of clear public interest. This reasoning would clearly apply to information relating to legal services. Perhaps the Court would make a distinction between commercial advertising of medical services and those relating to the administration of justice, but this is not certain.

In addition to the consumer's movement, recent developments in anti-trust law have tended to call into question the validity of advertising restrictions on lawyers. Prior to 1975 it was generally assumed that lawyers were exempted from anti-trust restrictions. The law was a learned profession, not a business. Further, lawyers were operating as officers of the court and therefore carrying out a state action. In Goldfarb v. Virginia State Bar the Court expressly rejected these arguments. That case involved a suit by a consumer of legal services who alleged that the minimum fee schedule of the Virginia State Bar constituted a conspiracy to fix prices. The Court ruled that the action of the state bar was not exempt from §1 of the Sherman Anti-Trust Act and that it could find no support for the proposition that Congress intended to exclude the "learned professions" from the effects of the anti-trust laws. In addition the Court ruled that the action of the state bar is not state action for Sherman Act purposes. Thus lawyers are not free under cover of their professional codes to engage in conduct which is essentially anti-competitive. This is not to say that the Supreme Court would find the advertising restrictions anti-competitive, or that the Court might not find sufficiently strong counter-balancing factors in favor of advertising. However, subsequent to Goldfarb, the Justice Department made clear to the American Bar Association its intent to institute anti-trust proceedings if some substantial changes were not made in the advertising restrictions. The Department did file suit in October.
1975 against the Michigan Medical Society, seeking a declaratory judgement that the Society's advertising restrictions on physicians violated the Sherman Anti-Trust Act.

Response of the Bar
The response of the bar to these developments has been the institution of a nationwide debate over the subject of advertising. The profession is obviously deeply divided on the subject. The American Bar Association's Committee on Ethics adopted a proposal in December which would permit lawyers to engage in general advertising in all media, subject only to the prohibition against false, fraudulent, or misleading advertising. Under this proposal lawyers would be permitted to advertise their areas of concentration, expertise, fee, and other professional qualifications. They could use radio, television, newspapers, direct mail ads or any other form of communication. They could not use ads which create false or unjustified expectations of favorable results, or which contain testimonials (which are essentially misleading) or represent that they could improperly influence any court, tribunal, public body or official.

At the mid-winter meeting of the American Bar Association House of Delegates in Philadelphia in February, 1976, the Ethics Committee withdrew its recommendation in the face of almost universal opposition. It substituted instead a proposal which would permit lawyers to advertise in the Yellow Pages of the telephone directory and would permit bona-fide consumer groups to compile directories of lawyers. The House of Delegates refused to accept the proposal regarding consumer groups. It did, however, accept the limited proposal which would permit lawyers to advertise in the Yellow Pages. This does not mean that lawyers everywhere are now free to place such ads. The Code of Professional Responsibility is adopted as a rule of court in the various states, and therefore the amendment accepted by the House of Delegates must be further accepted by the Supreme Court of each state before it becomes effective in that state.

If a state adopts the proposed change in the Code, what may lawyers include in the Yellow Pages advertising? Information publishable in the Yellow Pages would not include that information which formerly could be published in a reputable law list. It would include the name of the law firm, names of professional associates, telephone numbers, field of concentration, fields to which the practice is limited, bar admissions, law schools attended, normal office hours, a statement of legal fees for standard consultation or a range of fees for specific types of services, utilization of para-legals, and the availability of credit. The California Bar has prepared a sample Yellow Page of some advertisements. Some illustrations from this appear below:

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Footnotes


Types of plans in various states to better insure that the legal profession will both make legal services better available to the public and maintain its traditional values of professionalism that make a lawyer's services so useful to his client.
Land Use Techniques to Stimulate Massachusetts Agriculture

Pre-industrial America was a nation of farms and so it was in Massachusetts where in the 1860's nearly two-thirds of the state's land was in agricultural use. But as the country grew West, the East grew more industrial and farmers abandoned the poor soils and sloping lands that cover much of the state in favor of the rich, black soiled plains of the mid-west.

Since World War II the number of farms in Massachusetts has dropped from 35,000 to around 6,000; farm acreage is down from two million to around 700,000. Today farmland is being lost at a rate of about 20,000 acres per year. At the same time Massachusetts is importing 85% of its food. Even in those areas of the state's greatest strength (i.e., milk, eggs, seafood), consumption far exceeds production. It is only with the cranberry and sweet corn crops that any exports are made.

One might well ask why all this matters since the rest of the country is so productive. The answer is revealed by several problems, minor now, but growing. For example, Massachusetts residents pay 6% more for their food than the rest of the nation. Given the present increasing costs of fuel, the cost of transportation will continue to raise food prices so long as the sources remain distant.

Price is not the only problem raised by the sources of our food. California, for example, provides nearly 60% of our fresh fruit and vegetables. Planners in that state have estimated that by the year 2000 nearly all of its domestically produced food will be needed to feed its own population. The same is true for many other states and countries from which our food is supplied.

As these problems worsen, Massachusetts residents become increasingly susceptible to higher prices and outright food shortages. Although food self-sufficiency in this state is neither feasible nor particularly desirable, it is clearly in our interests to maintain a vital core of productive agriculture in order to respond to the threatened fluctuations in the price and supply of food. However, in order to insure this responsiveness, the stabilization process must begin now. For, as one commentator has well noted, "Once the practice of commercial agriculture entirely vanishes from a region like New England, its re-establishment in terms of land, manpower, capital investment and skills may be beyond feasibility."

This article will discuss the various legal and legislative tools available to reverse this alarming trend. Two of the techniques are presently a part of the state laws. Others are the fabric from which future laws will be made, here and in the other states, particularly throughout the Northeast, which is now fighting to save its farms.

Use Value Assessment

M.G.L. Chapter 61A
The law establishes a program whereby qualifying agricultural land is assessed, for real estate taxation, on the basis of value in its current use rather than upon the basis of fair market value, i.e., the "highest and best" developed use. Although in the past most real estate was not assessed at full fair market value anyway, this law takes on an even greater significance in light of the recent Supreme Judicial Court's holding requiring 100% valuation of all land.

In Ch. 61A the use value is arrived at through an examination of potential income available through the specific use to which the land is dedicated. Guidelines for assessors are issued by the Department of Corporations and Taxation upon a determination by a farmland valuation advisory commissioner, established pursuant to s.11 of the range of values of lands being put to particular uses. For example, in fiscal year 1976 cranberry bogs are valued between $1,000 and $1,800 per acre, tobacco lands between $500 and $1,000 per acre and so on.

In order to participate in this program, the landowner must apply to
the local Board of Assessors for a determination of eligibility. The statute requires a five acre minimum which has produced a gross income of not less than $500 per acre per annum for the past two years. The rate increases at $5 per acre for each acre greater than five. The increase is fifty cents per acre for woodlands and wetlands. The law also allows the inclusion of contiguous land not used for agriculture purposes but not to exceed 100% of the acreage actively devoted to agriculture. The law, however, expressly excludes all buildings located on the land from any special tax relief. Once these requirements are met, the land is assessed at a value according to its current use.

Ch. 61A includes a penalty for those who receive the tax relief yet fail to farm their land for a minimum period. Section 12 provides that land in the program which is sold for another use within ten years of its acquisition or first uninterrupted agricultural use, whichever is earlier, will be subject to a conveyance tax on the gross selling price of 10% the first year, 9% the second year down to 1% the tenth year. This tax must also be paid by one under the program who converts the land to another use within ten years of its acquisition just as if there had been an actual conveyance.

It also includes in §13 a “roll back” penalty payable when the land no longer qualifies under Ch. 61A. This penalty is equal to the amount of taxes saved by the owner during the current tax year and over the previous years, up to four, of participation in the program. The positive and negative effects of use value assessment upon the intended beneficiaries and the taxing jurisdiction are not entirely clear. This is largely due to the relative youth of these and similar laws throughout the country, coupled with the insufficiency of thorough research.

One problem which has been identified is the loss of tax revenues by the taxing jurisdiction. Presumably, as the assessed value of the land is lowered, the amount of tax revenues will fall in the absence of either an increase in tax rate (which would defeat the whole purpose of the law) or an increase in the assessment of lands not included in the program placing a greater burden on non-farming landowners. The only other alternative in this case would be to absorb the loss in tax revenues by cutting services or deficit spending. Some contend this whole problem is illusory since farmland in those communities so predominantly agricultural that any major affect would be felt, has historically been assessed at farm values anyway, either because such land had no higher use potential or because local assessors illegally chose to ignore development value. In the latter case, use value assessment simply legalizes a traditional practice.

Given optimum operating conditions and anticipating only the benefits, most authorities will agree that a use value assessment program can operate only as a temporary holding mechanism. The main reason being that real estate tax pressure is only one of many negative incentives bearing down upon the Massachusetts farmer. These include: nuisance actions by sensitive neighbors offended by the smells and sounds incidental to farming, the great burden of federal death taxes, simple inability to make ends meet by farming, the outlandish offers of developers and the relative prosperity of our cities, though quickly fading, which “lure” many young people away from rural life. In addition, many Massachusetts farms that are building intensive (greenhouses, dairies, etc.) do not benefit from Ch. 61A as presently drawn. It appears, therefore, that Ch. 61A in its present state will only be a part of the comprehensive plan the state must develop.

Conservation Restrictions
(St. 1969, c. 666, s5, M.G.L. Ch. 184, ss. 31-33)
In 1969 Massachusetts enacted legislation to enable the effective formation and enforcement of a conservation restriction (“CR”). A CR is a governmentally approved agreement between an owner of real property and a governmental agency or private charity, by which the owner agrees to keep his land in essentially the same condition as it was at the time of the agreement. Although similar covenants were possible and had been made prior to 1969, the law of real property was awash in technicalities which often rendered enforcement of old-fashioned restrictions difficult, if not impossible.

The CR Act was basically designed to remedy these difficulties. Section 31 defines a CR and lists those activities which may be prohibited upon land so restricted (e.g., dumping, billboards, etc.). There are no activities which must be prohibited on land to qualify it as a CR. Any covenant satisfactory to the holder, and the approving governmental bodies or charitable corporations will qualify as a CR, providing it is framed to keep land areas “predominantly in their open natural or scenic condition or in agricultural, farming or forest use.”
Section 32 remedies certain old property law complications and discusses the government role in the CR process. Paragraph one addresses an old problem arising under common law. For the restriction to “run with the land” and thereafter bind subsequent owners, there had to be a contiguous parcel of land benefited by the restriction. This is changed by the new law so that the land shall continue to be preserved despite multiple transfers of ownership provided that the CR, if acquired by a government body, is approved by the Department of Natural Resources and, if acquired by a charitable corporation or trust is approved by the Department of Natural Resources and the city council, selectmen, or town meeting.

Paragraph two of S.32 allows for the government acquisition of a CR, the enforcement of a CR via injunction and the release of a CR after approval by the local governing body and the state Department of Natural Resources.

Section 33 describes the complex but necessary recording system whereby a CR may continue in force without a re-recording every twenty years after the first thirty as was required under prior law.

In effect, the CR Act of 1969 ably allows for the charitable transfer of the rights to develop a parcel of land to a government body or charity.

In May 1975, approximately six years after the CR legislation was approved, the Conservation Law Foundation did a study of the implementation of CRs. The study was compiled from documents on file at the Department of Natural Resources, through which CRs must be approved, and telephone interviews with town assessors. The study shows that as of May 1975, 5,422.11 acres are covered by final or pending CRs. Of these acres the majority (3,457.84) is forest land, 814.17 is wetlands and 721.94 is clear areas. Thus only about 13% of CR land is potentially in farm use. Despite this low figure, the Massachusetts CR law, as it is presently written, could provide the farmer with substantial relief from real estate taxes, although it does entail significant diminution of his equity in land. The principle is that any reduction in market value must be reflected by tax assessors in assessing land. In addition the placing of CRs upon large areas of agricultural land would assist the Commonwealth in slowing down the rapid loss of agricultural lands to development and speculation.

The major problem now posed by conservation restrictions, aside from the usual administrative bottlenecks, is that of assessing the value of the land after it is restricted. This is important mainly because tax exemptions are the main incentive (aside from aesthetic and charitable principles) for those placing their lands under a CR.

When a CR is placed on land, the rights to develop are relinquished. The value of these development rights are deductible from federal estate, gift and income taxes, when gratuitously conveyed in perpetuity, under s.1.170A – 7(b)(i)(ii) of the Federal Income Tax Regulations. The effects upon taxation of land under a CR are mentioned above.

The problem in assessing the value of land encumbered with a CR is the lack of state-wide standards or guidelines. None are available in the General Laws, Court Opinions or through the Department of Corporations and Taxation which generally has the final word on tax assessments. An examination of federal law and the law of other states reveals little in the way of sensible standards.

The I.R.S. in Revenue Ruling 73-339 has suggested a valuation based upon market value before restriction minus market value after restriction. The problem with this formula though theoretically sound is that there exists little market for CR land and therefore values of parcels with restrictions are difficult to find comparable sales being practically non-existent. Nor does it appear entirely legal under present Massachusetts statutes and court rulings for town meetings (or selectmen) to make agreements with landowners, which are binding for a certain number of years on a particular assessment or percentage of fair market value of land under a CR. In Mahoney v. Board of Assessors of Watertown, the Supreme Judicial Court held that the town selectmen had no authority to enter into a contract binding the town to an agreement which would exempt realty from property taxes. An easement to use this land as a public parking lot had been granted to the town in exchange for a tax exemption. The court stated that any such exemption must “[come] within either the express words or the necessary implication of some statute conferring this privilege . . . .” Although the wording of this holding relates to tax exemptions, it seems that the principles stated also apply to an agreement by a town to assess lands at a particular percentage upon the receipt of a CR (or the granting of one to a private charity).

Other case law in this area reveals little in the way of valuation guidelines, although for a number of years there has been agreement that restrictions against the development of a parcel of land are real property interests and do lessen the value of the restricted land when it is assessed for the purposes of real estate taxation. A New York Appeals Court in Nyczepir v. New York held that 90% damage was proper compensation for the taking of a “scenic easement” permitting use of the land for farming but not construction. Yet such a cut and dry figure must fail as a state-wide standard since it cannot account for the variety of effects a CR will have on land (e.g., a CR on unbuildable cliff land will have little effect on its assessed value).

It would seem, therefore, that should the state ever seek to establish standards for the reduction of fair market value of land under a CR (the uniformity of which would be highly beneficial to the promotion of the program), these would probably emerge from an amendment to Ch. 184 s. 31-33 or at least from regulations of the Department of
Corporations and Taxations.

Absent the legislature's establishment of state-wide standards, ultimately each parcel of CR land will continue to be evaluated and assessed individually to determine the effect of that particular restriction on that particular parcel. The factors to be weighed in assessment will differ from locality to locality and assessor to assessor. If this arbitrariness is eliminated, however, participation in the CR program should increase. Until then it is enough to say that CRs do offer valuable options for the landholder interested in preserving open space and land in agriculture use. Nevertheless, it is questionable how much help they can provide the ailing agriculture industry and farmer in obtaining solvency. However, this law does open the way, to some extent, to other programs now under consideration here and in other states.

Purchase of Development Rights

The purchase of development rights is one such program under consideration in this and other states as a potential means of helping the agricultural industries. The purchase of development rights is similar to the state acquisition of a CR except the rights to develop are purchased at their full value as opposed to the right to enforce a restriction against development being obtained as a gift or at less than full value.

It is the view of many that the purchase of development rights ("DR") offers the most feasible program in the short and long run to preserve and increase the strength of Massachusetts agriculture. This would be most true in areas where the development rights are of significant value. These are usually areas where development pressures are the greatest, on the urban fringe, and it is there that farms are usually in the most trouble. Despite proximity to a large market, inflated land values, hostile suburbanites and rapid change take their toll.

In such a program the state buys from each landowner the rights to develop his land or to alter its natural features in any way, except for agriculture. The landowner stays in possession and, in the case of active prime agricultural land, continues farming and paying taxes. His only restriction is upon development. The state may not enter the land or in any other way interfere with the owner. It is clear that this sort of program promises to be somewhat expensive. Various funding mechanisms for the program have been suggested. The most promising of these is a seven mill tax on real estate transfers ($7 per $1,000) which with a bonding issue could be funded. This sort of funding has been used in a trial program in Suffolk County, Long Island. Informal research based upon statistics gathered through the state's Deed Excise Stamp Tax Program indicates that the value of real estate transfers during the twelve month period between November 1974 to October 1975 was about 2.772 billion dollars. A seven mill tax on this would yield about 19.4 million dollars, more than enough to finance a bond issue.

If the state opts to go the way of purchase of development rights, new legislation undoubtedly will be adopted. Nevertheless, the bases under which this program could operate already exist within present statutes. The Massachusetts CR law clearly contemplates and allows for the state purchase of development rights in Ch. 184, s. 32, paragraph 2.

"Such conservation and preservation restrictions are interests in land and may be acquired by any governmental body . . . which has power to acquire interests in land . . . "

M.G.L. Ch. 132A, s. 3 which deals with the powers of the Commissioner of the Department of Natural Resources gives the Commissioner power to acquire certain lands. It would seem this power could extend to the acquisition of partial interests in certain lands. Finally, the acquisition of partial interests in land is expressly allowed by the 97th Amendment ("Environmental Bill of Rights") to the Massachusetts Constitution.

A program involving the purchase of development rights from farmers on a large-scale is in many ways well suited for the problems Massachusetts agriculture faces. In other ways, it presents great problems.

Certainly the farmers find the purchase of DRS appealing. It gives them cash which they can use to pay debts and re-invest in their operations in exchange for rights they were not exercising anyway. At the same time, they remain in possession, face less severe death taxes, and are assured that the land will stay undeveloped.

However, this method appears to be the costliest of those under discussion with the exception of a total acquisition by the state and leaseback to those interested in farming (the leaseback fees may, however, reduce the costs after several years). This fiscal problem is further complicated by the difficulty already mentioned of determining the monetary value of the development rights.

In addition, once the land's DRs are purchased, no guarantee is made that it will be farmed. The owner could let the land revert to scrub and the state will have received nothing for all the money spent. While most farmers would rather sell their lands than see it revert to scrub, the state may still expose itself to large dollar expenditures without any guarantees.

All factors considered, the purchase of development rights may offer the most feasible immediate program to aid Massachusetts farming. The money received by farmers for leaving their land undeveloped will help finance capital improvements, i.e., new machinery, repairs to farm buildings, etc. in an industry which has traditionally required large capital expenditures while plagued with chronic shortages of ready cash. The main problem arises, as usual, in the financing. Although new taxes appeal to no one, they may be the only alternative to an end to this state's farming industry.

Transferable Development Rights

The transfer of development rights is a relatively recent idea in the field of land use. As such, it remains untied on any large scale. The idea behind TDRs is this: A commission or planning board sets up two different zones within the municipality. One is a preservation zone limited to agriculture or open space, and the other is the transfer zone, open to extensive development. The owners of land within the preservation zone are given negotiable "coupons" to represent their rights to develop the land. Developers wishing to build within the transfer zone must purchase a certain amount of these coupons. In other cases, should the developer wish to build within the transfer zone at a greater intensity than zoning laws allow, he may do so conditional upon the purchase of a certain quantity of TDRs.

The advantages of this system are numerous. Each municipality establishes...
clusters of development and of open space. This is far more desirable than the spotting effect often produced by the free market. In addition, the municipality pays only the cost of administration. The developer is the one who must expend the most (he ultimately passes it on to his customers) and those not involved carry none of the burden. Also, one need not second guess the market as to the values of the development rights since, being negotiable, they are valued by the market itself like any other commodity. This method, therefore, while it controls the direction of development, provides the owner of preserved land fair market compensation for his loss while hopefully costing the municipality next to nothing.

There are many problems with the TDR concept. One such problem is the determination of how many TDRs each owner is entitled to. Equations based on acreage alone are unfair since they don’t reflect the natural and zoning potentials of each parcel. Also, the problem of how many TDRs will be needed for each type of development arises. More should be needed for industrial than residential. Deciding on the numbers of required TDRs becomes therefore a question of what kind of growth the town wants. Who determines this and how? Should the program be state-wide or local (thus encouraging competition between municipalities)? How is the restricted landowner to be compensated when there is no market for his TDRs and he wishes to liquidate his holdings? These problems abound. Many in this state believe that given the present rate of loss of farmlands, the Commonwealth cannot risk wasting time experimenting with a technique such as TDRs which is so full of questions and practical difficulties.

In defense of the TDR concept, it should be pointed out that the benefits of such a program may outweigh the difficulties encountered getting there. Several attempts are now being made at implementing this concept. These include municipal level programs in St. George, Vermont and Sunderland Massachusetts. New Jersey has proposed legislation (Assembly Bill 3192, Municipal Development Rights Act, 1975) to enable municipal implementation of such a scheme. It was passed 49 to 7 by the Assembly session this past year and now is in committee in the Senate. If the technical difficulties outlined above can be resolved in these first attempts, the TDR concept may spread, for its benefits, at least on paper, are numerous.

Zoning Manipulation

The preservation of open space for agricultural use via zoning is the most unpopular with the farmers of all the options discussed here. The reason for this is that by zoning land for agricultural use that which was formerly zoned for development, farmers claim a significant portion of the land’s value is legislated away without compensation. In fact, however, zoning regulations may always be altered.

Clearly the towns have such power. Ch. 40A, s. 2 of M.G.L., Zoning Enabling Act, says in part that the towns may regulate “the location and use of buildings, structures and land for trade, industry, agriculture, residence or other purposes.” There are broad, constitutional limitations most notably the 5th Amendment requirements that private property taken for public use be accompanied by “just compensation” to the owner. The only other basic limitations placed upon the zoning power is that regulation not be unreasonable or arbitrary and that it “bear substantial relation to public health, safety, morals or general welfare.”

Nor are such ordinances invalid merely because the value of the property has been reduced (i.e., such value reduction is not a “taking”). This is an established legal principle recently reiterated by the Supreme Judicial Court.10

There are, however, considerations other than legal. From a policy point of view, it is questionable that the ailing Massachusetts farm economy can be helped by zoning away a substantial amount of the equity upon which the farmer may obtain a bank loan, retire or simply keep as a security should calamity or unexpected expenses strike. Nevertheless, in a policy geared towards preserving as much open space as possible, the zoning powers may have a role to play. Certainly there are situations where the use of “down zoning” from development to agriculture only will be important, particularly on prime and irreplaceable agricultural lands.

Over the next year, a state farm and food policy will emerge as a result of the tremendous amount of time and energy now being expended by those in the Massachusetts Department of Agriculture, the legislature and the private sector. A sound agricultural policy will undoubtedly serve to dispel much of the pessimism felt today in the farming industry. In the meantime, those who cannot shake their gloom should take a ride around the farmlands of the Connecticut Valley, the orchards of Bolton or the cranberry bogs of Cape Cod. They may be a sight for sore eyes.

Footnotes


3 Cloudemas, R. J., Use-Value Farmland Assessments: Theory, Practice and Impact, prepared for the International Association of Assessing Officers, Chicago, 1974. This is perhaps the best study presently available on these kinds of laws and is an excellent starting point for further research.


6 Lodge v. Inhabitants of Swampscool, 216 Mass. 169, 103 N.E. 635 (1913).


9 Nectow v. City of Cambridge, 277 U.S. 183 (1928).

By Michael J. Traft

The Boston Desegregation Case: An Alternative View

When Federal District Court Judge W. Arthur Garrity, Jr. issued his original finding of de jure segregation in the Boston public schools1 and ordered the immediate implementation of remedial measures few expected the extent of the difficulties which would subsequently arise. With the number of neighboring universities and other cultural institutions which could be enlisted to assist in the desegregation process and the generally tolerant reputation that the city possessed, Boston was considered the ideal location for the establishment of a model for the peaceful implementation of desegregation in a Northern urban setting.

Today few would hold Boston out as a model for the success of desegregation. Nearly two years after the initial holding several serious problems continue to exist. Racial tension still permeates the system and in some schools incidents of racial violence are a weekly, if not daily, occurrence. Increased costs for safety and transportation have forced cutbacks in needed educational and maintenance expenses. Inadequacies in pupil assignment have left some schools either overcrowded or underutilized. In addition, according to School Department figures, over 16,000 students, the majority of them white, have abandoned the public school system since 1973 resulting in the transformation of the system from one which was predominantly white to one which is predominantly non-white.14

What went wrong? Why has Boston not responded in the way that many expected? Some place the blame primarily on elected officials who have failed to lend their active support and encouragement to peaceful compliance with the court orders. That analysis, however, does not provide adequate explanation for all of the factors which have contributed to the disappointing results thus far obtained from desegregation. Rather, the fault may lie at least partially with the entire approach to the desegregation process which Judge Garrity has used.

While Judge Garrity's approach has been utilized in a number of other jurisdictions and his specific remedial orders have been upheld by the First Circuit Court of Appeals,2 it has never been clearly determined that this type of remedy is constitutionally required. On the contrary, a strong argument could be made that strict adherence to the notions adopted by Judge Garrity in constructing his remedy in fact conflict with both the letter and the spirit of many Supreme Court desegregation decisions. Rather than assisting in the amelioration of the problems it was designed to resolve, the Phase II remedy ordered by Judge Garrity may have actually made the situation worse.

In any event, whether or not one agrees with that evaluation it is clear that the time has come for a reassessment of the entire approach to the remedial phases of desegregation in light of the experience which has been received from the Boston case.

Immediately upon issuing his original finding the Judge ordered the School Committee to implement a plan for the 1974-75 school year to be known as Phase I. Since that plan was originally drawn up by the State Board of Education as an initial step to enforce a state racial imbalance law and not as a comprehensive city-wide remedy for desegregation, we will not concern ourselves with it here. Rather, it is more appropriate to consider the plan which was ultimately drawn up by the Judge with the assistance of court-appointed educational experts, and which was implemented last September—the plan known as Phase II.

Phase II called for sweeping changes in the Boston public school system. Differing grade structures and old assignment patterns were abolished and in their place the Court established a uniform pupil assignment procedure. The city was divided into eight community districts which with one exception contained racial compositions roughly corresponding to the racial composition of the city as a whole. A ninth citywide school district was also formed consisting of magnet schools which, it was hoped, would attract
students from all districts because of the special educational programs to be offered. Judge Garrity referred to this as the “magic” of his plan and hoped that this opportunity would help to appease those who wished to retain some modicum of choice over where their child would attend school.

In an attempt to institute educational improvements the Judge ordered a revamping of the administrative structure of the school system creating an assistant superintendent for each district and a principal for each individual school. Colleges and universities were enlisted to assist the School Department in developing a curriculum as well as special programs in certain schools and districts. Also, in an attempt to constructively utilize the efforts of those parents most concerned about education, several advisory councils were established: racial-parent councils in each school, community district councils in each district (consisting of parents, students, teachers and community representatives) and a citywide parents council. Monitoring of the desegregation process was to be conducted by a Citywide Coordinating Council, consisting of forty-two recognized community leaders both from Boston and from surrounding suburbs.

The purpose of all of these improvements was to focus the attention away from the principal assignment method to be used — compulsory assignment to schools on the basis of race — or in the colloquial phrase “forced busing.” While even Judge Garrity himself admitted his opposition to the concept of forced busing, he determined that in order for desegregation to be achieved in Boston’s schools, certain racial percentages would be required in each particular school. District schools were not to vary from the racial composition of the district by more than 15%, while the citywide schools were under greater scrutiny and could only vary from citywide racial ratios by 5%. The judge correctly surmised that voluntary methods could not possibly achieve such percentages and thus compulsory assignments were necessary.

Judge Garrity characterized his plan as one which “does not rest on any supposed constitutional right of a student to attend a school that has a particular ethnic composition, or whose ethnic composition matches that of the school system as a whole.” The actual application of the plan creates considerable doubt about the accuracy of that statement.

Like other Federal Court judges who use this approach, Judge Garrity is fond of stating that all other alternative measures for accomplishing desegregation, such as rezoning and providing magnet programs, have been utilized before resorting to the use of compulsory transportation. In fact, if one takes as a premise, as does Judge Garrity, that desegregation requires a relative racial balance in each school in the system (except for those in an isolated geographic area) then the natural housing patterns of any major city would make compulsory assignment on the basis of race an absolute necessity. If there had been no segregation in Boston, no School Committee, however brilliant, could ever have devised a pupil assignment plan which would achieve perfect racial balances without the use of compulsory assignment. It is insanity to expect that large numbers of parents would voluntarily send their children past six or seven local schools in order to attend another school not appreciably different from those nearby. It is even more ludicrous to expect that different parents would choose non-neighborhood schools in sufficient numbers so that precise racial ratios would be achieved, even if a variance of 15% were allowed. Thus the only assignment procedure in a city of the size and ethnic diversity of Boston which could achieve such ratios is a compulsory one based upon race.

The Supreme Court has never interpreted the Constitution to require the elimination of racial imbalance. On the contrary, the pursuit of such a goal by a Federal Court was specifically declared improper in Swann v. Charlotte-Mecklenburg. This position was further refined in two subsequent cases, Keyes v. School District No. 1 and Milliken v. Bradley.

In Keyes, the District Court had determined that any school containing a concentration of 70-75% Negro and Hispano students would be considered educationally inferior. The Supreme Court noted that such a racial percentage formula could not solely be used to determine what is a “segregated” school. “Other factors such as the racial and ethnic composition of faculty and staff and the community and administration attitudes toward the school must be taken into consideration.”

In Milliken, a lower Federal Court had ordered a metropolitan desegregation remedy for the city of Detroit because the Court had found that desegregation within the city limits would be ineffective given the fact that the racial composition of the school system was over 70% minority. In striking down the proposed remedy, the Supreme Court stated that the imposition of a remedy on municipalities which had not been shown to have participated in segregatory practices was a “drastic expansion of the constitutional right itself, an expansion without any support in either constitutional principle or precedent.”

These decisions have played an important role in several recent cases involving charges of racial discrimination. Segregation was not found in school systems in which most of the schools were identifiable black or white where this situation was caused by housing patterns and not deliberate School Board action.

Thus, a judicial double standard has been established. In cities like Boston, where segregation has been found, a remedy is ordered into effect which goes far beyond the traditional principle of equitable relief to restore the plaintiff to the position he would have occupied had there been no discrimination. Instead, the remedy requires racial percentages which could never have
been achieved by any rational assignment process and places the achievement of these arbitrary percentages above all other legitimate educational concerns.

The ultimate irony in this pursuit of mathematical parity is that in Boston, even with the use of compulsory assignment, 85% of the city’s schools were unable to achieve the racial percentages ordered for them by the Court.17

The imposition of strict racial percentages also had a stifling effect upon the magnet schools and in fact could be held to have perpetrated a new form of racial discrimination against blacks. Because of the percentage requirement, strict quotas were placed on the numbers of students of each race who could attend certain citywide schools. In some of the schools far more numbers of students of one race applied for admission than the other. For example, the Martin Luther King Middle School, located in an all-black neighborhood, had a capacity of one thousand, but only approximately two-hundred and fifty whites volunteered to attend. Thus the Court only allowed a comparable number of non-whites to attend, in the process turning away hundreds of black applicants while requiring the school to operate at only half capacity. Many of those turned away who lived in the Dorchester district were instead assigned to the Grover Cleveland Middle School, resulting in overcrowding at that school, and necessitating the opening of an annex in a formerly closed elementary school. Thus, black children were denied admission to a school with an innovative educational program on the basis of race and required to attend an overcrowded school—and one which had a racial composition of 60% minority.

The number of innovations which were introduced by the Phase II plan were adopted at least in part as a means to develop confidence among public school parents in the quality of education to be offered in the schools. The practical applications of many of these theories, however, fell far short of the expectations and in some cases worked to undermine public confidence in the system.

The eight community districts were established primarily to create a stable, cohesive geographical unit within which children could attend various schools in an orderly progression. Racial composition was deemed an important criterion in the establishment of boundaries since great variances in racial composition between neighboring districts, it was feared, could lead to rapid re-segregation.18 Only East Boston was designed to vary greatly from citywide percentages because of its isolation from the rest of the city.

After the students were actually assigned, however, it was discovered that a significant racial variance had developed in Dorchester’s District Five. While the high schools citywide were only 40% black, District Five’s two high schools were 68% black. Similar variances of over 12% had occurred also on the middle and elementary school levels. While the court-appointed experts may have claimed surprise at this result, close observation of the projected enrollment figures for the district makes this result hardly surprising. Under the Phase II plan, the district was projected to contain the highest percentage of blacks of any district in the city, a ratio more than 10% higher than the two adjoining districts. In addition, these figures did not take into account those who would be attending citywide exam schools, the majority of whom would be white. When one also considers other factors, such as the greater amount of neighborhood change in the Dorchester area and the likelihood of racial variance due to the reaching of the so-called “tipping” point (the point at which schools rapidly change from racially balanced to substantially non-white), it is difficult to believe that this change could not have been foreseen by educators experienced in desegregation.

The Dorchester district was also harmed in other ways. Based in part on the restrictive admission policies at the magnet schools, overcrowding existed at all levels of the system. Educational programs also suffered; in a test conducted at the beginning of the school year, 80% of the students at the Cleveland school were found to be reading below grade level, yet not one certified reading teacher was provided for the school.14 Per capita expenditures in District Five schools were also among the lowest in the city despite the presence in the district of perhaps the greatest percentage of underprivileged students — both black and white.15

While all of these actions may not have been deliberate, their combined effect was to penalize those parents and students who had peacefully complied with the court orders while at the same time rewarding those attending school in the sections of the city where the greatest racial violence had occurred.

As mentioned previously, the magnet schools were hampered in their effectiveness by the requirement of strict racial percentages. Their usefulness was further undermined by the presence of a shortage of high school seats throughout the city. As a result, many high school
students who wished to attend a district school were instead forcibly assigned to one of the citywide schools — thereby negating the magnet schools' voluntary status.

The programs for establishing university and community involvement in the educational system also were slow to produce any significant benefits. Many of the college contracts became bogged down in bureaucratic delay either in the School Department, the City Administration or both. In addition, there was some question as to how effective the collaborative effort would be since many perceived the contracts as providing benefits primarily for the colleges and teachers while only peripherally addressing the needs of the students.

The racial-parent and community advisory councils also developed serious problems in attempting to properly define their role. As a result, many local school councils were either never formed or never truly operational. The Citywide Coordinating Council drew wide criticism because its composition did not remotely represent the interests and concerns of the majority of Boston residents. One third of its members did not even live in the city and very few had any children in the public schools. This led to a widespread lack of respect for the organization in the majority of Boston's neighborhoods.

The only areas in which the Court orders could be perceived as providing some positive effect were in the areas of vocational education, bilingual education and special needs. But even there, the Court's role was confined chiefly to ensuring that the School Committee lived up to requirements already established in those areas by state law.

While Phase II has clearly not produced all of the improvements which had been desired, many claim that the mere presence of children of all races in each school will serve in the long run to improve the educational achievement of black children. Recent studies tend to cast doubt on that assertion.

In her book, *School Desegregation Outcomes for Children*, Nancy St. John cumulates data from over one hundred studies of desegregation. After a painstaking analysis of the results of these studies, she has come to the conclusion that desegregation by means of providing certain racial ratios within the schools has no unitary effect on academic achievement. Some children may be helped by it, but others may be harmed, depending on a variety of individual and societal factors. The process by which the school staff implements the plan and the extent to which individual needs and concerns of particular students are addressed were found to be far more relevant factors in the establishment of educational progress than the presence of any particular racial balance or ratio. 14 As St. John points out, "Unless schools are happy environments conducive to growth in competence, self-confidence and mutual respect for minority group and majority group child alike, of what use is mathematically perfect racial distribution?" 15

In proposing recommendations for future desegregation remedies, St. John counsels that courts and School Boards should consider the psychological power of self-determination, the potential harm of school assignment which does not take into account the diverse needs of individuals, and the danger of forcing those who are most hostile into a situation they will resent. In keeping with these principles, she proposes that freedom of choice should be a prime consideration. District lines should be re-drawn and schools within walking distance of each other paired to promote natural integration wherever possible. Combination schools could be established with some students assigned from the surrounding neighborhood and others attracted to the school voluntarily by virtue of some specialized program. Also, within certain guidelines, parents should be given the option to transfer their child out of a school with which they are dissatisfied and to refuse assignment to a school located in a distant neighborhood. 16

Could such a plan be constitutional? No court as yet has adopted all of these recommendations, but there is an indication that many judges are beginning to find fault with the percentage approach to desegregation and are searching for other, more workable remedial measures.

Supreme Court Justice Lewis Powell, in his concurring and dissenting opinion in *Keyes* expresses regret at the direction in which many lower courts are heading:

"Reasonableness in desegregation remedies would seem to embody a balanced evaluation of the obligation of public school boards to promote desegregation with other equally important educational interests which a community may legitimately assert . . . A constitutional requirement of extensive student transportation solely to achieve integration . . . is further likely to divert attention and resources from the foremost goal of any school system: the best quality education for all pupils." 17

Several lower Federal courts have picked up this theme and have applied it
in limiting the remedy imposed upon a particular school district. Federal District Court Judge Frank Johnson allowed the County of Montgomery, Alabama to implement a voluntary desegregation plan although two-thirds of the elementary schools would remain more than 70% of one race. A racial percentage system was specifically rejected because it would "severely and unnecessarily disrupt the operation of the system." Several other courts have issued similar orders in desegregation cases.

Boston has by no means been a model for the peaceful implementation of court-ordered desegregation. But it may well become a classic example of the shortcomings of heavy reliance on the compulsory assignent of students in order to achieve racial percentages. The Constitution is not an inflexible document. Indeed, courts in a desegregation case are required to apply broad equitable principles of reasonableness and feasibility. It would be utter folly to suggest that the Constitution requires the imposition of a remedy which is both ineffective and unworkable. The lesson we must draw from the Boston experience is that courts involved in the complex process of desegregation must pay greater attention to the practical effects and actual consequences of the remedies they propose rather than devoting blind allegiance to discredited sociological and educational theories.

Footnotes

5. Id. at 239.
6. Id. at 230.
10. Keyes, supra. 413 U.S. at 194.
15. Standardized Reading Test conducted by teachers at the Grover Cleveland Middle School.
18. Id. at pp. 121-122.
19. Id. at pp. 124.
20. Id. at pp. 120-131.
Politicians, Know Thy Worth

In a recent decision, Otto Kerner, Jr., 76,012 P-H Memo TC, the Tax Court held that a former governor overestimated his historical value by about $50,000. Following a popular political philanthropic ploy, Otto Kerner Jr., governor of Illinois from January, 1961 to May, 1965, decided to display his generosity to the public by donating his papers and memoranda to the Illinois State Historical Library. As an incident to this angelic act, Mr. Kerner hoped to receive a $73,375 charitable deduction.

It all started in 1968 when Kerner donated his collection of papers, memoranda and writings to the Illinois State Historical Library and claimed a charitable deduction of $24,736.89 on his 1968 income tax return, which was not contested. The taxpayer claimed the total value was $73,375; therefore, on his 1969 return he claimed a charitable deduction carryover with respect to the papers of $21,658.17 which was disallowed. Petitioner also claimed a carryover in 1970.

The donation consisted of 292 boxes, each box containing approximately 2,400 pieces of paper for a total of approximately 700,000 items. Among the various writings included in the collection were carbon copies of all outgoing letters, intra-governmental communications, minutes of cabinet meetings, political campaign materials, Christmas cards, invitations and materials concerning his charitable activities.

Section 1.170-1(c)(1) of the Income Tax Regulations provides that when a taxpayer makes a contribution to a properly qualified charitable organization, and the "contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution." Fair market value is defined in the regulation as "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts."

Kerner retained an experienced appraiser who valued the collection at ten cents a page based upon the cost of storing and copying the material. The appraiser also relied upon the fact that the library was anxious to accept and maintain the aggregation.

The court stated that Kerner's appraiser merely begged the question of the fair market value. Just because the library agreed to accept the collection did not prove it would have been willing to advance funds to acquire it.

The IRS retaliated with its own expert appraiser who testified that the petitioner's estimate was highly inflated. He concluded that the collection could not be worth more than $23,000 or $24,000 and would much more likely be sold for approximately $15,000. The IRS's expert arrived at his fair market value by taking into consideration the limited market for such a collection and the lack of intensity of customer demand within the market's boundaries. Another essential factor in his valuation was his judgment that "the overall quality of the collection was poor because it did not provide insight into how petitioner created policy or made decisions. The papers failed to convey a feeling of the pulse and energy of petitioner while in office." He finally asserted that the collection mainly dealt with the everyday mundane operations of the government and contained a great amount of unnecessary items.

Thus, the inexhaustible and boundless generosity of Kerner was dealt a cold-hearted blow by the Tax Court which, perhaps, did not perceive the extensive historical perspective which evolves from these invaluable archives. However, the people of Illinois have been benefited by the benevolence of their former governor's charitable gift. The disallowance of a $50,000 deduction was merely an insignificant inconvenience which accompanied his munificence.

Francis A. DeLuca

It's Legal! No . . . It's Illegal!

No . . . The Haefeli Case

The Haefeli case is back in the news again with the decision of the Court of Appeals for the First Circuit in Haefeli v. Chernoff, 18 CrL 2315 (December 12, 1975). The case had additional drama in that Judge Tauro of the United States District Court granted habeas corpus relief to the defendant after his conviction had been upheld by the Supreme Judicial Court on which his father sat as Chief Justice in Commonwealth v. Haefeli, 279 N.E.2d. 915, 11 CrL 2007 (1972).

During an investigation for a stolen check-cashing card and passing bad checks, the officer involved was given false names and commenced a search to determine the ownership of the vehicle in which the suspects were traveling. Through the window he could see an envelope on the floor with checks
protruding and, later, the stolen card.

The Supreme Judicial Court had held that the officer had valid reason to search, to investigate ownership, and that there were exigent circumstances which would justify the search.

The Federal District Court in granting habeas corpus, ruled that there were no exigent circumstances and that the warrantless search was invalid. The District Court first relied on the fact that the car was not apprehended while moving on a highway but while parked on a street. However, the court’s reliance was misplaced. In both Chambers v. Maroney, 399 U.S. 42 (1970), and Cardwell v. Lewis, 417 U.S. 583 (1974), the United States Supreme Court upheld seizures made in a public place where access was not meaningfully restricted. In addition, the second factor relied on by the Federal District Court, that there was no evidence of confederates who might abscond with the vehicle, was also eliminated by Cardwell as a bar to finding exigent circumstances.

While reversing the U.S. District Court, the Court of Appeals (1st Cir.) did not extend its ruling to uphold the search on the basis given by the Supreme Judicial Court, nor did it reach the question of the application of the plain view exception. The search was affirmed solely on the basis of the probable cause and the exigent circumstances.

Dennis E. McHugh

Prison Discipline: Can Prisoners Fight Back?


When the Court ruled that the trial judge should have instructed the jury on the matter of defense of another, the decision was criticized as detrimental to prison discipline. Newspaper reports claimed that the decision contributed to the recent disruption at MCI, Concord.

However, the decision is not as far reaching as it originally appeared. When Martin went to assist his fellow inmate he was under the impression that the inmate was being beaten wrongfully by prison guards. Martin denies using a knife to help in the fracas that followed. The Court explained that one is justified in using force to protect another when "(a) a reasonable person in the actor’s position would believe his intervention to be necessary for the protection of the third person, and (b) in the circumstances as that reasonable person would believe them to be, the third person would be justified in using such force to protect himself. The reasonableness of the belief may depend in part on the relationships among the persons involved . . . The actor’s justification is lost if he uses excessive force, e.g., aggressive or deadly force unwarranted for the protective purpose," at 347.

Within the factual context of the Martin case, the locus could significantly affect the reasonableness of the intervenor’s judgment. In addition, if the jury were to believe the Commonwealth’s contention that the defendant Martin was indeed the man with the weapon, then the question of excessive force would be raised.

The convictions for assault and battery on a guard of a correctional institution, assault and battery with a dangerous weapon and armed assault with intent to kill were reversed and the verdicts were set aside.

D.E.M.

Leo J. Nolin Knows How to Wait

The 73-year-old Norfolk lifer has been waiting for nearly 49 years in Massachusetts state prisons hoping that someday, somehow, he’ll be freed.

His case, at long last, may get to the Supreme Judicial Court this spring. He is petitioning for a new trial, alleging that his Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment rights were abridged at the time of his conviction in 1927.

In February his motion for a new trial was denied in Essex County Superior Court, Lawrence—the same court from which Nolin was convicted of shooting a Haverhill shopkeeper over a prohibition bottle of bootleg booze almost half a century ago.

The 60-page memorandum filed by his court-appointed counsel in support of his motion for a new trial, reads like a mini-course in criminal procedure.

His murder trial shared headlines in the local press with Sacco-Vanzetti, Lindbergh’s landing in Paris, Babe Ruth’s 60 home runs and the escapades of Chicago’s Al Capone.

He was convicted of murder in the second degree. A person convicted of second degree murder today would be eligible for parole in about 15 years. But Nolin got “lost” and for reasons not quite clear, minus an official record, no appeal was ever filed on constitutional or any other grounds.

Sent from Lawrence to the now-razed Charlestown jail, he was put into solitary in the prison’s segregated unit for six years following the shooting of a jail guard. He contends that not only was he not involved in that shooting, but that he never even received a hearing before being confined.

There he read what few magazines were provided, ate food which was

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shoved through a slot in the door and paced...completely wearing out a floor.

Finally, after some 1890 days of not seeing a human face, he decided no one was going to help. So he pulled out the toilet, flooded the area and was sent to Bridgewater State Hospital for a "brief" psychiatric exam.

Despite the horror stories about Bridgewater which have subsequently come to light, Nolin thought it better than Charlestown so he decided to be "crazy" and stay. "Who knows, after six years of solitary, maybe I was kind of crazy," he said.

That put him out of the correctional system and its parole review process. He stayed there, subject to the State Department of Mental Health and what he describes as its "once-in-a-great-while" psychiatric exams...for an unbelievable 35 years.

In 1969, hearings for the Bridgewater inmates started, as the result of new procedural safeguards for the criminally insane. These safeguards followed a decision involving an inmate at New York's Dannemora State Hospital, United States ex rel. Schuster v. Herold, 410 F.2d 1071 (2d Cir. 1969), cert. den. 395 U.S. 81 (1969).

Found sane he was sent to Walpole and a year later to Norfolk. Judge Roger Donahue, who was assigned the case specially by Chief Justice Walter H. McLaughlin, denied the new trial based on his interpretation of Massachusetts General Laws Ch. 278, §29, which limits his powers to grant a new trial to cases where it appears that "justice may not have been done." At issue only was the original trial, not what happened following sentencing.

In effect, a new trial would have set Nolin free. His status would have reverted to innocent and the prosecution would hardly have been able to come up with witnesses 49 years after the fact.

Admitted as the trial record in the absence of an official one dating back that far were accounts of the trial printed in the Lawrence Evening Tribune and the Haverhill Gazette. Based on those, Judge Donahue found that justice appeared to have been done, and in a three-page memorandum explained that "evidence was overwhelming against the defendant."

He highly commended defense counsel, however, for "his thorough and distinguished work" and noted to counsel that he expected an appeal.

A spokesman for the Massachusetts Parole Board meanwhile has said that Nolin's five denials of parole have been based on his lack of furlough time and "experience in the community." Nolin contends that the furlough office at Norfolk won't let him out. Furthermore he has very few places to go...and no relatives who want him, he said.

In its appeal to the SJC for a new trial the defense will contend that:

A fair trial was denied by an impartial jury, Duncan v. Louisiana, 391 U.S. 145 (1968) and Marshall v. United States, 360 U.S. 310 (1958), by virtue of the prejudicial effect of extensive pre-trial publicity, Marson v. United States, 203 F.2d 904 (6th Cir. 1953), and the improper admission of evidence and direct testimony from two co-defendants who subsequently went free. Bruton v. United States, 391 U.S. 123 (1968), Roberts v. Russell, 392 U.S. 293 (1968); Commonwealth v. Carita, 356 Mass 132, 249 N.E.2d 5 (1959). (One co-defendant who turned state's evidence and admitted he was outside in a car was adjudged innocent. The other was found guilty of being an accessory but freed without sentence).


Evidence was improperly admitted in the form of testimony from the victim of the alleged homicide, purportedly establishing pre-trial identification of Nolin, without sufficiently establishing that the victim knew he was dying or giving a dying declaration. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

The trial judge erred in denying a motion to remove the case from the jury because of the newspaper publicity; in denying motions to strike self-serving testimony of the co-defendants; in failing to charge the jury on manslaughter as requested by counsel, and in failing to exclude a single photo pre-trial identification, Bruton v. United States, supra; Gilbert v. California, supra; Chapman v. California, 386 U.S. 18 (1967), Fahy v. Connecticut, 375 U.S. 85 (1963), and Della Paoli v. United States, 352 U.S. 232 (1957).

Further, counsel maintains that to keep Nolin in prison longer is the continuation of cruel and unusual punishment in violation of Constitutional guarantees.

He's said if necessary he'll take the case all the way to the United States Supreme Court. . . . if Nolin lives that long.

Marcia D. Brockelman

Racially Motivated Mortgage "Redlining" is Illegal Under 1968 Civil Rights Act

In the first federal court decision on mortgage "redlining," a practice whereby banks refuse to make mortgage loans in an area regardless of the credit worthiness of the borrower or the condition of the property, the United States District Court for the Southern District of Ohio found that a prospective white home buyer who desired to purchase a home in an integrated neighborhood and was refused a mortgage has a cause of action under Sections 804 and 805 of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. §3604 and 3605. The court explained in Lauffman v. Oakley Bldg. & Loan Co., 404 F.Supp. 791 (1975), that banks which routinely refuse to lend mortgage money in neighborhoods populated by minority groups could be practicing in violation of the Fair Housing Act. The opinion strongly announced that "redlining," when based on racial grounds, is illegal under the Civil Rights Act of 1968. The home buyer in this case contended that "redlining" is prohibited by the plain language of §§804 & 805 of Title VIII of the 1968 Civil Rights Act, but the banks read these provisions as not prohibiting "redlining."

Section 804 prohibits discrimination in the sale or rental of housing. Although the bank argued that it is not engaged in the sale or rental of housing, the court found that the broad mandate of Section 804 warranted its application
to situations which extend beyond the purview of the terms “sale or rental.” The court reasoned that the denial of the loan application occurred in connection with the sale of the dwelling. “The cost of housing being what it is today, a denial of financial assistance in connection with the sale of a home would effectively make unavailable or deny a dwelling.” Section 805 prohibits the denial of a loan because of the borrower’s race. The court however, reasoned that the practice of “redlining” falls under the proscription against the denial of loans and financial assistance on the basis of race where the purpose of the loan is to finance the purchase of a home in an integrated neighborhood.

The opinion is one long awaited by civil rights activists who feel that once lenders refuse to invest because they fear a neighborhood is declining, the effect is a self-fulfilling prophecy that sentences the area to inevitable decay. In response, lenders contend they cannot risk their depositors’ money by making “bad loans.” The petitioners in this case, a white couple, were attempting to buy a home in an integrated neighborhood. The court indicated that their credit was not at issue.

In an effort to halt “redlining” practices, President Ford signed a law scheduled to take effect in June of this year, which requires federally regulated lending institutions with more than $10 million in assets to report the number and size of loans they grant by census tracts. In addition, bills have been introduced in some state legislatures, among them Pennsylvania, Missouri and Massachusetts, which are designed to force lenders to invest in specific areas.

In response to the fear that more mandatory regulations will be implemented, such as the ones previously discussed, states are instituting voluntary programs to address the issue of “redlining.” Massachusetts, under the guidance of Governor Michael Dukakis and Banking Commissioner Carol S. Greenwald, recently announced the formation of a voluntary mortgage review board designed to end discrimination against inner-city loan applications. This board, officially known as the Boston Banks Urban Mortgage Review Board, met for the first time on March 23, 1976. The 12 largest mutual savings banks in Boston have agreed to participate in the program. The board, consisting of representatives of banks, civil rights groups, and government, will review rejected loan applications. If a majority of the board agrees that the loan was denied because of the location of the house the potential mortgagor seeks to purchase, the board will recommend that the bank involved grant the loan. If the bank again declines, then one of the other participating banks will be asked to take the loan. None of the participating banks, however, will be required to issue the loan. The program is entirely voluntary.

It is highly unlikely that we have seen the last of these cases dealing with the increasingly severe problem of the unavailability of mortgage credit for inner-city borrowers.

Nina M. Wells

Retribution First

Throughout the 1950’s and 1960’s, rehabilitation had been the primary goal of the American prison system. This goal was dramatically re-asserted five years ago following the Attica prison calamity. Since that time, however, there has been a sharp shift to the right on prison methodology. The rising trend is toward a prison system based on retribution first, and rehabilitation second.

Advocates of the change have come from such diverse groups as “disillusioned liberal reformers” to conservative legislators to prisoner rights organizations. Among the ranks of those sponsoring the “new realism” are liberal Democratic Senator Edward M. Kennedy and conservative Republican President Gerald R. Ford.

There are numerous reasons why these varied factions are moving away from rehabilitation as the primary objective of the prison system. First, and most apparent, is that rehabilitation is simply not working. Andrew Hacker wrote, in a 1973 article “Getting Used to Mugging,” that recidivism rates have increased as a result of the failure of rehabilitation programs. He said, “Many of us wonder whether we can still afford to treat our street-corner gunslingers as sociological casualties.” His argument has fallen on receptive ears as many seem to have lost faith in the wisdom of “treating” criminals.

Second, it is argued that rehabilitation has not conformed to the altruistic standards set by its early liberal supporters. Stephen A. Bennet, the editor of Trial Magazine wrote that, “Advocates of retribution argue that not only is it meaningless to continue rehabilitation. it is contrary to its imagined humanitarianism. Allowing parole authorities to keep an inmate in prison until he is ‘rehabilitated’ becomes a perverted toying with human life.” At what point a person becomes rehabilitated is obviously a very subjective judgment which is made under highly artificial conditions. The better the criminal can perform, the shorter amount of time he’ll remain in prison.

Third, retribution proponents argue that rehabilitation should be available to those individuals who volunteer. It is asserted that only a minority of inmates truly want to be rehabilitated, absent any parole incentives. For these few, the prison system will be able to provide a better program of rehabilitation than is possible under the present “rehabilitation for all” policy.

Fourth, and finally, retribution first and rehabilitation second represents the real concern that today’s high crime rates have stirred within our society. Whether the conservative reaction is justified is an open question. But as Stephen Bennet asks: “Who would have recommended rehabilitation for Adolph Eichmann?”

Ronald R. Sussman

Ristaino v. Ross, an Epitaph for Ham v. South Carolina

In 1970, a black civil rights worker was on trial for possession of marijuana, his defense being that he had been “framed” and that the police “were out to get” him because of his civil rights activities. Ham v. South Carolina, 409 U.S. 524, 525 (1973). Defense counsel requested that prospective jurors be asked:

Would you fairly try this case . . . disregarding the defendant’s race? You have no prejudice against negroes? Against black people? 409 U.S. at 525 n.1.2.

The trial court refused and instead asked general questions prescribed by South Carolina law such as:

Are you conscious of any prejudice for or against him? Can you give the State and the defendant a fair and impartial trial? 409 U.S. at 526 n.2.3.

The defendant was then tried and convicted.
The United States Supreme Court reversed the conviction on the ground that to refuse to interrogate the prospective jurors as to possible racial prejudice "under the facts shown by this record" was to deny the petitioner of the "essential demands of fairness" in violation of the Due Process Clause of the Fourteenth Amendment.

In the meantime, a black defendant in Massachusetts had been tried for and convicted of assaulting a white, uniformed security guard at Boston University. Defense counsel had requested that prospective jurors be specifically questioned as to possible racial prejudice but his request was also denied. Instead questions equally general to those asked by the trial court in Ham were asked and his conviction was affirmed. Commonwealth v. Ross, 282 N.E.2d 70 (Mass. 1972). Ross' petition for certiorari was granted, however, and the case was remanded for reconsideration in light of Ham.

The Supreme Judicial Court again affirmed Ross' conviction on the ground that unlike Ham, who was well known in the locality for his civil rights activities, Ross was not a "special target" for racial prejudice and therefore the Ham ruling was inapplicable. Commonwealth v. Ross, 296 N.E.2d 810 (Mass. 1973). Ross again sought certiorari but the writ was denied. 414 U.S. 1080 (1973) (Marshall, Brennan and Douglas, JJ., dissenting).

On collateral attack, the Federal District Court granted a writ of habeas corpus, Ross v. Ristaino, 388 F. Supp. 99 (D. Mass.) and the Court of Appeals affirmed, 508 F.2d 754 (1st Cir. 1974). The Court of Appeals reasoned that to ask specific questions pertaining to possible racial prejudice only when it is shown that the defendant is a "special target" for racial prejudice was to assume that if a juror were prone to racial prejudice he would confine that prejudice and its destructive effects on his impartiality to cases where the defendant was a civil rights leader. The court stated that the fact that a juror might be particularly prone to "vent his bias" in such a case lends no support to the conclusion that he would be impartial absent the "special circumstances." 508 F.2d at 756 n.4.

The court also reasoned that since the defendant was charged with a crime of violence against a white, uniformed security guard, he was in fact a "special target" for discrimination and the specific questions should have been asked.

The First Circuit was not without company in its holding since most of the cases decided after Ham and many prior to that decision require that specific questions pertaining to possible racial prejudice be asked when the defendant is a member of a racial minority without any showing of aggravating circumstances.

In Ristaino v. Ross, 44 U.S.L.W. 4305 (1976) (No. 74-1216) however, the Supreme Court in a 5-1-2 decision reversed the First Circuit ruling, holding that not all members of a racial minority are entitled to the specific questions and further that the fact that a defendant is charged with an interracial crime of violence is not in and of itself sufficient to invoke the Ham ruling.

Adopting the Supreme Judicial Court's reasoning, the Supreme Court distinguished Ham on the ground that, unlike Ross, whose only claim of special circumstances amounted to an assault upon a white security guard, Ham was a civil rights activist, known well in the locality who claimed that he was the subject of racial discrimination by the police because of his activities, thereby making racial issues "inextricably bound up with the conduct of the trial."

Had Ross been tried in a federal court, the outcome may well have been different since Aldridge v. United States, 283 U.S. 308 (1931) required specific questions were a black defendant was charged with murdering a white police officer without any further showing of special circumstances. Although the Court in Aldridge relied upon several state court opinions as attesting to the "widespread sentiment" that fairness demanded that specific questions dealing with racial prejudice be allowed, the Court in Ross said that in light of their present holding, the result in Aldridge should be recognized as an exercise of the Supreme Court's supervisory power over federal courts. 44 U.S.L.W. at 4308 n.10. It appears that Aldridge is still good law in the federal court system. It is hard to imagine, however, a case in which the specific questions will be required in a state court, unless of course the defendant happens to be a black, civil rights leader who is well known in the community for his civil rights activities and who also claims that he has been framed.

Chester L. Tennyson, Jr.
Justice Rehnquist to be Honored

William H. Rehnquist, Associate Justice, United States Supreme Court, will be honored in ceremonies at Suffolk on May 3. Mr. Justice Rehnquist will be present for the dedication of the Phi Delta Phi International Fraternity as the Suffolk chapter's namesake and first honorary member.

Already the largest of the legal fraternities at Suffolk with 29 members, Phi Delta Phi has 103 other chapters throughout the United States, Canada and Mexico. Founded in 1859, it is the oldest legal fraternity. Members include President Ford and seven of the nine Supreme Court justices.

On hand also will be the International President of Phi Delta, the Province President and the International Council. These include lawyers, professors and law students from Washington, D.C., Seattle, San Antonio, New York City and Virginia. Returning to preside at the ceremonies will be Henry Berliner, Chairman of the District of Columbia Judicial Advisory and Removal Commission. Also present will be Terry Claassen, Counsel to Futures Commodities Exchange Commission.

Sulab Expansion

During recent years there has been an ever-increasing demand by law students for clinical education. With scarce opportunities to acquire meaningful first-hand experience by way of part-time or summer employment, students are turning to the school to provide clinical programs to supplement their academic curriculum. One of the more successful and highly popular of these programs is the Suffolk University Legal Assistance Bureau (SULAB).

At its inception five years ago, SULAB was known as Beverly Legal Aid Inc. This non-profit corporation was created by a handful of Suffolk Law students determined to provide needed legal assistance to the North Shore of Metropolitan Boston. With the exception of Lynn, Essex County was devoid of legal services for the poor. Through donations from members of the community, funds from the Office of Economic Opportunity and appropriations from the Suffolk Law School Student Bar Association, Beverly Legal Aid Inc. was born. Borrowing form letters and manuals from other legal aid offices in greater Boston, and soliciting advice from clerks, judges and members of the local bar, a group of idealistic students began to furnish legal services to the indigents of Essex County.

In 1973, Suffolk University Law School, impressed by the effectiveness of the program and cognizant of the need for a clinical program in the civil area of law, adopted Beverly Legal Aid Inc. The Law School changed the name of the Corporation to SULAB and totally funded the operation. With its official recognition of the program, the Law School supplied a faculty sponsor, Professor Charles B. Garabedian, and a supervisory attorney, John David Schatz. Mr. Schatz, a founder of the original organization, was charged with the responsibility of locally administering the program and teaching a course in the substantive and procedural aspects of the Bureau's operation.

During the first two years as a school-supported program, all interested second-year day and third-year evening students were able to participate in the program. The only requirements were that the interested student be in good academic standing, and be enrolled in or have completed a course in evidence. To assist the student, Prof. Schatz has prepared an extensive manual on how to prepare client interviews and procedures for filing and litigating an action. The SULAB program takes in clients between October and April and during the past year the program provided legal services for approximately 350 clients. To cover any matters which may extend into the summer, SULAB employs two work-study students along with the constant supervision of Prof. Schatz.

First year students who are interested in SULAB for 1976-77 should be aware of the following: Next year admittance to the program will require taking a correlative course such as Landlord-Tenant Law, Consumer Protection, or Family Law during the first semester. All prospective candidates will be screened by Prof. Schatz in order to evaluate the students' reasons for desiring to be in the program.
and what he or she has to contribute. Enrollment is tentatively planned at a maximum of 60 students.

Because of the increased interest in participating in the program, Prof. Schatz is looking into ways of expanding the program. In the future there are possibilities that SULAB offices may open in Charlestown and on the South Shore. Prof. Schatz has been negotiating with the Kennedy Center of Boston in Charlestown since November, 1975, in the hope that SULAB can open up an office in that facility to serve the residents of Charlestown. The Center is only a fifteen minute walk from the school. If approval is given by the Center, the school, and the courts, Suffolk Law students will have an opportunity to handle cases in the Suffolk Probate Court, Charlestown District Court and the Boston Housing Court. The expansion will require proper supervision and Mr. Schatz is making a recommendation to the trustees to hire a full-time assistant.

SULAB has an excellent reputation in the Beverly area. The office receives referrals from the Judiciary, the Probation Department, the Welfare Department, community service organizations, and members of the bar. All of SULAB's prospective clients are carefully screened to make certain they qualify for free legal services. Their only costs are actual filing fees and sheriff's costs.

Prof. Schatz feels that clinical education has been viewed as an entity distinct from the academic curriculum. He feels an emphasis should be made to integrate clinical education into the curriculum to provide an expanded law education. An ever-increasing number of students feel the same way.

The Council is presently preparing to appear before a hearing of the Department of Transportation on the Council's proposal to require theft-resistant locks on automobiles. This is an attempt to decrease the 96 million dollars a year which consumers lose in auto thefts.

Ms. Pote has filed a bill in the State legislature to create consumer courses in schools, starting in the 4th grade, although Ms. Pote believes "... it really should begin in the first grade." To implement this proposal, Ms. Pote has arranged that high school teachers will receive free instruction in these courses at Suffolk University starting in March.

In the future the Council will be working on rent control and the buying of drugs by generic name. The Council will also be investigating the manner by which the Rate Setting Commission, a part of the Public Utilities Commission, arrives at its figures. The Council, in conjunction with this, will be considering the possibilities of LifeLine, the concept of giving phone service to those elderly who can not afford the service.

In addition to her other positions, Ms. Pote is a member of the Legislative Commission for Property Damage Insurance, which is a sub-body of Senator Foley's and Representative LaFontaine's Special Legislative Commission Studying Automobile Insurance. Ms. Pote fought the 200 dollar deductible insurance on property damage since in her opinion it accomplished nothing. In the future Ms. Pote said that there is the possibility of a merit rating system which could be in effect within a year. This Commission was created in response to the widespread criticism of the costs of the no-fault insurance system, especially property damage. As a result, Ms. Pote is involved in what could be the total revamping of the innovative no-fault system in Massachusetts.

Doris Pote
Doris Pote, Registrar of Suffolk University Law School, was appointed to the Massachusetts Consumer Council on July 7, 1975. The Council is an independent watchdog agency, nominally placed under the direction of the Secretary of Consumer Affairs. Its purpose is to educate the public and to act in matters which are adverse to the consumer. In general, the Council carries out its duties by appearing at Federal and State hearings, advising the Attorney General, and by filing legislation.

Suffolk Law Forum
The Suffolk Law Forum, chaired by Baker Smith, continues its presentation of timely and informative public speakers to the Law School.

On February 5th, James D. St. Clair addressed an overflow audience on the topic "Trial Without Error." Mr. St. Clair stressed that organization and planning are the keys to success in any trial. Eschewing the "back of the envelope" technique, he outlined the use of his now-famous trial book. Briefly, the trial book is a loose-leaf binder which includes a chronological sequence of events, a synopsis of discovery materials, an index of items and documents noted as to admissibility problems, a sequence for calling witnesses, a written outline of direct examination for each primary witness, and an index of all of the above. Mr. St. Clair emphasized that the use of the trial book helps guarantee self-confidence and is essential for comprehensive, errorless trial preparation.

Ethel Payne, CBS radio commentator and syndicated columnist, addressed the Law School on February 19th. Ms. Payne, who had just returned from a trip to Africa, spoke on "Foreign Policy: The Urgency for Change." Ms. Payne is presently Associate Editor of the Sengstacke Newspapers syndicate and is heard weekly on the CBS Radio Network "Spectrum" series. She has received the First Prize of the Illinois Press Association for a series on child adoption and in 1973 was named "Media Woman of the Year." A member of numerous legislative committees concerned with crime prevention, Ms. Payne has found time to collaborate on the publication of the book, Crime and Citizen Action As Deterrent.

Sports Attorney Bob Woolf, speaking in the Donahue Building on March 4th, said that there should be a federal regulatory board involved with sports. He said further that he is all for players' associations and thinks that more should be done through them on an individual basis. "Most of the time, everyone's reading all about these large contracts and it's only the star or the superstar." Woolf added that the only way the average player can participate fairly is through the players' associations, and that some athletes are being paid unrealistic sums having no basis in economics.

Attorney Roger Allan Moore addressed the Law Forum on Thursday, April 20, 1976. Mr. Moore, a partner in the firm of Ropes & Gray, spoke on "The Reactiory Consequences of Liberal Political Reform." A former Legal Assistant to the Attorney General of Massachusetts, Mr. Moore also served as a member of the Board of Foreign Scholarships, United States
Department of State. At age 44, he is Chairman of the Board of the National Review magazine and recognized as one of the most articulate young spokesmen for the intellectual conservatives.

SWLC

Four years ago a small nucleus of women law students formed the Suffolk Women's Law Caucus, which today numbers over 40 active members. The Caucus has been actively engaged in increasing the Suffolk University community's awareness of current legal and social issues involving women and in so doing, enhancing Suffolk's stature as a socially active law school.

This year the Caucus' continuing internship program has placed over 20 Suffolk University Law School students in Boston area agencies, which provide them with first-hand experience in dealing with legal problems concerning women. Internship agencies include: the Massachusetts Commission Against Discrimination (MCAD), the Women's Rights Project of the Civil Liberties Union of Massachusetts (CLUM), the Attorney General's office, and the Special Legislative Committee to Study the Effects of the Massachusetts State Equal Rights Amendment (on existing State law). As the caucus continues to expand this program, more and more Suffolk students will be able to broaden their law school experience and in turn enrich the Suffolk community with fresh ideas and programs.

On April 10, at Suffolk, the Caucus will sponsor a day long conference on Women's Rights in conjunction with the Women's Equity Action League (WEAL). Much planning has gone into 14 workshops which will focus primarily on Massachusetts laws affecting women. Each will be chaired by a lawyer and a lay expert in the particular field. The topics to be covered include:

- wills, estates, and insurance
- separation, divorce, child custody
- consumer rights and small claims
- court
- education (both 622 and Title IX)
- gay rights
- employment rights
- marriage rights and credit
- the state Equal Rights Amendment
- filing a sex discrimination suit
- operating your own business
- criminal law and criminal issues
- women and health issues
- constitutional law and sex discrimination

The conference has been well publicized and a large turnout from the greater Boston area is expected.

To keep the Suffolk community up to date on issues affecting women, the Caucus publishes a newsletter approximately every six weeks. Major articles this year have included: a follow-up on the Edelin case, a series on classroom sexism, a review of Susan Brownmiller's Against Our Will: Men, Women and Rape, articles on name change, no-fault divorce, the historical origins of the Equal Rights Amendment, and analyses of the Quinlan decision (the right to die) and the O'Connor v. Donaldson decision (the right to treatment). Subscriptions to our newsletter are available upon request. The Caucus has found that the newsletter provides both a forum for thoughtful consideration of legal issues and a catalyst for discussion among the students of current problems.

Seventeen Caucus members attended the Seventh National Conference on Women and The Law at Temple University Law School in March, making Suffolk's one of the largest delegations present. Suffolk delegates covered more than three-quarters of the 99 different workshops and are putting together a handbook summarizing current legal thinking in many diverse areas affecting women. Several area law schools have already expressed interest in this handbook and it is expected to receive wide circulation. It should also be of assistance to the increasing number of lawyers with cases in which subtle forms of sex discrimination may be at issue. (The handbook will be available upon request.)

Finally, the Caucus will be ending up this year with a two-fold presentation on Law Day. The first presentation will consist of a panel of three attorneys discussing how the Massachusetts State Equal Rights Amendment will affect existing State laws and which areas of law will not be affected by it — the discussion will touch labor law and employment, family law, public education, and criminal law and corrections. The second presentation will feature Florence Luscomb, a suffragist and early fighter for equal rights for women. She will share her experiences in the women's movement of the early twentieth century. This should prove to be an informative and inspiring wrap-up for a very active year.

Law Day 1976

On April 30 and May 1, Suffolk University Law School will celebrate Law Day, a rededication to freedom. Seminars and workshops will begin the weekend on Friday, April 30, and will concern themselves with current legal problems. On Saturday morning the Massachusetts Criminal Trial Lawyers will present a mock civil trial, featuring leading advocates. Personnel from Fort Devens plan to conduct a courtroom, followed by a seminar on military law.

On Saturday evening at 6:00 p.m., the Copley Plaza will play host to our Law Day Dinner. The featured speaker will be William Rusher, publisher of the National Review.

Friday, April 30:
9:00 Current Adoption Laws
10:00 Rape — Boston Police Seminar

Lunch
1:00 Florence Luscomb, woman's rights advocate
3:30 Federal ERA — Evelyn Pitscke, legal counsel to Phyllis Schaffley
4:30 To be announced

Supper
7:30 Massachusetts Bay Development Panel Discussion

Saturday, May 1:
10:00 Massachusetts Criminal Trial Lawyers — Fort Devens Legal Staff
6:00 Copley Plaza Hotel — Cocktails
7:00 Dinner
9:00 Dancing
Alumni News

1936
H. Edward Snow, JD, has retired from Natick, Massachusetts, District Court after 21 years.

1941
John R. McClaren, JD, has recently been elected Vice President and corporate counsel for J&S Hydraulics, Inc., of Milford, Massachusetts.

1957
Anthony J. Bille, BSBA '54, JD, is a tax partner with Sullivan, Bille & Company in Boston, Massachusetts.

1960
Robert F. Cox, JD, is Assistant General Counsel with the American Mutual Insurance Companies in Wakefield, Massachusetts.

1963
Robert Goodnow, JD, has joined the law firm of Cormier and Doucette in Worcester, Massachusetts.

1967
David S. Tobin, JD, is with the law firm of Pompeo, Giroux, Tobin and Kineen in Boston, Massachusetts.

1968
Eugene F. Grant, BSBA '65, JD, practices law in Boston and Malden, Massachusetts. James B. McElroy, JD, has joined Attorney Arthur Stavisky as an associate in Great Barrington, Massachusetts. Francis S. Moran, Jr., JD. Captain in the U.S. Air Force, has earned the Meritorious Service Medal. Edward J. Murphy, JD, has been appointed by Massachusetts Attorney General Francis X. Bellotti as a special Assistant Attorney General.

1969
Francis P. Balas, JD, announces the formation of a partnership for the general practice of law under the firm name of Hall & Balas, in Westford, Massachusetts. W. Robert Graves, JD, is an associate of the law firm Morgan and Graves in Winchester, Massachusetts. Stephen W. Wight, JD, is a partner with the firm Miraghiotta & Wight in Lawrence, Massachusetts.

1970
John J. Grant, Jr., AB '64, JD, is practicing attorney in Malden, Massachusetts with the law firm of Donnelly, Rogovin, Appleyard, and Grant. C. Rayford Quinn, BSBA '64, JD, is a practicing attorney in Woburn, Massachusetts.

1971
Michael J. Murphy, JD, has been appointed City Solicitor for Springfield, Massachusetts.

1972
Blaise P. Berthiaume, JD, is practicing law with Robert R. Waldo in Worcester, Massachusetts.

1973
James Belliveau, JD, was appointed Special Assistant District Attorney for Middlesex County, Massachusetts. Walter P. Faria, JD, is currently practicing law in New Bedford, Massachusetts. Richard Michael Lane, JD, is a practicing attorney in Boston, Massachusetts. Ralph R. R. Odour, JD, announces the opening of his law office in Boston, Massachusetts. James Arnold Paisley, JD, has been appointed instructor in Business Law at Garland Junior College in Boston, Massachusetts.

The winners of the 1976 Justice Tom C. Clark Moot Court Competition were Aline Lotter and Walter Oney. They argued for the petitioner.

The runners-up in the competition were Geline Williams and Neil Philbin. Geline Williams also won the Chief Justice G. Joseph Tauro Oral Advocacy Award.
1974
Donald Baillie, JD, has joined the law firm of Dice Fazzone and Nuzzo in Connecticut. Ralph F. Champa, BS '72, JD, is the founder & President of The Champa Corporation, Professional Real Estate appraisers, and is founder and President of the Industrial Construction Company. Sumner F. Kalman, JD, announces that he is now engaged in the general practice of law in Plaistow, New Hampshire. David J. Keating, JD, is an Executive of P. J. Keating Company in Fitchburg, Massachusetts. Thomas A. Meade, JD, announces his association with Attorney Louis H. Cohen for the practice of law in Springfield, Massachusetts. Alex L. Moschella, JD, has been appointed Project Director of the Massachusetts Bar Association's Specialized Training and Advocacy Program. Robert Daniel Parrillo, JD, is an attorney with the Boston, Massachusetts, firm of Lyne, Woodworth, and Evarts. Anthony E. Penski, JD, is practicing law in Gardner, Massachusetts.

1975
Robert C. Rufo, JD, is presently an instructor in the Legal Practice Skills program at Suffolk University Law School.

In Memoriam

Law Alumni Information
In the process of updating their records, the Alumni Office has gathered some interesting information. As of February, their files showed 7,607 Suffolk Law Alumni, of which 2,843 are classified as lost.

For those whose whereabouts are known, the following geographic distribution applies:

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<th>State</th>
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<td>Other</td>
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</table>

The office requests that address changes and information about 'lost' alumni be submitted to them at:
Office of Alumni Records
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