the Advocate

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Directing Auto Insurance Reform: No-Fault Revisited

Restricting Municipal Workers' Right to Travel: Many Unanswered Questions
The brief people.

(Emphasis supplied.)
Table of Contents

Massachusetts Auto Insurance Reform ........................................... 2
by Senator Daniel J. Foley

Residency Requirements: An Infringement on The Right to Travel .......... 8
by Thomas Caruolo

Developments in The Law Regarding Involuntary Early Retirement ......... 12
by John H. Post

Legal Insurance: Bridging the Gap in Professional Services ............... 18
by William Price

Protection of Performer’s Rights Against Voice Imitation in Commercial Advertising ......................................................... 23
by Kathleen A. Voccola

The State of the Constitution Today: Are Benign Quotas Obsolete ....... 29
by Alexander Weir III

Legal Briefs ................................................................................. 35
Meditation or Prayer: The Import of a Two Letter Word
Forty-nine Going on 50 ... Leo J. Nolin Still Waits
Inmate Rights
A Conflict of Ethical Standards
A Break For Innocent Beneficiaries
I’m Suing You ... Dear:
The Last Word on Initiative Petitions ...
Who Has It

Book Review .................................................................................. 43
Lawyers’ Ethics in an Adversary System

Suffolk Notes .................................................................................. 45
Senator Kennedy at Suffolk
Suffolk Gains at ABA/LSD Convention
An Asset for Suffolk
The Outside Clinical Studies Program
Alumni News
In Memoriam

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Massachusetts Auto Insurance Reform

With the recent enactment of far-reaching auto insurance reform, insurance companies and state regulatory authorities now have the responsibility of liberating nearly 3 million Massachusetts motorists from the most costly and most unfair system in the nation.

The Legislature has acted in good faith and with much courage in providing the framework for true reform; it is now up to the insurance companies and the state insurance commissioner to carry out their responsibilities and thus make reform a reality for the motoring public.

It would be unrealistic to expect immediate and substantial reductions in insurance rates, due to the effects of onrushing inflation on claim costs. However, we have every reason to expect that the new and constant threat of merit rating surcharges, the tighter requirements on claim procedures, and the mandatory $200 deductible for collision and comprehensive coverages authorized as of last January 1st will work in combination to reduce insurance premiums within a few years.

In any event, we no longer will have a situation in which drivers with multiple claims and traffic law convictions pay no more for their insurance than drivers with infrequent or no claims and convictions. Under the prescribed merit rating system, the so-called “problem motorist” will have to pay a fairer share of his claim losses.

The following is an analysis of Chapter 266 of the Acts of 1976:

I. Merit Rating

It has been established that the good driver in Massachusetts, comprising about 85% of all motorists, is paying from $50 to $100 each to subsidize the losses of bad drivers. Subsidization of this magnitude is clearly unconscionable and provides no incentive to drive carefully.

Chapter 266 of the Acts of 1976 includes provisions for merit rating plans which will develop severe monetary penalties for the irresponsible driver and provide credits for good drivers. It will give Massachusetts the strongest and the most effective merit rating plan for automobile insurance anywhere in the United States. Under this law, surcharges will be applied as follows:

1. Accident involvement based on fault in excess of 50% will carry a flat fee of $50 for the first accident.
2. Drivers convicted of operating under the influence of alcohol or drugs or placed in an alcohol education program will be charged $200.
3. Convictions of driving to endanger will be assessed a surcharge of $100.
4. Speeding convictions will carry a $25 surcharge, as will those for other moving traffic violations, except operating without possession of a license or registration and other exclusions provided by the Commissioner.

The above statutory surcharges will apply for the first offense. The Insurance Commissioner is directed to establish guidelines for assessing additional premium surcharges for subsequent at-fault involvement in accidents and for additional convictions of moving violations within a period of three years.

Surcharges for convictions of moving violations or at-fault accidents shall be assessed against the policy of the driver determined to be more than 50% at fault in an accident or against any other driver who resides in the same household.

Where there is more than one surcharge resulting from a single accident, then only that surcharge that represents the largest dollar amount shall be assessed.

The merit rating plan will be balanced, with insurers being required to provide credits to good drivers in direct proportion to the surcharges collected (and investment income earned) from drivers who are assessed penalties. Thus, the monies collected in surcharges will not be retained by insurance companies, but will be applied directly toward lowering rates for good drivers. Each insurance company must assure that each policyholder surcharged or receiving credits is informed of the merit rating proce-
dure in a form prepared by the Commissioner. In the case of surcharges, the insured must be notified 30 days after the surcharge has been imposed.

Every company will be required to use a merit rating plan, thus guaranteeing that every good driver will receive the long overdue benefits earned by his or her superior driving performance.

Where a surcharge is warranted, it is mandatory, and the failure to impose such will subject the insurer to the penalty set forth in the new rating law, Chapter 175E. Provisions for appropriate notification to an insured are included in the law, and certain identified accidents are, in the absence of clear showing to the contrary, presumed to be non-surchargeable, such as rear-end collisions.

Determination of fault for the purposes of merit rating will be in accordance with rules promulgated by a board of appeals and the law contains ample appellate procedure.

The law adds a new section 183 to Chapter 6, creating a Motor Vehicle Insurance Merit Rating Board consisting of the Registrar (Chairman), the Insurance Commissioner and the Attorney General (or his designee). They shall appoint a director. The function is to provide a system to gather and disseminate to insurers information relating to accidents and violations necessary to the facilitating of a Merit Rating System.

Merit rating took effect upon passage of the Act but applies only to accidents and incidents resulting in convictions which occur on or after November 1, 1976.

II. No-Fault Property Damage

No-fault property damage in its present form is repealed. Property damage liability and collision coverages will be reinstated, and policyholders will have the right to choose the coverage under which they may prefer to pursue a claim. This will allow the driver not at fault to pursue his claim directly against the negligent driver or his insurance company.

Property damage liability insurance will be a compulsory coverage. To assist a motorist in collecting his liability claim, the jurisdiction of the small claims court has been expanded to provide expeditious disposition of all automobile property damage cases. The $400 limitation on the small claims procedure has been eliminated with respect to claims for property damage caused by a motor vehicle. Moreover, costs will be added to awards by the court if it is determined that the insurer’s refusal to pay the claim was unreasonable.

As a replacement for the first party benefits of the no-fault property damage law, insurers will be required to sell a new coverage, at the policyholder’s election. The new coverage is as follows:

Policyholders will be able to purchase a limited collision coverage to provide a waiver of comparative negligence as an added feature of their property damage coverage. A motorist with this coverage would recover full damages, with or without deductible, from his own company, in accidents in which
he is 50% or less at fault and can identify the other motorist. 

Car owners also would recover full damages, with or without a deductible, in the following accident situations:
1. Where the insured’s vehicle is damaged while legally parked and the insured can identify the other motorist, or
2. Where the insured’s vehicle is struck from the rear by another vehicle owned by another identified person moving in the same direction, or
3. Cases in which the operator of the vehicle causing the loss or damage was convicted of operating under the influence of alcohol or narcotic drugs, driving the wrong way on a one-way street, operating at an excessive rate of speed, or of any other similar violation of the law of any other state in which the loss or damage is sustained.

This coverage is similar to Option 2 under the present no-fault property protection system. It is designed to offer a choice to a motorist who may not want to buy collision insurance but who does not want to subject himself to comparative negligence under the tort system. The premiums would obviously be less than those for collision.

III. Claim Payments
The insurer would be required to pay collision claims within 7 days after proof that the repair work has been completed.

If the insured chose not to repair the vehicle, the insurer would remain responsible for payment of the claim. The insurer would be required to decrease the actual value of the insured’s vehicle by an amount equal to the claim and pay to the policyholder the decrease in actual value of the vehicle. This provision would eliminate multiple claims for the same damage, which is never repaired, a practice which has become a major contributor to the high cost of insurance premiums.

When the legislature decided to return to the liability system, they foresaw the possibility of a return to the abuses which existed prior to the No-Fault Property Damage System. In order to avoid these abuses the following provisions were included in the new law:
1. A provision prohibiting an insurer from denying a property damage liability claim solely on the basis that its insured failed to comply with policy provisions relating to notice of accident, provided that the claimant himself provides the Company with notice containing specified information within 30 days of the accident. This provision does not prohibit an insurer from pursuing any remedy or indemnification it may have against its insured resulting from his failure to comply with such policy provisions.
2. A provision permitting a property damage claimant to submit a demand to the liability insurer for payment of his claim. The insurer must respond within 15 days of the demand. If the claimant rejects the insurer’s response, and if he recovers substantially the full amount of his claim in a subsequent law suit, then the court may impose a penalty to be included in the judgment not to exceed the amount of the determined damages plus costs and reasonable attorney fees.

The legislature fully expects that the inclusion of the above provisions will eliminate prior abuses and will lead to the fair and expeditious settlement of claims.

IV. Staggered Policies
Policyholders will have the option of having their auto policies run for any twelve month period they desire instead
of being forced to purchase calendar year policies. The law does not require that auto policies be co-terminous with registration, but there is nothing in the law to foreclose a policyholder from arranging to have his policy expire on the same date that his registration expires.

V. Competition

There will be a file and use system for all automobile insurance coverages, including compulsory (Chapter 175E in the law). Insurers will be required to file rates with the Commissioner of Insurance at least 45 days prior to their effective date in order to give him an opportunity to review the filing. If needed, an additional 45 day review period is available, with the insurer having the option of putting the rates in effect subject to a bonded agreement to return any disapproved increase plus 8% interest.

1. Consumer Protection - The Attorney General's Consumer Affairs Division will have the right to insist upon a hearing on any filing where the provision for agents' commission is changed. Bureau advisory rates will be needed for small insurers, but the larger insurers will be required to file rates which reflect their own credible loss and expense experience. As a result, approximately 30 companies who write over 85% of the automobile insurance in the Commonwealth will be engaged in real competition for automobile insurance business.

2. Anti-Trust - Provision is made for an information guide to be sent to all insureds to outline coverage choices and cost difference. Chapter 175E has the strictest anti-trust provision of any insurance rating law in the United States. The provisions were developed in a manner which will foreclose any chance of insurance company collusion in terms of pricing - the penalties for such collusion include criminal sanctions, and are more than sufficient to discourage any collusion.

The Commissioner of Insurance also will have sufficient control over motor vehicle insurance rates since chapter 175E requires prior filing of rates with the Commissioner.

Additionally, the Commissioner of Insurance (after a hearing) may for any territory, kind, subdivision or class of insurance “fix and establish” rates if he determines that competition is either insufficient to assure that rates will not be excessive or so conducted as to be destructive of competition or detrimental to the solvency of insurers.

If at any time the Commissioner determines after a hearing that any classification, rule, rate or rating plan does not comply with chapter 175E, or is violative of public policy, he shall order that such classification, rule, rate, or rating plan be disapproved, and his order may include a provision for premium adjustment.

As an added protection, provision is made for penalizing a company which makes a “bad faith” filing. Such a filing would be made for the purpose of destroying competition by writing auto insurance at grossly inadequate rates to “cream skim” the market. Companies that “cream skim” kill off competition initially but then raise rates later to excessive levels. To foreclose this practice, the Commissioner is empowered, after a hearing, to order that such prac-
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In the voluntary market, the law requires the facility to include in its rate filing a rate for the "clean risk" which "... shall approximate as closely as the Commission approves as practicable the rate levels used by insurers for risks not reinsured in the plan."

VII. Book Value Law (Policyholder Option)
Section 1130 is amended to provide the policyholder a choice of purchasing comprehensive fire and theft coverage on an actual cash value basis or on an agreed value basis. If the policyholder chooses to purchase the agreed value coverage (at a higher premium), the insurer is entitled to inspect the vehicle at the time the coverage is purchased.

VIII. Auto Thefts
One of the most devastating factors causing the high cost of auto insurance in the Commonwealth has been automobile thefts and fraudulent automobile thefts:
1. To assist in preventing fraud, theft claimants must submit to police authorities signed statements under penalties of perjury.
2. Persons convicted of using a motor vehicle without authority will be ordered to pay restitution to the owner for any damages to the vehicle.
3. The "problem motorist" will have to pay a fairer share of his claim losses.
Residency Requirements: An Infringement on the Right to Travel?

In *McCarthy v. Philadelphia Civil Service Commission*¹ the United States Supreme Court reviewed the constitutionality of an ordinance requiring civil servants to maintain their bona fide residence within the city as a condition to continuing municipal employment.² The Court distinguished such requirements from durational residence requirements³ and held that, when "appropriately defined and uniformly applied", bona fide residence requirements are constitutionally permissible.⁴ The decision, however, fails to satisfy an acute need for a statement by the Court defining the parameters of the right to travel and the degree to which legislation may constitutionally impinge upon that right.

McCarthy, a fireman for sixteen years, was dismissed from the Philadelphia fire department when he moved his permanent residence from Philadelphia to nearby New Jersey in violation of a city ordinance requiring all municipal employees to reside within the city limits. The appellant challenged the constitutionality of the ordinance on the grounds that it violated the equal protection clause of the Fourteenth Amendment and that it imposed a penalty on the exercise of his federally-protected right to interstate travel. The Supreme Court of Pennsylvania upheld the ordinance and McCarthy appealed to the United States Supreme Court.

The appellant's equal protection claim stemmed from his allegation that the residence requirement contained in the ordinance created an "arbitrary wall" around the city of Philadelphia which, in effect, denied nonresidents the essential right to work.⁶ The appellant's right to travel argument, however, constituted the major thrust of his challenge. He maintained that the Philadelphia ordinance penalized travel in much the same manner as the durational residence requirement found to be unconstitutional in *Shapiro v. Thompson*.⁷ Therefore, he argued, the bona fide residence requirement contained in the Philadelphia ordinance should, like the durational residence requirement in *Shapiro*, be required to meet the strict standard of the compelling state interest test rather than the reasonable relation test applied by the Pennsylvania court.⁸

The city of Philadelphia answered that its legislative classification did not violate the equal protection clause since a rational relationship existed between the ordinance and the desire of the city to reduce the high unemployment rates of inner-city minority groups.⁹ The city also denied that the ordinance penalized the appellant's right to travel in any constitutionally protected sense. Rather, it claimed, the activity engaged in by the appellant involved a different, as yet unrecognized right, the right to commute.¹⁰ Anticipating that the Court would find the appellant's change of residence to be constitutionally protected travel, the city of Philadelphia argued in the alternative that statements in *Shapiro* had established appropriately defined and uniformly applied bona fide residence requirements as prima facie immune to constitutional challenge.¹¹

In its opinion, the United States Supreme Court rejected both the equal protection and right to travel arguments presented by appellant McCarthy. In striking down the equal protection claim, the Court reasoned that, because no authority existed for the appellant's contention that the right to work is constitutionally protected, the Philadelphia ordinance need only meet the standard of the rational relation test.¹² Citing its previous dismissal of a similar appeal for want of a substantial federal question,¹³ the Court stated that the equal protection issue presented — whether a rational relation may possibly exist between legislation establishing a bona fide residence requirement, and a Court conceived legislative objective — had already been decided in the affirmative.¹⁴

The Court then cursorily considered McCarthy's right to travel argument in the light of *Shapiro* and its progeny.¹⁵ Relying upon the distinction made in those cases between durational and bona fide residence requirements, the Court took the position that the holding of *Shapiro*, that a durational residence requirement that penalized the exercise of the
right to travel was unconstitutional, does not apply to "appropriately defined and uniformly applied" bona fide residence requirements. Without explanation, the Court held that the bona fide residence requirement contained in the Philadelphia ordinance was that kind of bona fide residence requirement.

The most significant, and disturbing, aspect of McCarthy is that the Court failed to state clearly whether that part of the opinion pertaining to the appellant's right to travel claim was the result of a conclusion that the ordinance satisfied the standard of the rational relation test, or whether it held as it did because the ordinance satisfactorily met some, as yet unannounced criterion for judicial ascertainment of constitutionality where the right to travel is allegedly being impinged upon by a bona fide residence requirement. Still unanswered are the questions: Does the scope of constitutionally protected travel include change of permanent residence? If it does, do bona fide residence requirements unconstitutionally impinge upon the right, or is the constitutional protection of the right limited to protection from durational residence requirements? If bona fide residence requirements do impinge upon the right, does the reasoning of Shapiro apply, and if it does not, to what extent may such legislation restrict movement before it is unconstitutional?

The gap in the law surrounding the right to travel caused by these unanswered questions, has resulted in divergence of opinion at the lower court level. At the root of the incongruity is the dispute over what is the proper constitutional response to the contention that the reasoning of Shapiro, that legislation precluding eligibility for government assistance upon compliance with a durational residence requirement is unconstitutional for penalizing the exercise of the right to travel, should also apply to legislation conditioning municipal employment upon compliance with a requirement that a municipal employee not move his permanent residence from within city limits while employed. This debate will remain unresolved until the United States Supreme Court comprehensively defines the scope of the right to travel as it relates to bona fide residence requirements. Until such time as the Court offers its guidance, the key to how a lower court will hold on the constitutionality of a bona fide residence requirement which has been alleged to violate the right to travel is whether the court views Shapiro as having established the principles by which all right to travel cases should be judged, or whether it views Shapiro as limited to fact situations in which durational residence requirements are at issue.

Some lower courts have construed the scope of constitutionally protected travel to include change of residence. Supported by statements in Shapiro that any infringement upon the right to travel will trigger the compelling state interest test, these courts have concluded that forfeiture of one's job for having moved one's permanent residence penalizes travel in such a way so as to trigger the stricter test. Other courts, relying on the Shapiro Court's caveat that bona fide residence requirements and durational residence requirements are distinct and independent prerequisites for assistance, have refrained from extending the principles of Shapiro and hold the traditional, rational relation test to apply where challenges to the constitutionality of bona fide residence requirements are based on an allegation that they impinge upon the right to travel.

Some jurisdictions employing the rational relation test have justified its use with the same analysis advanced by the city of Philadelphia, that the right at issue in situations similar to McCarthy is not the right to travel at all, but a distinguishable, nonfundamental right to commute. The act of commuting, however, is naturally independent of any decision to permanently change one's residence since employees must commute to and from work whether they live within or without city limits. Any holding which sustains legislation enacting a bona fide residence requirement on grounds that it is rationally related to the desire of a legislature to control, for whatever reason, the commuting habits of municipal employees, is too narrow for failing to recognize the real purpose behind such legislation, which is control over the migration of municipal employees.

Judicial restraint in matters involving an assessment of the relationship between a city and its employees is understandable. Courts have always, where possible, deferred to legislative pronouncements on matters of state or municipal business. However, that line of cases affording a wider latitude to the concept of constitutionally protected travel seems more appropriate because in addition to mandating judicial restraint, case law also obligates courts to view impingement upon individual rights as a serious matter. If the right to travel with the intent to settle and abide, as Shapiro indicates, a "fundamental" right, legislative interference with it should be closely examined. Appellant McCarthy's reliance on Shapiro should have spurred the Supreme Court to have settled the question of whether bona fide residence requirements may, under other circumstances, be found to illegally impinge upon the right to travel. However, the court, by not detailing the criterion used to arrive at the conclusion that the Philadelphia ordinance contains an appropriately defined and uniformly applied bona fide residence requirement, has implied that it will not participate in further development of the law surrounding the right to travel. This will undoubtedly cause some lower courts to cite McCarthy as limiting Shapiro. Whether the Court will reverse a lower court decision to apply the reasoning of Shapiro remains to be seen. Vagueness in the reasoning behind McCarthy, coupled with a statement in the opinion that the Court still recognizes the right to travel as constitutionally protected is reason to view McCarthy as confined to its facts. After McCarthy it seems that it is the option of a lower court to recognize or suppress the dynamism Shapiro ought to enjoy in litigation involving the right to travel.

Terminating appellant McCarthy's employment and, as a result, his ability to earn an income with which to provide

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for himself and his family, in effect, denied him the same basic necessities denied the plaintiff in Shapiro. One cannot doubt that the grim prospect of being unable to find another job would substantially influence the decision of a municipal employee not to move his permanent residence. Thus, the Philadelphia ordinance "penalizes" the exercise of the right to travel in the same manner as the durational residence requirement in Shapiro. This fact should have motivated the Supreme Court to have required the city of Philadelphia to demonstrate a compelling need for the legislation.

The burden imposed by this standard is not insurmountable for cities defending bona fide residence requirement legislation. At least one court has applied the strict scrutiny standard to an ordinance similar to that challenged in McCarthy. In Krzewinski v. Kugler, a New Jersey federal court held that the state interest in fostering good relations between police and firemen, and the community they serve, and the fact that policemen necessarily have to be present in order to enforce the law during their off-duty hours, were sufficiently compelling to justify a state statute requiring their residence in the city. This approach, in addition to affording proper protection to "fundamental" rights, also protects against arbitrary or overinclusive classifications which essentially burden unnecessarily the freedom of individuals to move from state to state.

The standards by which bona fide residence requirements should be judged were clearly enunciated in Shapiro. The Court stated that the ordinance must be "appropriately defined and uniformly applied". The McCarthy Court acknowledged the existence of this language in Shapiro but ignored its impact. McCarthy did little to relieve the confusion which surrounds the issue of bona fide residence requirements. The question of their validity will continue to surface in the courts until uniform constitutional guidelines are established by the Supreme Court.

Footnotes
1. 96 S.Ct. 1154 (1976)
2. The Philadelphia Code of Ordinances, §20-101, requires that "every employee of the civil service shall maintain his bona fide residence in the City. The City Controller may require proof of the residence of any employee in the civil service.
3. 96 S.Ct. at 1155.
4. Id. at 1155.
7. Id. at 7, 8, citing 394 U.S. 618 (1969).
8. Id. at 11.
10. Id. at 7.
11. Id. at 5.
12. 96 S.Ct. at 1154.
14. 96 S.Ct. at 1154.
16. Id. at 1155.
17. Id. at 1155.
19. 394 U.S. at 631.
20. See Krzewinski at 498; see also King v. New Rochelle Municipal Housing Authority, 442 F.2d 646 (2d Cir. 1971); Cole v. Housing Authority, 435 F.2d 807 (1st Cir. 1970).
21. Id. at 498.
22. 394 U.S. at 636.
23. See e.g. Wardwell v. Bd. of Education, 529 F.2d 625, 628 (6th Cir. 1976).
26. 394 U.S. at 634.
27. 96 S.Ct. at 1155.
29. Id. at 500.
Developments in the Law Regarding Involuntary Early Retirement

There are presently in the United States millions of workers who are covered by employee benefit plans providing for mandatory retirement at a specified age, most often 65, but frequently at an even earlier age. Other prevalent plans provide for retirement at the unilateral option of the employer after the worker has reached a certain age, again oftentimes below 65. The social implications of involuntary early retirement in our youth-oriented, but statistically aging, society have been evaluated again and again. This article will address the legal issues raised by such retirement, within the context of the Age Discrimination in Employment Act of 1967 and in light of the recent Fourth Circuit decision in McMann v. United Air Lines.

The Statute

In enacting the Civil Rights Act of 1964, Congress took note that like discrimination based on race, color, religion, sex, or national origin, age discrimination posed a threat to concepts of equal opportunity. The Secretary of Labor was directed by section 715 of the Act to make a full and complete study of the problem, and to report his findings to Congress. The Secretary’s report, “The Older American Worker—Age Discrimination in Employment”, supplied the impetus for passage of the Age Discrimination in Employment Act of 1967 (ADEA).

Generally, the ADEA affords workers between 40 and 65 years old protection against age discrimination by employers, labor unions, and employment agencies. For the purposes of this article, two sections of the ADEA are of prime importance. Section 4(a)(1) provides that it is illegal for an employer to discriminate on the basis of age in regard to hiring, discharge, or terms and conditions of employment. In §4(f), some otherwise discriminatory acts are excepted from ADEA proscription: those based on age-related “bona fide occupational qualifications,” reasonable factors other than age, good cause, and, under §4(f)(2), an employer’s observance of the terms of a bona fide employee benefit plan which is not a “subterfuge” to avoid the purposes of the ADEA.

The Issue

The broad question is simply whether involuntary early retirement based on the terms of an employee benefit plan, an act which is clearly age discrimination, is permissible under the ADEA because of the exception contained in §4(f)(2). As long as the plan meets the tests of being bona fide and of not constituting a subterfuge to avoid the purposes of the statute, it would seem from the face of the statute that such a practice would be sanctioned. The test of bona fides has been applied by the courts with facility, but the interpretation and application of the subterfuge clause has not always been adequately addressed or well reasoned.

Before examining the cases construing §4(f)(2), it is informative to look at statements of the draftsmen.

Legislative History

The joint House-Senate report on the ADEA bill described §4(f)(2) as applying “to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older persons—by permitting employment without necessarily including such workers in employee benefit plans.”

Senator Javits, with the concurrence of the bill’s floor manager, explained that the section had important and practical economic significance. If an employer were required to provide the same benefits to a newly hired older worker as to a younger worker, under some types of plans the employer’s cost would be far greater. Thus, in order to encourage the hiring of older workers, §4(f)(2) allowed the employer to decrease or eliminate benefits under its plan for workers hired at an advanced age.

Despite these clear indications of legislative intent, the Secretary of Labor in 1969 issued an interpretative bulletin which did not focus on the ability of an employer to hire an older worker without providing him with any or all the benefits
extended to younger new employees. Rather, the Secretary viewed §4(f)(2) as enabling the employer to retire a worker involuntarily, solely on the basis of age if done pursuant to a valid benefit plan, even though the worker was within the otherwise protected age range of 40 to 65.15

Litigation Under §4(f)(2)
Due in large measure to a reliance on the Secretary’s interpretation, courts held without exception, until the very recent McMann case, discussed infra, that involuntary early retirement which was pursuant to plans executed prior to the ADEA and paying substantial benefits was within the scope of §4(f)(2).

Hodgson v. American Hardware Mutual Ins. Co.16 contained dicta that §4(f)(2) permitted involuntary early retirement of plan members. DeLoraine v. MEBA Pension Trust,17 found the plan involved there not a subterfuge based on the factors of predating the ADEA and payment of substantial benefits to a broad class of workers. The contention that the ADEA prohibited any involuntary retirement before 65 was not considered on appeal as it had not been raised at trial. In Steiner v. National League of Professional Baseball Clubs,18 the court found that since the plan in question predated the ADEA, “(o)bviously it could not have been evolved in an attempt to circumvent any public policy or law.”19

Brennan v. Taft Broadcasting Co.20 held that a “bona fide” plan was one actually in existence and effective, and that the plan in question “was effectuated far in advance of the enactment of the ADEA, eliminating any notion that it was adopted as a subterfuge for evasion.”21

The court in Taft refused to consider legislative history in construing §4(f)(2), invoking the plain meaning rule.22 Despite the court’s assertion that the meaning of the statute was clear on its face, it nonetheless felt compelled to explain the seeming contradiction between its interpretation allowing the employer to retire an under-65 worker involuntarily and the provision forbidding the refusal to hire an under-65 applicant (presumably to include the worker who is involuntarily retired).

It was not until the decision in Dunlop v. Hawaiian Telephone Co.22 that a court rejected the notion that the mere fact that a plan predated the ADEA disposed of the issue of “subterfuge.” Judge Wong noted the inconsistency of the logic of the Taft reading of ADEA: the purpose of the ADEA was to prohibit age discrimination in employment; involuntary retirement before age 65 based solely on considerations of age was an act of age discrimination; §4(f)(2) allowed such discriminatory acts under an employee benefit plan which is not a subterfuge to avoid the purposes of the ADEA; yet given the purposes of the ADEA, such an act is necessarily a subterfuge, rendering the section nugatory.

The judge noted a plausible interpretation based on the actual legislative intent, but chose instead to attempt to render the section meaningful by relying on the Labor Secretary’s interpretation and found the legislative intent to be the prohibition of involuntary retirement under plans where “the retirement benefits are not sufficient.”23

McMann v. United Air Lines
The case of McMann v. United Air Lines24 provides the first vindication of the contention that the ADEA prohibits involuntary early retirement when based solely on the age of the employee. McMann was employed in a non-flying position with United since 1944. In 1964 he elected to participate in United’s retirement plan, in which 60 was the normal retirement age for employees in his particular category.25 In 1973 he reached age 60 and was retired. McMann brought suit under the ADEA, and United obtained a summary judgment on the strength of the holding in Brennan v. Taft Broadcasting, supra, since the plan was effectual (and therefore bona fide) and, due to its predating the ADEA, was not a subterfuge.

The unanimous Court of Appeals panel flatly rejected the Taft test of subterfuge “because what is forbidden is not a subterfuge to evade the Act, but a subterfuge to evade the purposes of the Act”26 (emphasis in original). The court observed that a plan could have been enacted prior to the ADEA and still have been intended to be age discriminatory. Its continued execution would thus be contrary to the purposes of the statute.27

The McMann court also rejected the unequivocal assertion in Taft that it was inappropriate to examine the legislative history28 and noting that the Secretary of Labor’s argument in the case (as amicus) constituted an abandonment of the interpretation contained in 29 C.F.R. §860.110,29 proceeded to investigate the congressional intent. The court found that Congress “did not intend retirement plan provisions ever to excuse the failure to hire or the discharge of any individual, but only to permit exclusion of some workers from the plan on the basis of age where exclusion is justified by economic considerations . . . .” Recognizing that the terms of the section seemed to allow an employer to discharge workers “to observe the terms of” a plan, the court held that to “escape condemnation as a ‘subterfuge’ an early retirement provision must have some economic or business purpose other than arbitrary age discrimination.”30

The court reversed the summary judgment and remanded the case to the district court to allow United the opportunity to raise any other defenses under §4(f). See “The Statute”, supra, for an enumeration of alternative §4(f) defenses.

McMann provides a well reasoned precedent upon which employees subject to involuntary early retirement may base an ADEA cause of action. The upcoming months will give a good indication of judicial acceptance of the McMann deci-
McMann v. United Air Lines provides the first vindication of the contention that the ADEA prohibits involuntary early retirement when based solely on the age of the employee.
with and in reliance on any written administrative regulation... or interpretation” of the Labor Secretary. Nor does the subsequent rescission or judicial invalidation of the regulation or interpretation subject the employer to liability thereafter.

Since no case has found for the plaintiff on the merits (McMann reversed the summary judgment granted on the basis of §4(f)(2), but remanded for further trial on the merits), the availability of the Portal to Portal Act as a good defense to a count for back wages has not been litigated. The McMann court noted the issue but made no comment. Due to the statements contained in 29 C.F.R. §860.110 interpreting §4(f)(2), defendants who lose on the merits will have a viable defense to raise, which, if successful, would limit available remedies to reinstatement.

Conclusion

While retirement can be a welcome milestone in a worker's life, it also has the capability of being economically and spiritually devastating. McMann v. United Air Lines provides an indication that involuntary early retirement is finally being scrutinized as an act of age discrimination contrary to the express purposes of the ADEA. The McMann decision offers a means by which employees affected by a benefit plan incorporating involuntary early retirement may mount an effective challenge to such terms of the plan. It remains for litigation already underway and the actions which certainly will be brought in the wake of McMann to see if this potential becomes reality beyond the boundaries of the Fourth Circuit.

Footnotes

2. References herein to "involuntary early retirement" shall mean discharge from employment pursuant to an employee benefit plan which requires, or allows the employer the option to require, retirement prior to age 65.
7. 29 U.S.C. §611 (1975). As to Congress's reasoning in selecting only this age range for protection under the ADEA, see 113 Cong. Rec. 31253, 31255, 34749-34750 (1967).
8. For jurisdiction to attach, the employer must be engaged in an industry affecting interstate commerce and must have at least 20 employees. State governments are included in the term "employer," and by amendment federal agencies are subject to the ADEA. 29 U.S.C. §630, 633a (1975).
10. The pertinent text of §4(f)(2) (29 U.S.C. §623(f)(2)) is as follows:
   (f) It shall not be unlawful for any employer.... to observe the terms of a bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that such employee benefit plan shall excuse the failure to hire any individual.
11. Due to the plans' reliance on an arbitrary age as the basis for retirement discharge, the courts which have heard the cases discussed in the text infra have all acknowledged the discriminatory character of their involuntary early retirement provisions.
14. While Congress's statements were clear, they were unfortunately incomplete. Despite the extensive statements regarding the purposes of §4(f)(2), Congressional discussion never focused on involuntary early retirement, thus there can be no more than a strong inference drawn that such retirement is not within the exception. The lack of a conclusive statement ruling out involuntary retirement by Congress has directly led to the confusion exemplified by the case law reviewed infra.
19. Id. at 948.
20. 500 F.2d 212 (5th Cir. 1974).
21. Id. at 215.
24. Id. at 332.
26. United's plan was the subject of an ADEA suit in McGovern v. United Air Lines, Civil No. 75-2206 (N.D. Ill. Oct. 31, 1975). Therein plaintiff alleged that the plan was a subterfuge to avoid the purposes of the ADEA in that the retirement age of 60 precluded his attaining the requisite number of years of employment to obtain maximum retirement benefits. McMann's contention that the retirement age of 60 per se violated the ADEA wasawaed a summary judgment, and no appeal was taken.
27. Slip op. at 8.
28. Id. at 9.
29. Id. at 12.
30. Id. at 6, n.4. McMann was the first case in which the Secretary's claim that involuntary early retirement was, per se, contrary to the ADEA. In prior cases, most notably Taft, the Secretary put forth two arguments dealing with specific characteristics which he felt precluded validity of plans under §4(f)(2). First, if the employer's cost of benefit plan coverage was not higher for an older worker then, it was maintained, the section's purpose was not served by including the plan within the exception. Second, the language of the section related to "observing" the terms of a benefit plan. It was argued that only where retirement was mandatory, not at the option of the employer, could the terms be "observed." These contentions were specifically rejected in Taft, and when raised again in McMann were not adopted by the court.
31. Id. at 8.
32. United will seek certiorari from the U.S. Supreme Court. Letter from Earl G. Dolan, Planning and Research Counsel for United, Nov. 3, 1976.
33. Civil No. 76-2874 (9th Cir.).
34. McMann v. United Air Lines, supra at 12.
35. Civil No. 76-2371 (9th Cir.)
36. Civil Nos. 76-1542, 76-1543 (6th Cir.)
37. In addition to arguments based on the holding in McMann, the Secretary of Labor will contend that a Taft interpretation of §4(f)(2) constitutes an unconstitutional delegation of Congressional authority to employers, in that it allows the employer, by the use of a benefit plan, to exclude itself from the strictures of the ADEA. Telephone interview with staff member, Office of the Solicitor, U.S. Dept. of Labor, Oct. 19, 1976.
41. 29 U.S.C. §626(d) (1975). One case has held that where the conciliation efforts on behalf of the Labor Secretary are inadequate, no ADEA action may be maintained. Brennan v. Ace Hardware Corp., 405 F.2d 368 (8th Cir. 1974). See note 39, 36 v. Pitt. L. Rev. 914, 928 (1975).
45. Comment, supra at 923.
47. Levien, supra at 236-238.
48. As to the effect of the employer's bargaining representative consenting to such a plan, the McMann court said, "we doubt that Congress intended employers to invoke such a subterfuge, if employees, either individually or in collective bargaining, to be able to waive rights granted by the Act." As to the parallel question of the significance of voluntary plan membership, the McMann court did not find a meaningful distinction between voluntary and involuntary membership. Slip op. at 3, n.l.
Legal Insurance: Bridging the Gap in Professional Services.

The inadequacies of the traditional system of providing legal services were highlighted as the nation sought to remedy social inequities in the 1960's. The Office of Economic Opportunity's War on Poverty included a legal services program for poor people. The Civil Rights movement documented the need for legal services for Blacks and other minorities. Most recently the consumer movement initiated by Ralph Nader drew public attention to the high cost and poor work encountered by the buying public.1

Government-sponsored programs and non-profit private operations have attempted to provide legal services to the poorest segment of society. The richest segment has always been able to afford any legal services needed. Caught in the middle are Americans of moderate means, unable to obtain quality legal care at a reasonable price. These forgotten clients are largely unrepresented for several reasons. Moderate income consumers have no method of obtaining advance protection against unexpected legal costs other than auto or liability insurance. These potential clients have difficulty in determining the existence and extent of their problems or finding a lawyer willing to help them. Even when an obvious legal problem arises, middle income Americans are reluctant to visit an attorney for fear of the high prices generated by the small offices serving most of these clients.2

Group and prepaid legal services plans are a method for providing access to quality legal care at reasonable cost for moderate income persons. A prepaid delivery system allows a person to secure personal legal services before an urgent need for them occurs. These services can be obtained as legal insurance by paying a premium to an insurance carrier or trust which administers the program. An alternate arrangement involves labor union membership which entitles a member to legal care as a fringe benefit, financed by the employer, or a membership benefit financed by union dues. Additionally, any group organized for other purposes can provide legal care as a membership benefit. Ultimately, other groups can be organized for the sole purpose of providing prepaid legal care for members.

Labor unions, which have expertise in administering fringe benefits, were the first organizations to push for prepaid legal services. Laborers' Local 423, in Columbus, Ohio, has been running such a program since March of 1972. Two thousand six hundred union members and their dependents in a nine-county area of central Ohio are covered by a plan financed solely by union dues. Eighty percent of the members earned between $2000 and $8000 in 1972. The majority had never used an attorney before the plan.3

Three staff attorneys occupy a downtown office similar to an OEO neighborhood office. Members and dependents are limited to the service of these three attorneys, an example of the 'closed panel' option. The plan's benefits include unlimited advice, workmen's compensation service, and up to 80 hours work for any civil or criminal matter in which program members are a party. The attorneys are instructed by the plan's charter to provide legal help but not to receive any instructions, directions, or interference from union officers. Any complaints or grievances against the attorneys are reviewed by a committee of local persons including a dean from a local law school.4

In the first three years of operation, the plan was financed by a 10¢ per hour worked member contribution. Three thousand two hundred and fifty four cases were handled. Criminal work and civil litigation involving collections, divorce, and probate comprised almost ninety percent of the caseload. The only major problem was the development in members of a proprietary attitude toward their attorneys. This attitude was illustrated in opposition to the referral to outside attorneys of contingent fee cases. The members objected to the loss of one third of any eventual recovery as attorney's fees.5

An ABA-initiated trial program was sponsored by the Shreveport (Louisiana) Bar Association. The Shreveport Bar contacted local homogeneous groups and received an expression of interest from
Caught in the middle are Americans of moderate means, unable to obtain quality legal care at a reasonable price.

Local 229 of the Laborers’ International Union. Five hundred union members and their 1500 dependents were enrolled in a three year trial program beginning in January, 1971. The Union contributed 2¢ per hour worked and the Ford Foundation and the ABA also made grants to start the program. The plan used a commercial consulting firm to provide administrative and actuarial help. The program began with the assumption that a person with a legal insurance policy would seek legal aid sooner, before the problem reached crisis stage. One of the program’s objectives was to gather actuarial data on the occurrence of normal legal problems and develop data on the financial feasibility of such a plan.8

Benefits of the Shreveport program were divided into four categories: advice and consultation, office work, judicial and administrative proceedings, and major legal expenses. Advice and consultation included $100 for office visits each year, limited to $25 per visit with no deductible. Office work provided up to $250 yearly for this type of expense. The judicial and administrative proceedings benefit covered client representation at these proceedings up to $325 for legal fees, $40 for court costs, and $150 for out-of-pocket expenses. An insured who was the moving party was required to make a $25 prepayment to reduce frivolous and harassment filings. Major legal expenses covered the member as a defendant in civil or criminal action up to eighty percent of the first $1000 after the litigation money (previous benefit) was exhausted. Excluded from coverage were contingent fee cases and suits among participants. No fee limits were set but bills submitted to the program were monitored by the Shreveport Bar Association. These benefit amounts were expendable by members for an attorney of their own choosing in an attempt to determine the commercial feasibility and effectiveness of the open panel concept.7

Data recorded after two years of the study showed that use of the program was not similar to medical insurance plans. Young dependents of plan members had few legal problems, though they may often have been sick. A movement toward preventive law was noticed as office visits decreased during the second year. No signs of legal hypochondria occurred, either through client or attorney abuse. The Union liked the plan so much that it was planning to continue it alone after the three year trial finished.8

A four year summary supported the earlier data. Only twenty percent of eligibles used the plan in any given year. Use of benefits did not increase in later years as the plan became better known to members. The most common problems were auto and domestic, while judicial and administrative proceedings were the most popular benefit category.9

Recommendations for a permanent program included a suggestion that major legal coverage be raised to eighty percent of the first $2500 for an operational, financially stable program. A long term program might cost 5-6¢ per hour, with a slight increase in benefits. One objective of the program appeared to be reached: cost and quality control did not require a closed panel option when the local bar actively participated in organizing and implementing the program.10

The Utah State Bar Association initiated a prepaid legal services plan based partly on the Shreveport experience. The Utah Plan is an open panel, available to the public, and uses a trust fund to which members contribute rather than an insurance carrier to administer the program. The Utah Bar considered the use of an insurance carrier receiving monthly premiums in exchange for a fixed schedule of benefits to administer the program, but the drawback to the use of an insurance carrier is the necessity of qualifying under state insurance laws or seeking a legislative exemption. The decision was to use a trust fund instead which would collect fees to pay for services. Since the program is open to the public, the open panel option was chosen, with the closed panel option available for special interest groups interested in lower rates.11

Most services normally available from a lawyer are provided by the program. A schedule of benefits in the same four categories as the Shreveport Plan is available, with slight variations in dollar amounts. Excluded are business ventures, suits against the plan, and contingent fee cases. Attorneys are free to set their own fees, subject to action by the State Bar Fee Dispute Arbitration Committee. Members receiving legal services give a billing form to their attorney who completes the form after the services are rendered charging his ‘usual and customary’ fees.12

No problem was encountered with members rushing to use their coverage; use was sensible. The $60 yearly fee was determined by consumer interests and data from the Shreveport Plan. Organized groups using the service would have lower administrative costs, now fifteen percent of the trust fund income, and reduce the yearly fee.13

The California State Bar has approved a wide variety of lawyer-sponsored prepaid group plans. The plans range from a panel of attorneys charging $7.50 per month for a preventive law plan to a group legal care program costing $10

A state cannot forbid a union and its members from engaging in collective activity to obtain meaningful access to the courts.
monthly in which a previously existing group enrolls and is assigned an attorney by the Bar Association. One of the early California plans was started in 1971 by the Berkeley Consumers Cooperative as Consumers Group Legal Services, open to members for a $25 yearly fee. Benefits included two 40-minute consultations with a full-time staff attorney and other services at specified rates. If a particular problem became complicated, the client was referred to one of a panel of 15 attorneys, some of whom were specialists.

Historically, the organized bar has opposed any changes in the traditional relation of the attorney and client. Bar associations have brought court actions to enforce local bar association rules and the American Bar Association Code of Professional Responsibility (CPR). The courts, however, have eroded almost all the basis for these actions. A suit to prevent the NAACP from finding staff attorneys and referring needy clients to those attorneys was ruled not to be solicitation in violation of the CPR. NAACP v. Button. Unions are allowed to refer members to certain selected lawyers, in a direct confrontation with the CPR prohibitions on solicitation and unauthorized practice of law. Brotherhood of Railway Trainmen v. Virginia State Bar. Unions also have the right to hire their own staff attorneys on a salary basis to represent union members in workmen’s compensation cases. United Mine Workers v. Illinois State Bar Association. More recently, unions could not be enjoined from furnishing the names of injured members or information about the injuries to attorneys and even transporting injured members to an attorney’s office. These acts occurred in the context of the union advising its members of their rights under the Federal Employers’ Liability Act. United Transportation Union v. State Bar of Michigan.

The results in these cases were based on the rights of union members under the First and Fourteenth Amendments. The First Amendment gives union members a right to associate for the lawful purposes of advising and helping one another in asserting their rights under federal statutes. Brotherhood of Railway Trainmen, supra. A state cannot forbid a union and its members from engaging in collective activity to obtain meaningful access to the courts. United Transportation Union, supra.

Failing to completely stifle group legal plans, the organized bar has attempted to restrict prepaid plans to those utilizing an open panel of attorneys, which allows the client to choose his attorney in the traditional way. Attempts have been made to prohibit or restrict closed panel plans, where an attorney or attorneys preselected by the membership group provide all the service to client members. Closed panels are thought to inject an element of lay control over the attorney’s professional judgment, creating built-in opportunities for conflict and abuse. Union plans which select a single attor-
Closed panels are thought to inject an element of lay control over the attorney's professional judgment, creating built-in opportunities for conflict and abuse.

Union members supposedly may wonder who selected their attorney and whether the attorney has been proved competent in the 'market place'. Prepaid plans are felt to subject professional services to control by persons without professional training.20

This attitude among members of the bar has been criticized as motivated solely by economics. In the guise of saving the public's freedom of choice and the sanctity of the attorney-client relation, the bar is actually denying the public the larger choice between open and closed panel systems.21 The private bar overestimates the effect of closed panel systems on the sole practitioner and small firms. Services provided to group members will be to persons receiving and paying for no legal services under the current system.22 The present freedom to choose is frequently meaningless because the public lacks sufficient knowledge to make a valid choice among the hundreds of attorneys in a large metropolitan area. Low cost may justify the loss of a questional freedom of choice when contrasted against a larger choice between an inexpensive closed panel attorney and no attorney at all. It is inconsistent to contend that the public is capable of competently choosing among hundreds of attorneys listed in a phone book but not between open and closed panel plans.23

Union plans particularly favor the closed panel option in an attempt to reduce costs through volume and maintain high quality. Members face the same problems as anyone in choosing an attorney, and may prefer an attorney chosen and approved by the union, in the same way OEO programs and legal aid societies provide 'closed panel' service in a local office.24 The situation would be similar to a union-sponsored health clinic run by staff physicians, who are paid a flat salary to care for all union members seeking health care.

Two early impediments to legal service plans as an employee benefit were the provisions of the Taft-Hartley Labor Relations Act relating to negotiable fringe benefits, and the taxable status of employer contributions to legal service plans, and the value of services received by employees under those plans. Section 186 of Taft-Hartley (29 USCA 186) is intended to prevent employers from attempting to dominate employee bargaining units by making payments directly to unions or union officials. In 1973 Section 186c was added (Pub.L. 93-95, 87 Stat. 314), which permits employer payments to a trust fund established by an employee group for the purpose of providing legal services to employees and their dependents. These funds may not be used, however, in legal proceedings against an employer other than in workmen's compensation cases, the labor union or employee organization, or any other employer or labor organization.

The 1984 Internal Revenue Code included no mention of prepaid legal services. The problems of employer contributions and the value of services provided to employee members mentioned above are two of the results of that omission. Another problem was the status of the entity running the legal services program. Such a group might have desired status as a non-profit tax exempt organization similar to Blue Cross and Blue Shield under Section 501(c), as a charitable, educational, or scientific organization. Applications for this exempt status have been uniformly rejected by the IRS for two reasons: 1) these groups were thought to be carrying on a business with the general public in the same manner as an organization operated for profit, and 2) the group's activities were viewed as conferring an economic benefit upon the attorneys rendering legal services under the plan. Recommended amendments to the Code included tax exemption for organizations running legal service programs, a deduction under Section 162 for employer contributions as an ordinary and necessary business expense for fringe benefits, and an income exemption for members for benefits paid under the program similar to the exemption for health and accident benefits paid under Section 105.25

The Tax Reform Act of 1976, Section 2134, eliminated almost all tax questions for prepaid legal service plans. Gross income of an employee does not include employer contributions to legal service plans or the value of benefits received by the employee under such plans. Item (20) to Section 501 (c) grants exempt status to an organization or trust whose exclusive function is to form part of a legal services plan. These provisions expire in 1982, but the Secretaries of Labor and the Treasury are directed to submit complete reports on the desirability and feasibility of these exclusions to the President and Congress before December 31, 1980.

Another piece of federal legislation affecting legal service plans is the Employee Retirement Income Security Act of 1974 (ERISA), which covers any legal service plan provided as an

In Massachusetts, a legal service bill prepared by the Massachusetts Bar Association has languished in the legislature for several years.
employee benefit, (29 USCA 1002). ERISA preempts any state regulation of legal service plans provided by an employer or for any employee group directly engaged in, or directly affecting, interstate commerce. An obvious problem arises immediately:

Section 514 (1144) may be read to forbid state bar associations, acting officially through the highest judicial body of the state, to enforce any law or prior precedent which has the effect of regulating, directly or indirectly, the terms or conditions of employee benefit plans.17

ERISA’s effects on legal service plans are generally limited to three areas: reporting and disclosure requirements, fiduciary responsibilities, and administration and finance. As with all new federal regulatory law, the greatest problem with ERISA will be the extent of its reach into state and local government. Undoubtedly the solution will lie with the federal courts. One commentator has read the act to limit state regulation of plans marketed by insurance companies to matters other than form and content; with the states precluded from forbidding closed panel plans.20

Arguments for having an insurer similar to Blue Cross and Blue Shield underwrite a bar-sponsored legal insurance program include the reasons justifying prepaid health insurance. An insurer can advertise while lawyers cannot. It has the necessary expertise, manpower, and computer facilities; can review fees for legal service in a way necessary but not available to attorneys; and lastly, can reduce its profits to an economic level commensurate with the lowest possible cost for clients.30

An insurer-run program might, however, receive all the criticism which has been directed at Blue Cross and Blue Shield. Medical insurance programs have been taken to task for bureaucratic inefficiency, high volume/low quality care, fee-padding by unscrupulous physicians, and contributing to the skyrocketing costs of hospitalization.

In Massachusetts, a legal service bill prepared by the Massachusetts Bar Association has languished in the legislature for several years. The 1976 version, House No. 2497, provides for two types of plans. An insured legal service plan is underwritten by an insuring corporation. A membership legal service plan is provided by certain non-profit corporations and labor unions. Both types of plans are subject to approval by the Commissioner of Insurance, and may be established and operated by any group or entity qualifying as a sponsor.

The corporation, or insurer, operating an insured legal services plan may not restrict the ability of an insured person to choose an attorney. The insurer must pay the fee of any attorney chosen by an insured. In contrast, the bill appears to allow the sponsor of a membership legal services plan to contract for its members with participating attorneys including "an attorney or attorneys chosen by a member or members."32 This language and the distinction in the way the two plans may and may not restrict a member’s choice of attorneys show that the argument between open panel and closed panel partisans still rages, albeit quietly and away from public scrutiny.

Some movement at the national level toward greater acceptance of prepaid plans, even closed panel, occurred at the ABA mid-winter meeting in February, 1975. The Code of Professional Responsibility was modified to make all restrictions relating to group practice apply equally to open and closed panel plans.33 The ABA’s fears that group practice attorneys will become biased or tainted by association with intermediaries who refer clients or pay for services may be mitigated by divorcing the business aspects of a law firm from the professional activities, according to one suggestion.34

In addition to the plans previously mentioned, legal service programs are under active discussion or in operation in Colorado, Idaho, Kansas, Michigan, New Mexico, Ohio, Oregon, and Texas. Labor unions, insurance companies, bar-sponsored non-profit corporations and other groups are participating. With an unmatched concentration of law schools, legal scholars, and public interest groups, Massachusetts continues to have no operating legal services plan.36 If this embarrassing situation is not changed soon, the legislature and the bar associations will lose any chance they now have to contribute to the organization of legal service plans in Massachusetts. Taft-Hartley, ERISA, and the 1976 Tax Reform Act represent federal actions which will ultimately permit interested persons to develop legal services in Massachusetts without the regulation or even participation of the state government and local bar associations.

Footnotes
2. Bernstein, ‘Legal Services, the Bar, and the Unions,’ 58 ABA JOURNAL 472 (1972), [hereinafter cited as Bernstein, ABA JOURNAL]
5. Needham and Woolley, at 496-498.
7. Id. at 29-31.
12. Id. at 1082.
13. Id. at 1083.
15. Id. at 435-436.
17. 377 U.S. 1, 84 S.Ct. 1113 (1964).
24. Bernstein, ABA JOURNAL at 474.
32. House Bill No. 2497, 1976 session, section 7 (a).
33. Gilmore at 224.
34. Id., at 224.
35. Material on these plans available at the Massachusetts Bar Association, Center Plaza, Boston, Massachusetts.
Protection of Performer's Rights Against Voice Imitation In Commercial Advertising

Few would deny the substantial persuasive impact of television commercial advertising on the average American viewer. One need only watch two hours of prime time scheduling nightly to appreciate the enormous amount of creative, artistic, technical, and managerial input for every thirty second spot, in addition to the equally enormous expense. Clearly, all of this talent and money are expended for the primary purpose of promoting the subject matter of the advertisement. Each jingle, gimmick, and catch-phrase is designed to create in the consumer-viewer a desire to purchase the product.

Becoming increasingly popular in the scheme of commercial advertising is the use of celebrities to achieve this purpose. Commonly employed formats show the celebrity actually using the product or the “fireside chat” approach where the celebrity tells the viewer that he uses the product and recommends its use to the viewer. Whichever method is used by the advertiser, the goal sought, and often achieved, is increased sales. The success of this method is generally attributable to the popularity, sincerity, and believability of the celebrity. In addition to the increased sales that benefit the advertiser, the celebrity himself realizes substantial financial compensation as well as extensive television exposure.

The use of the celebrity’s publicity value for advertising purposes is not without problems. Indeed, from the perspective of the celebrity this area is sometimes fraught with unfair and deceptive practices. Problems often arise where a voice, which is unique in its tone, pitch, pace, and inflection, and therefore readily identified with a particular celebrity, is used for commercial advertising without a visual or written representation of the speaker. Clearly, if the voice is that of the celebrity and he authorizes such use, there is no cause for complaint. It is also clear that the unauthorized use of a celebrity’s actual voice in a commercial advertisement is actionable as direct misappropriation. The legal implications of the unauthorized use of an imitation of a celebrity’s readily identifiable voice to promote a product are of greater interest.

At first blush, the unauthorized use of the imitation may seem harmless. After all, how many of us have offered to do our impressions of John Wayne or Barbra Streisand at parties, even in the absence of coaxing? Surely the “Duke” would be denied damages in an action against an impressionist. The mimicry and imitation of another is a talent in and of itself with enormous entertainment appeal. Such a talent is not involved with commercial exploitation of the talents of another, but with the talents of the impressionist. In all fairness, however, it would seem that a distinction should be made between the acknowledged, good-faith, non-commercial mimicry of another’s voice and the unauthorized mimicry and imitation of a famous personality in an advertising context. One’s voice may be a valuable and salable asset; its unauthorized commercial use depriving its owner of substantial income from the sale of rights to the use of that voice. Once an imitation of his voice has been used for commercial sponsorship of a product, the celebrity will undoubtedly be precluded from any potential contractual relationships with respect to goods of that kind, and perhaps others as well. Furthermore, he may never wish to endorse or advertise commercial products, and that choice ought to be his own. Equally important is the viewer’s confusion caused by such an imitation. If the advertisers are eager to spend considerable sums of money to obtain famous personalities for their commercials, it is fair to assume that the experts are convinced that celebrity promotion of their product has a profound and positive effect on the sales. Using a celebrity’s voice imitation without his authority or a statement of disclaimer may deceive the viewer and exploit the celebrity’s publicity value.

It is this writer’s view that the law ought to recognize the distinction between the mere imitation of another’s voice for the purpose of entertainment, and the misappropriation of that voice through imitation for commercial advertising purposes. The right of a celebrity to be free from the latter should fall...
squarely within the reach of the law of unfair competition. To permit such commercial use without the consent of the person involved is unconscionable.

This article is limited in scope to the protection from the unauthorized use of a celebrity's voice imitation for commercial advertisement through the law of unfair competition. It is of course essential to keep in mind that unfair competition is a tort governed by state law and differing among the jurisdictions. The purpose of this article is not to discuss the various requirements of state law or the state's ability to compel labeling of imitations to avoid confusion among consumers. Rather, it deals with the performer's right to prevent advertisers from exploiting his publicity value via the law of unfair competition. Until recently, performers were precluded from bringing such an action by the federal preemption doctrine. It was thought that since the voice was not amenable to copyright, a state might not circumvent that federal determination by enforcing a state's law of unfair competition in favor of the performer. Recent developments in this area indicate a trend towards recognition of the performer's rights in his voice and publicity value. It would be a premature and perhaps unfair statement of the law to say that a performer's publicity value has been given substantial judicial recognition. Much controversy centers around the limitations of protection to be given. But this is not to say that the judiciary has been unwilling, per se, to extend protection for publicity rights.

Perhaps the most widely known case recognizing the right of publicity is Haelan Laboratories v. Topps Chewing Gum. In that case a contract dispute arose between rival chewing gum manufacturers with respect to the contract rights to use a certain baseball player's name and photograph in connection with the sale of commercial products. In discussing the ball player's interest in the case, the court recognized that "a man has a right in the publicity value of his photograph, i.e., . . . the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross'. . . ." The court emphasized that this "right of publicity" would be diminished in value unless it could be made the subject of an exclusive grant which barred any other advertiser from its use. The Haelan case viewed the right of publicity as a valuable and salable asset given a preferred status heretofore unrecognized. The right of publicity was again recognized in Uhlaender v. Henricksen, involving a manufacturer's use of a baseball player's name in manufacturing a baseball table game without entering into royalty or license agreements with the baseball player. In discussing the misappropriation of one's name or public personality and recognition of the so-called right of publicity, the court stated that:

A celebrity must be considered to have invested his years of practice and competition in a public personality which eventually may reach marketable status. That identity, embodied in his name, likeness, statistics, and other personal characteristics, is the fruit of his labors and is a type of property.

A search of the applicable case law reveals that there is authority recognizing the publicity rights of a celebrity with relation to his name, photograph, and image. However, the courts have not as yet extended the same qualified property status to a celebrity's rights in his voice.

A number of courts have dealt with this issue by focusing on the nature of the imitation itself. For example, "where the imitation is of another's unique performance, actions, gestures, tones, etc., and where the imitator's own excellence of talent contributes materially to the acceptability of the imitation and where the imitation is done in good faith, the imitation is generally not actionable. Among the cases supporting such a proposition is Bloom & Hamlin v. Nixon. Plaintiffs were the owners and producers of a copyrighted song entitled "Sammy" from the stage production of "The Wizard of Oz." In the defendant's musical comedy,
an actress imitated Lotta Faust, the star of plaintiffs' show, singing the chorus of "Sammy." This skit was preceded by an announcement that it was an imitation of Lotta Faust singing her song "Sammy" from the "Wizard of Oz." Although the action was one for copyright infringement, the court emphasized that the chorus of the song was merely a vehicle for the imitation. The imitation itself was sanctioned as good faith mimicry. Essentially, it was held that mere mimicry and imitation, per se, are not actionable.

In *Murray v. Rose,* plaintiff, Mae Murray sought an injunction against Billy Rose's Diamond Horseshoe and dancers Mitzi Haynes and George Fontaba for stage vaudeville imitations of her performance of "The Merry Widow Waltz." Injunctive relief was denied as there was no claim that the imitation was other than fair or that it aimed to ridicule or stage vaudeville imitations of her performance of "The Merry Widow Waltz." The public was not in any measured deceived.10

Where the imitation leads to public deception or to confusion as to the actual origin of the performances, however, the courts have extended protection to the performer from imitation under the theory of unfair competition. For example, in the first major case in the area of performance imitation, *Chaplin v. Amador,* silent film star Charlie Chaplin sought injunctive relief in preventing the defendant from imitating his mannerisms, dress and performing style, and from appearing in films under the name of "Charles Aplin." The court granted the relief sought on the basis of fraud and deception.13

As late as 1962, courts were applying the state law of unfair competition to protect the artist from voice imitation in television commercial advertising. Entertainer Bert Lahr brought an action against Adell Chemical Company for advertising its product "Lestoil" on a television commercial showing a cartoon film of a duck, and without the plaintiff's consent, using an imitation of plaintiff's voice for that of the duck.4 In response to the claim of unfair competition, the court noted that the important consideration is whether there has been any confusion as to the source of the voice, and stated further: Plaintiff's complaint is that defendant is 'stealing his thunder' in the direct sense; that defendant's commercial had greater value because its audience believed it was listening to him. In the light of plaintiff's allegations we could not say there was no such enhancement.

Furthermore we can hardly agree with the defendant that there was no competitive interest or purpose served and no real confusion of opportunity in the entertainment field. It could well be found that defendant's conduct thwarted plaintiff's audience to the point of curtailing his market. No performer has an unlimited demand. We may agree with defendant that plaintiff has not shown any 'property interest' entitled to copyright protection. And we might hesitate to say that an ordinary singer whose voice, deliberately or otherwise, sounded sufficiently like another to cause confusion was not free to do so. Plaintiff here alleges a peculiar style and type of performance, unique in a far broader sense.15

Thus it is shown that although the court in *Lahr* was unwilling to call the plaintiff's peculiar style and unique voice a "property interest" and thereby extend to him the same protection afforded the plaintiffs in the right of publicity cases, it did recognize the defendant's conduct as leading to plaintiff's "loss of opportunity in the entertainment field."

The unauthorized use of a celebrity's name to promote the sale of a baseball table game is easily distinguished from the unauthorized use of a celebrity's voice imitation to promote the sale of a commercial product, especially where the voice is so similar, unique, distinctive, and readily identifiable causing actual confusion as to its source. A voice that is so distinctive may be equally as identifiable to the celebrity as is his name; indeed, some voices are quickly recognized as belonging to celebrities for whom we know no names. Where the voice is so unique that an anonymous imitation may lead to confusion as to its source, relief should be granted on the theory of unfair competition. As the court in *Lahr* recognized, the celebrity's potential opportunities in the area of television commercial advertising are diminished, while the defendant is benefited by the misuse of the imitation. If the courts are reluctant to call a celebrity's rights in his unique and distinctive voice a property interest, it is difficult to deny that it is at least a pecuniary interest worthy of protection from misappropriation by others.

It is easy to speculate that after *Lahr,* the law would have made considerable progress in the protection of performer's rights against voice imitation in commercial advertising. However, in 1964, protection of performer's publicity rights through the law of unfair competition suffered a substantial setback. On the same day, the United States Supreme Court decided two significant cases subsequently applied to preclude protection for performer's publicity rights. In *Sears, Roebuck & Co. v. Stiffel Co.,* as in *Compco Corp. v. Day-Brite Lighting, Inc.,* the question before the court was "whether a State's unfair competition law can, consistently with the federal patent laws, impose liability for or prohibit the copying of an article which is protected by neither a federal patent nor a copyright." In both cases plaintiffs brought suits alleging patent infringements under federal law and unfair competition under Illinois law against the defendants copying and marketing plaintiffs' patented lighting fixtures. The lower courts found both defendants liable for unfair competition although the patents were held to be invalid. The Sears' Court reversed the lower court's decision on the unfair competition issue holding that application of Illinois unfair competition law was preempted where in conflict with the federal patent laws. Where the determination had been made under federal patent laws not to protect the plaintiff, the preemption doctrine precludes states from providing protection via the state law of unfair competition.

Accordingly, one may conclude from these opinions that a state is precluded from providing protection through the law of unfair competition where those laws are in conflict with the federal patent law objectives to preserve free competition and to promote invention and originality. Although the Sears and Compco cases both involved patents, the opinions contained language suggesting that such preemption would extend to published writings as well. The Sears' decision noted that "because of the federal patent laws a State may not, when the article is unpatented and "uncopyrighted", prohibit the copying of the article itself or award damages for such copying." Apparently many lower courts assumed that the language "when the article is unpatented and uncopyrighted" brought performer's rights within the limitations of the Sears-Compco case preemption doctrine."Employing a broad interpretation of this doctrine, the courts reasoned that since performances were uncopyrighted, it automatically followed that the states were preempted from affording any form of protection. The states' laws of unfair competition
which once held out a promise of relief to performers were now considered adverse to an expressed policy of exclusive federal control in the copyright area.\textsuperscript{24}

An example of the new approach taken by the judiciary after Sears and Compco is found in Sinatra v. Goodyear Tire \& Rubber Co.\textsuperscript{25} Plaintiff, Nancy Sinatra, had popularized a rendition of the song “Those Boots Are Made For Walkin’” which lyrics, music, and arrangement had been copyrighted by Criterion Music. Subsequently, defendant produced a series of radio and television commercials to promote automobile tires manufactured by defendant. The tires were called “wide boots” and to promote this theme, the song “These Boots Are Made For Walkin’” was used in the commercial advertising. The commercial featured the voice of an unidentified female singer whose “vocal rendition was an imitation of plaintiff’s recorded performance of this particular song.”\textsuperscript{26} In denying plaintiff injunctive relief or damages, the Ninth Circuit Court of Appeals refused to extend unfair competition protection to a celebrity’s voice where the imitation is so inextricably bound up with materials under which the defendant had obtained a copyright license.\textsuperscript{27} Essentially, the court reasoned that since Miss Sinatra’s voice is an item ineligible for copyright protection, protection from imitations of her voice through the law of unfair competition is likewise precluded by the Sears-Compco preemption doctrine.\textsuperscript{28} In discussing Sears and Compco, the Sinatra court noted:

\begin{quote}
The Court made it very clear that just as a state could not encroach upon the federal patent laws directly it could not do so indirectly under the guise of enforcing its laws against unfair competition where those laws would clash with the federal objectives.\textsuperscript{29}
\end{quote}

An earlier case, Columbia Broadcasting System, Inc. v. De Costa\textsuperscript{30} presents another example of the restricting effects of the Sears and Compco doctrine. Plaintiff, DeCosta, had developed a highly distinctive and unique western character role, and appeared in public as such character passing out cards which included the words “Have Gun Will Travel.” Defendant, CBS, subsequently produced a television series entitled “Have Gun Will Travel” using a character named “Paladin” who was identical in appearance, dress, and even name to that of plaintiff. DeCosta brought an action under state law against CBS for misappropriation of his character, trade and/or service mark infringement, and unfair competition. Although plaintiff was successful in the district court, the First Circuit Court of Appeals reversed the decision, holding that the case fell “squarely under the rule of Sears and Compco.”\textsuperscript{31}

If a ‘writing’ is within the scope of the Constitutional Clause (Copyright Clause), and Congress has not protected it, whether deliberately or by unexplained omission, it can be freely copied.\textsuperscript{32}

“In essence, the court indicated that since the character of ‘Paladin’ was according to the court, encompassed by the copyright law,\textsuperscript{33} it could be copied at will, once the originator’s common law copyright was lost by publication.”\textsuperscript{34}

Essentially, the aftermath of Sears and Compco led to a judicial block of protection of performer’s rights through the state law of unfair competition. Recently, however, the Supreme Court has limited and redefined the thrust of Sears and Compco. In Goldstein v. California,\textsuperscript{35} the Court held that states may afford protection to items in the public domain which fall outside the statutory subject matter for a copyright and in so doing limited Sears and Compco to the patent sphere. In Goldstein the petitioners were convicted of committing acts of “record piracy” or “tape piracy” under a California criminal statute proscribing such practices as violative of the “Copyright Clause.” In holding that the copyright clause did not preempt the California statute, the court reasoned:

\begin{quote}
At any time Congress determines that a particular category of ‘writing’ is worthy of national protection and the incidental expenses of federal administration, federal copyright protection may be authorized . . . However, where Congress determines that neither federal protection nor freedom from restraint is required by the national interest, it is at liberty to stay its hand entirely. Since state protection would not then conflict with federal action, total relinquishment of the State’s power to grant copyright protection cannot be inferred.\textsuperscript{36}
\end{quote}

Since Congress did not manifest an intent to legislate in the area of record or tape piracy “the language of the constitution neither explicitly precludes the state, from granting copyrights nor grants such authority exclusively to the Federal government”\textsuperscript{37} and the California statute was therefore, upheld.

In discussing the limited scope of Sears and Compco, Justice Burger, writing the majority opinion, noted that:

\begin{quote}
In regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition . . . The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free. The application of state law in these cases to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn . . . No comparable conflict between state law and federal law arises in the case of recordings of musical performances. In regard to this category of ‘Writings’, Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act.\textsuperscript{38}
\end{quote}

Since Congress had not struck any balance with regard to the duplication of other’s recordings and it was found that record piracy was not included within the federal copyright statute nor was there any implication that the statute apply, the states were not interfering with any specific policy of Congress by regulating record piracy.

It could be argued, therefore, that since a performer’s voice is not included within the scope of the federal copyright statute, expressly or impliedly, the protection afforded a performer against voice imitation through the state unfair competition law is not in conflict with federal policy or objectives. Protection of performer’s rights should be considered in the light of Goldstein and its limited effect on the Sears-Compco preemption doctrine.

Unfortunately, this decision did not have that effect. Shortly after Goldstein was decided, actress Shirley Booth brought an action for damages under the New York state law of unfair competition against the defendant advertiser and its advertising agent promoting a laundry detergent.\textsuperscript{39} Miss Booth portrayed the title role of “Hazel” in a popular television comedy series. A cartoon figure of the same name and likeness as this character was used, pursuant to a written licensing agreement with the copyright holder, in radio and television commercials promoting defendant’s laundry detergent, “Burst.” The voice of the character in the commercials, performed by Ruth Holden was admittedly an intentional imitation of the plaintiff as heard in the earlier television series.\textsuperscript{40} Miss Booth argued that she has devoted many years to training as an actress and has attained stardom. “She contends that she endowed the role of Hazel with her own unique and creative artistic interpreta-

26
tion, and that the 'modern liberalized and considerably expanded doctrines of the New York law of unfair competition' protect her against imitation of her voice in defendant's commercials.\textsuperscript{41} In rejecting this argument, the federal district court found that the cases upon which Miss Booth relied were not controlling since they involved direct misappropriation, not imitation.\textsuperscript{42}

The Booth case really turned on the court's broad interpretation of the Sears and Compco doctrine.\textsuperscript{43} The court, in failing to recognize the limitations placed on Sears and Compco by the Goldstein decision, read that decision as one which reaffirms the broad reach of Sears and Compco, and specifically allowed imitation or copying of another's performance.\textsuperscript{44} The court supported its position by quoting Chief Justice Burger's discussion of the scope of the California statute: No restraint has been placed (by the California statute) on the use of an idea or concept; rather, petitioners and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording.\textsuperscript{45}

The Booth court quoted the above language as an indication that state law could not prohibit the imitation of an artist's performing style. Perhaps, "a fairer reading, however, is that the Court in Goldstein was explaining what the California statute did not regulate, not what it could not regulate."\textsuperscript{46}

The Goldstein decision and its restriction of Sears and Compco was again recognized in Kewanee Oil Co. v. Bicron Corp.\textsuperscript{47} The Supreme Court reversed the holding of the Sixth Circuit Court of Appeals that Ohio's trade secret laws were preempted by United States patent laws.\textsuperscript{48} "The question before the Court was whether the federal patent laws effectively preclude state protection for those works which are within the scope of the federal patent laws, but which fail to meet the standards necessary to qualify for protection."\textsuperscript{49} The Court concluded that "the extension of trade secret protection to clearly patentable inventions does not conflict with the patent policy of disclosure . . ." and that "there is no real possibility that trade secret law will conflict with the federal policy favoring disclosure of clearly patentable inventions . . ."\textsuperscript{50} Thus where the Goldstein Court allowed state protection for any works in the public domain not within the federal copyright legislation,
instant case, we are free to consider deception and passing off, secondary meaning and likelihood of confusion.58

The court then went on to consider DeCosta’s claim of common law service mark infringement and unfair competition. Finding that plaintiff’s evidence fell short of proof that viewers were actually deceived or confused, the court ultimately held for CBS.59

Although the evidence did not support a finding for plaintiff under the law of unfair competition, the decision recognized plaintiff’s right to bring such an action by acknowledging the Goldstein limitations on Sears and Compco. If this emerging trend is extended to its fullest implications, the state law of unfair competition could be reopened to afford protection of performers’ rights.

The preceding material offers an appreciation of the difficult path protection of performer’s publicity rights has taken through the years. The progress hoped for after Lahr was barred by the restricting decisions in Sears and Compco. Perhaps the Goldstein gloss on the preemption doctrine and the subsequent judicial trend offers renewed hope.

Although case law has been temporarily denied the opportunity to develop due to the implications of Sears and Compco, it is important to now reconsider the interests sought to be protected by entertainers in the area of voice imitation in commercial advertising. The nature of the interest is really pecuniary. It bears emphasis that the Lahr court recognized the defendant’s conduct as leading to plaintiff’s loss of opportunity in the entertainment field.60 Where an advertiser uses an anonymous imitation of a professional entertainer’s unique style of vocal delivery, the celebrity interest in his right of publicity has been exploited. And whether the viewer has been actually deceived by the commercial advertisement or merely confused as to the source of the voice employed, the ultimate result is an infringement of the entertainer’s right of publicity. Indeed, the anonymous voice imitation of Peter Falk on a Colombo Yogurt commercial has the effect of precluding Peter Falk from using his voice for other yogurt commercials and perhaps other products as well. For as the Lahr court noted, “no performer has unlimited demand . . . and it could well be found that defendant’s conduct saturated plaintiff’s audience to the point of curtailing his market.”61

One should be realistic in applying this theory to a particular case, however. A claim by a relatively unknown performer, whose voice has no peculiar tone, pitch, inflection or unique style of delivery, that a commercial advertisement is using an imitation of his voice, is at best tenuous. In such a case, it would be impossible to show that the viewers were deceived into believing that the voice used was his or that they were at least confused as to its source. Each case, of course, must be supported by convincing facts and stand on its own merits. But where the facts are convincing, the courts should allow protection for the infringement of an entertainer’s right of publicity.

Finally, the post Sears and Compco decisions have advanced public policy reasons for refusing to recognize a performer’s right of protection against imitators. The thrust of the argument is in the inherent difficulty in policing or supervising the infringement of the right of publicity.62 However, mere supervisory or enforcement problems should not serve as a blanket deterrence for affording the protection sought. Instead, the rights and interests sought to be protected, severity of the infringement and harm resulting therefrom, as well as the remedies available should be given a preferred status when weighed against the difficulty of supervision.

Footnotes
1. 202 F.2d 866 (2d Cir. 1953).
2. Id. at 868.
4. Id. at 1282.
8. Id. at 978-979.
9. 30 N.Y.S.2d 6 (1941).
10. Id. at 7.
11. Sir Gardella v. Log Cabin Products, 89 F.2d 891 (2d Cir. 1937); Savage v. Hoffman, 159 F. 584 (S.D.N.Y. 1908); Netterville at 250.
13. 269 P. 544, 546 (1928).
15. Id. at 259.
17. Note 3 supra.
20. 375 U.S. 225, 225 (1964). In Compco, Justice Black phrased the issue to be "whether the use of a state unfair competition law to give relief against the copying of an unpatented industrial design conflicts with the federal patent laws", 376 U.S. 234, 234.
21. 376 U.S. 225, 231 (1964). In Compco, the Court used similar language holding “that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. 1 § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain”, 376 U.S. 234, 237.
26. Id. at 713.
27. Id. at 716-718; Plaintiff did not allege that her sound is uniquely personal; it is that sound in connection with the music, lyrics and arrangements which made her the subject of popular identification, Id. at 716.
28. Id. at 716-718.
29. Id. at 717.
31. Id. at 321.
32. Id. at 319.
33. Id. at 321.
34. Id. at 331; see Goodwin at 245-246.
36. Id. at 559.
37. Id. at 540.
38. Id. at 570.
40. Id. at 345.
41. Id. at 345.
42. Id. at 345.
43. Id. at 346.
44. Id. at 346.
48. Id. at 474.
49. Id. at 478; see Goodwin at 252-253.
51. Id. at 482; See Comment, 6 RUTGERS CAMDEN L. REV. 868, 878 (1974).
52. 362 F.Supp. 343 (1973); see p. 10 supra.
55. Civil No. 3130 (magistrate’s opinion) at 24-32.
56. 383 F.Supp. 326, 339; see Comment, 6 RUTGERS CAMDEN L. REV. 868, 878.
58. Id. at 510-511.
59. Id. at 515.
60. Purcell v. Summers, 145 F.2d 979 (4th Cir. 1944).
61. 300 F.2d 256, 259.
62. Id. at 259.
The State of the Constitution
Today: Are Benign Quotas
Obsolete?

Discrimination is a much-abused word in American society today. To the lawyer, the word often becomes a focal point for argument within the confines of the Fourteenth Amendment’s guarantee of “Equal Protection of the laws. . . .” When the discrimination is racial discrimination, the parameters of the Fourteenth Amendment appear most clear. Thus when a minority plaintiff can prove he has been racially discriminated against, courts will righteously denounce that discrimination and afford him redress for his injuries. However, where a white plaintiff proves he has been racially discriminated against, denunciation has not been so quick because of a lack of constitutional standards. A recent Supreme Court decision, along with an apparent conflict in decisions by the highest courts of California and New York over the proper constitutional interpretation of “reverse discrimination,” indicate a fertile ground for civil rights litigation by white plaintiffs as well as a possibility that racial quotas are unconstitutional.

The Supreme Court — Equal Rights for ‘All Persons’
The facts leading up to the Supreme Court’s decision in McDonald v. Santa Fe Transportation Co. are deceptively simple. Plaintiffs were two white employees who were fired by the defendant, their employer, for stealing. A black employee caught with them was charged with the same offense and not fired. Plaintiffs alleged that they were discriminated against on the grounds of race, and after exhausting their proper administrative remedies, filed suit under federal statutes extending guarantees of nondiscrimination in private employment. The District Court determined that the guarantees of nondiscrimination offered by the Federal Civil Rights Acts were unavailable to white plaintiffs and dismissed the suit. The Supreme Court disagreed, finding that Title VII of the 1964 Civil Rights Act, which purports to eliminate racially discriminatory employment practices, does so irrespective of what race is discriminated against. The Court also held that 42 U.S.C. 1981, which had previously been determined to afford a remedy to black plaintiffs for discrimination in private employment, applied equally to white plaintiffs.

In extending the coverage of Title VII to whites, the High Court makes a rather predictable advance in the civil rights field. Noting that the statute proscribes discharge of “any individual” because of “such individual’s race,” it was not a particularly difficult step for the Court to conclude that such a statute was “not limited to discrimination against members of any particular race.” Moreover, the Court noted that dicta in a previous case had described Title VII as prohibiting “(d)iscriminatory preference for any (racial) group, minority or majority (emphasis added).” However, in ruling that 42 U.S.C 1981 applies to Whites as well as Blacks, the Court appears to take a rather long constitutional stride. The difficulty lies not with the statutory language which affords freedom of contract to “(a)ll persons within the jurisdiction of the United States . . .,” but rather with the underlying basis for allowing the application of the statute to the case at bar. Since the case involves an action between private parties, there are none of the essential vestiges of State involvement in the case that would allow application of the Fourteenth Amendment’s guarantee of Equal Protection to apply. Rather it is the Thirteenth Amendment, which has no State action requirement, from whence Congress derives the authority to protect civil rights of U.S. citizens, that authority being incident to the power of Congress to abolish the “badges and incidents of slavery.” The case does not mention the Thirteenth Amendment specifically, but in his opinion for the Court, Justice Marshall draws upon the statutory construction of the 1866 Civil Rights Act to conclude: “(E)vidence of congressional intent makes clear, we think, that the 1866 statute, designed to protect the ‘same right . . . to make and enforce contracts’ of ‘citizens of every race and color’ . . . was meant, by its broad terms to proscribe discrimination in the making or

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enforcement of contracts against, or in favor of any race. Unlike as it might have appeared in 1866 that white citizens might encounter substantial racial discrimination of the sort prescribed under the Act, the statutory structure and legislative history persuades us that the Thirty-Ninth Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves. 18

By construing such a "broad principle" as Justice Marshall describes from the legislative history of the 1866 Civil Rights Act, the Court is clearly setting important constitutional precedent. Since the 1866 Act has been found constitutional beyond the limiting scope of the State Action doctrine by virtue of the Thirteenth Amendment, 19 does McDonald's interpretation of the far-reaching intent of the Act imply the authority of the Thirteenth Amendment to extend beyond protection of Blacks from the "badges and incidents of slavery" to the "broad principle" of eliminating all racial discrimination? Alternatively, since the 1866 Act was in part the basis for the passage of the Fourteenth Amendment, 20 does McDonald lay the groundwork for a similar interpretation of Equal Protection that applies equally to all plaintiffs regardless of race? Although it would be presumptuous to imply such a far-reaching constitutional doctrine from a decision that was concerned with statutory interpretation, still it appears that a point has been made by the Court in McDonald that evinces an underlying principle of constitutional law. The principle is that discrimination can be found to affect more than just one race, and when justice condemns discrimination, it does so in toto, without regard to which race is being discriminated against.

The Admission's Quota Controversy — California's View

The California Supreme Court adopted the underlying message in McDonald when they were presented with an issue of racial discrimination by a white plaintiff in Bakke v. Regents of the University of California. 21 The court applied the same standards as if the plaintiff were a minority member and found the discrimination unconstitutional. Noting the McDonald decision as showing a "marked reluctance (of the Supreme Court) to apply different standards to determine the rights of minorities and members of the majority," 22 the California court found a special admissions policy that gave special treatment solely on the grounds of race to be a violation of the Fourteenth Amendment.

The plaintiff, Allen Bakke, was a white applicant denied admission to the medical school of the University of California at Davis in 1973 and 1974. The admissions procedure used by the University consisted of a two-tiered screening process whereby 84 of 100 places were filled by a regular admissions process and 16 places were reserved for the recommendations of a special admissions committee. The regular admissions process consisted of an initial screening whereby applicants with grade averages below 2.5 (on a 4.0 scale) were summarily rejected. The remaining applicants were further screened on the basis of their records and on the results of an interview process until the final selections and alternate lists were made by the admissions committee. 23

The special admissions process consisted of an initial screening by the chairman of the special admissions committee to determine if applicants were disadvantaged. 24 The special admissions committee would then personally interview a number of applicants, recommending the admission of some of those interviewed. 25 These recommendations would then be presented to the full admissions committee who had final approval over the admissions selection process. In practice, the regular admission's committee generally accepted the special admissions committee's recommendations. 26 In contrast to the regular admissions procedure, applicants for the special admissions procedure were not summarily rejected with college grade point averages below 2.5 and in fact the court noted that applicants with GPA's as low as 2.11 (in 1973) and 2.21 (in 1974) had been accepted through the special admissions procedure. 27 In addition, although the University admissions director noted that his committee scrutinize applicants with scores on the Medical College Admissions Test (MCAT) below the 50th percentile, the mean average for students admitted under the special admissions process for both 1973 and 1974 was below the 50th percentile in all four areas of testing. 28 Plaintiff's scores were in the 96th, 94th, 97th, and 72nd percentile in the four MCAT testing areas. In addition, his college GPA was 3.51 and he was not admitted nor placed on the alternate list in either 1973 or 1974. 29 The special admissions program, although ostensibly open to "economically disadvantaged students" in fact operated to admit only minority students. As the trial court found, the fact that members of the majority were barred from participation in the special program constituted an "invidious discrimination in favor of minority races and against Bakke and others whose applications were evaluated under the regular admissions procedure." 30 The issue presented was whether plaintiff, who asserted he was better qualified than applicants accepted under the special admissions program, can constitutionally denied admission on the grounds of his race. 31

The answer was no. The court held that the Constitution's extension of equal protection to "any person" meant such protection was to be afforded on an equal basis for all races. 32 In evaluating the challenge under Equal Protection standards, the California high court noted that where discrimination based on race has been shown, the justification for that discrimination shall be subjected to "strict scrutiny". The court noted that the University's justifications offered for the special program, essentially those of providing more minority doctors, were insufficient to meet the Constitutional standards. 33 The court also found that the other justification offered for the special admissions program, that of providing opportunities for economically disadvantaged students, would be legitimate if it did not result in racial discrimination. Here, the special admissions program did. The court noted, however, that the University had not met its burden of showing that its legitimate goals could be achieved by means less detrimental to the majority, and hence found the special admissions program to be, on balance, unconstitutional. 34

The lone dissent in the case argued that the racial classification at issue was essentially a case of benign discrimination. As such, the dissent argued it should be subjected to a less demanding constitutional standard than was reserved for racial discrimination cases, that is, the rational relationship test. 35 The dissent further argued that the benefits engendered by allowing more minorities the opportunity to become doctors outweighed the disadvantages presented to white applicants who were denied admission. Noting that the Fourteenth Amendment's precepts allow courts to utilize racial guidelines in remedying cases of
past discrimination, the dissent felt it incompatible with those precept for a court to strike down a system voluntarily created to remedy the effects of past discrimination through the use of racial guidelines. The majority opinion noted, however, that the cases involving the effects of past discrimination in education did not have the effect of denying educational opportunity as was the issue presented by the case at bar.

Countering the dissent's assertion that the decision as rendered would deprive minority applicants of the opportunity to become doctors, the court noted that such a view presupposed that minority status is of itself a substantive qualification and foreclosed the issue presented by Bakke. The court agreed with Bakke's contentsions that he was discriminated against on the basis of race and hence was entitled to a remedy, noting "we do not hesitate to reject the notion that racial discrimination may be more easily justified against one race than another."

Since the trial court had dismissed Bakke's claim because of his inability to prove he would have been admitted but for the discriminatory admissions procedure, the California Supreme Court drew upon the analogy of employment discrimination cases to require on remand that the University assume the burden of proof of whether Bakke would have been entitled to be admitted but for the special admissions program.

The New York View — An Opposite Stance?
On the surface, the decision by New York's highest court in Alevy v. Downstate Medical Center appears to run counter to the California decision in Bakke. Plaintiff was a white applicant who argued he had been denied admission to defendant Medical School because of the effect of preferential treatment for minority applicants. However, in Alevy, the admissions procedure consisted of only one process and the admissions committee considered, among other factors, an applicant's background, giving due consideration to applicants from "educationally deprived backgrounds." In Bakke, the California court noted that although the admissions procedure worked to create a discriminatory effect, special admissions considerations for economically disadvantaged students could be constitutional if students were not barred from consideration under such a program because of race. And indeed in Alevy, the trial court found that the Medical School based their acceptances on financial and educational disadvantages instead of race. Irrespective, the court dismissed the suit because plaintiff was unable to show he would have been admitted but for the alleged discrimination. Since the New York Court of Appeals affirmed the trial court, ultimately resting its decision on the fact that plaintiff Alevy would not have been admitted even if the minority preference were eliminated, the California court in Bakke, distinguished Alevy on those factual grounds.

However, in dicta, the New York high court dealt with the minority preference issue in a way that appears to conflict with the California ruling. In fact, minority applications were specially marked and handled differently by the admissions committee. In addition, an initial cut-off point based on a numerical formula of grade-point averages and MCAT scores were applied to majority applicants but not to minority applicants. Moreover, although there was no special procedure for minority applicants, there was nonetheless a subjective preference given in the admissions process. The court noted:

"[While the (admissions) committee had not express written or oral directives to give special preference to minority applicants from the dean of the college, the Chancellor of the State University, or the board of trustees, the policy of the admissions committee regarding minority applicants was understood and well known to the faculty and dean of the college."

In addition, plaintiff's MCAT scores were higher than any of the minority applicants accepted by the School. Finally, at the trial, the admissions director conceded that had the plaintiff been a minority group member, he would probably have been admitted.

However, in dealing with the question of reverse discrimination, the New York court declined to suggest strict scrutiny standards would be applicable, noting that "such an application would be contrary to the salutary purposes for which the Fourteenth Amendment was intended." Rather, the court suggested that the proper standard to apply in such a case would be the "sliding scale" approach, where the relative merits of plaintiff's interests would be weighed against the state's interest. Applying the test, the Alevy court intimated the admissions preference would be constitutional if a substantial state interest were furthered, and if it could be shown that the state interest could not be reasonably advanced without the racially discriminatory methods. The court expressed caution, however, about the possible adverse effects of long-term benign discrimination practices.

"If such practices really work, the period and extent of their use should be temporary and limited, for as goals are achieved, their utilization
"... Is it a permissible goal of society to attempt to deliberately advance a minority group's social and economic standing ... "

Since the New York court's ruling turned on plaintiff's lack of demonstrable harm, the issues raised concerning the constitutionality of reverse discrimination remain unanswered in New York.

However, a comparison of the cases' facts, with consideration of Bakke's constitutional ruling and Alevy's suggestions, present a real conflict between the two states' views. In both cases, minority applicants were given preferential treatment over nonminority applicants, and an initial screening procedure with a numerical cut-off point was applied only to nonminority applicants. In addition, racial discrimination was found to exist in both admissions procedures. Each admissions procedure was ostensibly established for the benefit of "economically disadvantaged students" and yet each had the practical effect of giving minority applicants preferential treatment. In California, the case involved an express, separate screening process for minority applicants; in the New York case, the minority preference program was incorporated within the regular admissions procedure where an applicant's race was an unstated factor considered by the admissions department.

The California court, applying established constitutional standards applied to cases of racial discrimination, found the discrimination unconstitutional. The New York court seized upon the opportunity presented by plaintiff Alevy's low standing on the Medical School's waiting list, declining to rule on whether the racial discrimination shown in the case was constitutional. However, the court suggested that racial discrimination should be treated differently depending upon which race is discriminated against. Further, the New York court noted that benign discrimination in favor of minorities could be constitutional if it appeared to be working for its intended purpose.

The Future For Reverse Discrimination — Are Quotas Obsolete?

The ultimate issue presented by the admissions quota cases is whether it is a permissible goal of society to attempt to deliberately advance a minority group's social and economic standing, and if so, may this be done at the expense of individual majority group members? The dissent in Bakke and other critics of the case, focus on the fact that without special admissions programs, there would be little or no minority graduates from professional schools, and therefore society would have a disproportionately number of professional minority members. Therefore, the critics charge, society's minority groups would be less well served because of the lack of members with professional training. However, as Justice Douglas stated in his DeFunis v. Odegaard dissent: "The Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, Polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans ... "

In DeFunis, as in Bakke and Alevy, the question was not whether racial guidelines could be utilized to eliminate discrimination. Rather, the question was whether, under the guise of establishing equality, methods could be used which deny equal opportunity to majority applicants. As Justice Douglas in DeFunis and the Bakke court found, there is no comparison between school desegregation cases, where judicial remedies present merely an inconvenience, and admissions quota systems, where equal educational opportunity is denied majority race members. The question of judicial interpretation ultimately hinges on whether the Equal Protection Clause and the related Civil Rights Statutes would protect all races, or only one race from discrimination.

The recent Supreme Court decision in McDonald appears to point the way for an interpretation of civil rights principles that extend to all persons, regardless of race. The implication, at least for Title VII employment discrimination suits, seems clear: white employees will have the same remedies available to them of racial discrimination as black employees. Insofar as overt acts of an employer are concerned, civil rights principles will protect all litigants without regard to their particular race or minority status. Thus, absent a showing of actual past discrimination in a particular case, courts have ruled reverse discrimination practices unconstitutional. But the ruling in McDonald makes a stronger statement than the mere allowance of standing for white civil rights plaintiffs. The Supreme Court held that the words of the 1866 Civil Rights Act, which extended protection from discrimination to "any person," applied equally to all races. Might not the words of the Fourteenth Amendment extending rights of due process and equal protection of the law to "any person" be likewise interpreted to apply to all persons without regard to race?

In the final analysis, the legal question must answer to society's needs, as Brown v. Board of Education answered the cry of educational inequality. It was the essential injustice of racial discrimination that compelled the courts and Congress to outlaw educational discrimination and fashion remedies for its victims.

Does the essential injustice of racial discrimination change with the color of its victims? To presume that "(t)wo centuries of slavery and racial discrimination" justifies a different standard depending on the color of the plaintiff, as the Bakke dissent argues, misses the essential injustice involved. For while racial guidelines have been used in school desegregation cases, it must be remembered that they are merely a judicial tool. To suggest that racial guidelines be used in all professions is to promote the tool at the expense of its underlying rationale of justice for all, not reparations of past social injustices for a few. In order to uphold that sense of justice, a court must treat racial discrimination with the same judicial scrutiny regardless of the victim's color. To this end, it is hoped that the direction of equal justice for all races Justice Marshall expressed in McDonald will continue, with all racial discrimination being banished from the American judicial system forever.

Footnotes
20. The 1866 Act was passed over President John-
2. Bakke v. Regents of the University of California, 3. Alevy v. Downstate Medical Center,
5. Plaintiffs also filed complaints with their Union and the Equal Employment Opportunity Com-
9. 44 U.S.L.W. at 5071.
11. 44 U.S.L.W. at 5071.
12. See note 8 supra (statutory language).
15. 42 U.S.C. 1982 is constitutional despite lack of "state action" because of Congressional authority under 13th Amendment's enabling clause to abolish "badges and incidents of slavery.")
18. 44 U.S.L.W. 5007, at 5074.
33. See Lack v. Metropolitan Edison Co., 419 U.S. 345 (1974) (public utility subject to government regulation insufficient "state action" to allow application of 14th Amendment to its private actions).
35. Id. 36. 416 U.S. 312 (1974).
37. Id. at 13.
38. Id. at 20.
40. Id. at 23.
41. Id. at 28.
42. Id. at 30.
43. Id. 44. Id. 45. SF 23311 (Tobriner, J. dissenting).
46. Id. (dissent) 12, citing Swann v. Board of Educa-
47. Id. (dissent) at 57.
52. Id. at 91. The Airy court it was within the province of the University and not the courts to make the determinative question was a practical effectiveness of their integration efforts.
53. Id. at 91; Calif. Sup. Ct. opinion SF 23311 (majority opinion) at 13. In both cases the final determination as to the existence of racial discrimina-
54. Note also a study in being prepared by Boalt Law School of the University of California, Berkeley that argues that the constitutionally allowable methods established by the court in Bakke would result in substantially less minority members of the medical and legal profession. Again, how-
55. The court also noted that during the special pro-
gam's operation 6 Mexican-American, 1 Black and 67 Asian-American. It noted that the regular admissions program, Calif. Sup. Ct. opin-
56. 1416 U.S. 342, 342 (Douglas J. dissenting).
57. 416 U.S. 342.
59. 334 NYS2d 82 (April 8, 1976).
60. Bakke v. Regents of the University of California. Calif. Sup. Ct. opinion SF 23311 (majority opinion) at 41.
61. Applicants were given a numerical score from 0-120 by adding the sum of their undergraduate science and nonscience GPA's multiplied by 20 (80 possible on a 4.0 scale) plus his average MCAT score multiplied by .05 (40 possible out of 800 perfect MCAT score). If the point given if the applicant was a resident of New York. Applic-
62. Desegregation remedies require a showing of past discrimination first. Ser Milliken v. Bradley 418 U.S. 717 (1974) plus 8 cases of other deseg-
63. 13th Amendment's enabling clause to abolish "badges and incidents of slavery.")
MEDITATION OR PRAYER: The Import of a Two-Letter Word

Johnny may now pray again in the Massachusetts public schools, as long as Mary may meditate, Betty may think about her Saturday date, and Bobby may reflect on last night’s Bruins game.

Directives to institute a moment of silence for meditation or prayer were sent to all Commonwealth school committees and school superintendents by the state Department of Education this fall as the result of a three-judge United States District Court decision in September. The decision held that a 1973 statute mandating a one minute silence is not unconstitutional.

The statute, Mass. G. L. c.71, §1.A, was challenged last February 2 by a Framingham parent and student plaintiffs with the assistance of the Massachusetts Civil Liberties Union in an action against the town school committee, Lynda Gaines et al. v. Winston D. Anderson et al., Civil No. 76-435-M, (D. Mass., filed Sept. 1, 1976).

The school committee adopted a resolution January 12 to comply with the law “until such time as the court ruled the Chapter in violation of the Constitution,” and adopted guidelines to carry out the statutory provisions January 27.

At issue was the 1973 addition by the legislature of the two words “or prayer” into a 1966 statute which only permitted “meditation”.

The plaintiffs sought declaratory and injunctive relief to vindicate alleged violations of their U.S. Constitutional rights under the First Amendment’s Establishment and Free Exercise clauses, and the Fourteenth Amendment’s Due Process rights of parents to exclusively “supervise the religious upbringing of their children.”

The District Court said the 1973 statute maintains its neutral secular purpose and its respect for the students’ free exercise of religion.

There will be no appeal.

John Roberts of the MCLU explained that since the District Court did “not buy our argument on the legislative history of the statute,” it was his opinion that “the First Circuit would not buy it either and that an appeal now would only be solidifying the District Court opinion in the First Circuit.”

Roberts said the MCLU believes the addition of the words “or prayer” does violate the neutrality of the statute.

“When the legislature added the words ‘or prayer’ there must have been a reason . . . a tilt toward a religious exercise or an interpretation of how the moment of silence was to be used,” he stated.

He added, however, that if the statute is tested again, it will be with another case, possibly “showing some kind of abuse which would give us a shot at the Circuit Court of Appeals.”

In its 15-page opinion, the District Court held that the statute is clear in its requirements, “providing that a minute of silence, without any overt activities, is to take place each day at the opening of school.” The teacher is to announce that the minute of silence is “for meditation or prayer,” and remind students that non-observance is in violation of school rules from which disciplinary measures will result.

The court stated, “because we conclude that the statute and the guidelines do not advance or inhibit religion, coerce any student into participating in any activity which infringes his liberty of conscience or interferes with the free exercise of his religion, we do not agree that they violate plaintiffs’ rights under the Constitution.”

In reference to the Establishment Clause, the opinion cites Committee for Public Education v. Nyquist, 413 U.S. 203, 222 (1967) in which the Supreme Court set forth a three-part test: “(1) the law must reflect a clearly secular purpose; (2) it must have a primary effect that neither advances nor inhibits religion; and (3) it must avoid excessive government entanglement with religion.”

Noting that “the line which separates the secular from the sectarian in an elusive one,” Tilson v. Richardson, 403 U.S. 672, 678 (1971), the court said that the “application of any of these criteria to state action, challenged as violative of the Establishment Clause, cannot be scientifically precise.”

Following a brief review of the legislative history of the 1966 enactment calling for meditation alone, the court said that history, statutory language and its likely operation in effect “all suggest that this legislation was designed to serve secular objectives without unconstitutionally advancing religion.”

“A state statute which mandates a moment of silence in a public school setting is not per se an invalid exercise of legislative power. All that the statute requires students to do is be silent. Silence during the school day may frequently be necessary if schools are to attain their educative goals, and may serve legitimate secular purposes in aid of the educative function. A quiet moment at the beginning of the day would tend to ‘still the tumult of the playground and start a day of study.’ Abington School District v. Schempp, 374 U.S. 203, 222 (1963) quoting in part from the June 28, 1962, edition of the Washington Post.

“The legislature could reasonably believe that students tend to learn greater self-discipline and respect for the authority of the teacher from a required moment of silence. These are legitimate secular ends . . .”

Turning next to a discussion of whether the 1973 amendment, adding “or prayer” still withstands the strictures of the Establishment Clause, the court noted that the word “prayer” unlike “meditation” has a specifically religious meaning in its usual sense.

If the amendment has the “purpose or primary effect of encouraging the religious activity of prayer the statute would be rendered unconstitutional,” the court said, citing Abington School District v. Schempp, supra, and Engel v. Vitale, 370 U.S. 421 (1962).

Noting that the requirements of the First Amendment do not “implicate hostility to religion or indifference toward religious groups” nor “import a preference for those who believe in no religion, or demand primary devotion to the secular,” the court pointed out that the 1973 amendment is framed in the disjunctive,
permitting meditation or prayer without mandating one or the other.

"Thus the effect of the amended statute is to accommodate students who desire to use the minute of silence for prayer or religious meditation and also other students who prefer to reflect upon secular matters."

Commenting on the Framingham silence directives, which have now been adopted in whole by the state Department of Education and then by all other communities in the state, the court said the defendant school committee appeared to understand clearly the legislative purpose to maintain neutrality.

"The fact that the Framingham program provides an opportunity for prayer for those students who desire to pray during the period of silence does not render the program unconstitutional."

Turning to the claim under the First Amendment Free Exercise Clause the court said "there is no showing that any plaintiff was coerced into participating in practices which violate his religious beliefs concerning prayer . . . . The statutes and the guidelines do not compel participation by any student in a religious activity which violates his liberty of conscience."

"If a student's beliefs preclude prayer in the setting of a minute of silence in a schoolroom, he may turn his mind silently toward a secular topic, or simply remain silent, without violating the statute or guidelines or facing the scorn or reproach of his classmates. No rights of the plaintiffs under the Free Exercise Clause are violated where the statute and guidelines compel no participation in any religious exercise by the students, the state infringes no parental liberty protected by the Due Process Clause."

In conclusion the court said "the statute and guidelines do not have a primary effect of favoring or sponsoring religion. They do not involve the state in religious exercise or directly in the realm of religion. They do not fall within the proscriptions of the First Amendment."

Marcia D. Brockelman

Forty-nine Going On 50 . . . Leo J. Nolin Still Waits

Five attorneys and a black-robed white haired Justice gathered in the paneled and carpeted Supreme Judicial Court in late October to discuss the best approaches for getting 73-year-old lifer Leo J. Nolin out of jail.

The former Groveland, Massachusetts man has been imprisoned for 49 years.

Readers of the Spring, 1976 Advocate, supra, p. 47. Massachusetts Defenders Committee has submitted a writ of error petition while Prisoners' Rights has been working through the Norfolk County Courts.

At the October hearing the three attorneys, who had only just learned of each other's existence, decided to go ahead with Riley's approach, if the Parole board does not get Nolin out first.

A new trial will amount to a release, as there is no possibility that the Commonwealth could restage the 1927 event. Court records are not even extant.

An outright pardon has been denied because Nolin is too close to parole, Attorney Keegan said.

If Nolin does not go to Shirley, or if he does and is still not paroled, the new trial issue may get to the full bench of the Supreme Judicial Court in the spring.

Meanwhile for a 73-year-old man, time marches on and on . . .

M. D. B.

Inmate Rights

In a consideration of whether any procedural safeguards are constitutionally prescribed for prison disciplinary proceedings, the Supreme Court in Baxter v. Palmigiano, U.S.S.C. Nos. 74-1187 and
74-1195 (April 20, 1976), reversed judgments of the First and Ninth Circuit Courts of Appeals by holding that the right to retained or appointed counsel does not extend to prisoners in the context of a disciplinary hearing, and that the privilege against self-incrimination of the Fifth Amendment does not preclude the deduction of adverse inferences against an inmate for his failure to furnish testimony.

The companion cases arose from actions filed under 42 U.S.C. sec. 1983 by state prison inmates in California and Rhode Island, who alleged that the disciplinary processes at their respective penal institutions had been violative of the fundamental constitutional right to which they were entitled.

Since a prison disciplinary proceeding is not in the nature of a criminal prosecution, the Court had earlier determined in Wolff v. McDonnell, 418 U.S. 539 (1974), that the full compliment of rights afforded a criminal defendant do not apply to inmate disciplinary procedures. The Court there announced the policy that officials must conduct such hearings with regard to a mutual accommodation between institutional needs and goals and those provisions of the Constitution which are of general application.

Where the charge against an inmate in a disciplinary proceeding concerns conduct susceptible of punishment as a crime under state law, both the First and Ninth Circuits had held that inmates have a right to representation by counsel and that authorities must so inform them. The Baxter Court, however, declined to recognize an absolute right to retained or appointed counsel in disciplinary hearings and affirmed its opinion in Wolff v. McDonnell, supra, which stated that inmate representation by counsel would effect a more adversarial encounter and reduce the proceedings' usefulness, as a means to further the objectives of the correctional system.

The court found, furthermore, that minimal procedural safeguards in a prison disciplinary hearing encompass the Fifth Amendment's prohibition against compelled self-incrimination but not the potential deduction of adverse inferences from an inmate's failure to testify. Griffin v. California, 380 U.S. 609 (1965), the Court acknowledged, prohibits a suggestion to the jury in a criminal case that it may treat a defendant's failure to testify about relevant facts as substantive evidence of guilt. But where parties
to civil actions remain silent in reply to
the probative evidence presented against
them, the Fifth Amendment has not been
discriminatory to the conclusion of
adverse inferences. As a result of its anal-
ysis, the court considered its decision in
the instant case consistent with the view as
to civil actions and refrained from
extending the Griffin rule to the context of
civil disciplinary hearings, since
those proceedings incorporate other
important state interests and the correc-
tional process rather than conviction for
criminal conduct.

Where an inmate remains silent in
response to accusation and incriminatory
evidence, it is not an invalid practice to
permit the deduction of adverse inferences.
In such circumstances, the deduct
socially constitutes a violation of any
constitutional protections, although silence
—in and of itself—would not fur-
sish sufficient evidentiary value to sup-
port an adverse decision by state prison
officials.

In Wolff v. McDonnell, supra, the court
had held that an inmate who must appear
before a disciplinary board should be per-
mitted to present documentary evi-
dence and call witnesses in his defense,
to the extent that the permission would
not entail immoderate hazards to correc-
tional goals or institutional safety. The
right, however, to call witnesses at a dis-
ciplinary hearing, according to the Court
in the present case, must be circumscribed by the doctrine of reasonable accommodation between the interests of the inmates and the requirements of the institution.

Although the right to present evidence
is fundamental to a fair hearing, an abso-
lute and unrestricted right to call wit-
nesses from the members of the prison
population affords great potential not
only for disruption but also for interfer-
ence with the correctional program, spe-
cifically in cases where swift discipline is
essential. The Court noted, in addition,
that the confrontation and cross-exami-
nation of witnesses present more sub-
stantial hazards to institutional interests
than does the right to call the witnesses,
and adequate bases of decision are avail-
able without them.

Authorities, moreover, need not pro-
vide prisoners with written explanations
when they refuse to grant them permis-
sion to cross-examine or confront adverse
witnesses. Thus considerations as to the
right to call witnesses, confrontation and
cross-examination, reasoned the Court,

must reside in the discretionary province
of state prison officials.

The Court declined to reach the issue
whether the minimal due process safeg-
guards of notice, opportunity for
response and statement of reasons for
action by prison officials should attend
prison disciplinary proceedings which
involve other than serious misconduct,
because it considered such action prema-
ture on the face of the record.

An opinion dissenting in part pro-
posed that the majority's view as to the
Fifth Amendment and the drawing of
adverse inferences was inconsistent with
numerous prior cases holding to the
effect that the government may not
penalize an individual for invoking the
privilege against self-incrimination. That
principle, the opinion concluded, must
preclude a reliance on any inference of
guilt issuing from the exercise of the
privilege in the context of prison discipli-

nary proceedings.

Susan Leach De Blasio

A Conflict of Ethical Standards

In United States v. Coast of Maine Lobster
Co., 538 F.2d 899 (1st Cir. 1976), the court
held that a United States Attorney's
widely-publicized opinion that white col-
lar criminals receive inadequate jail sen-
tences, expressed while defendant was
being tried for mail fraud, provided suffi-
cient justification to order a new trial.

The opinion in question was expressed
by the United States Attorney for Maine,
Peter Mills, the well-known superior of the
prosecuting attorney in the Maine Lobster
case. The day before the case went
to jury, Mills stated his opinion on a local
television broadcast. The following
morning, a widely-read local newspaper
carried the story, complete with photo
and prominent headline reading, "Mills:
White Collar Criminals Get Off Easy."

After defendant moved for a mistrial,
the judge asked whether any of the jurors
had seen the broadcast or read the article.
The vice-foreman answered that he had
read the article, and six or seven other
jurors admitted having seen the paper.
None responded when asked if they
would be influenced by Mills’ statement.

The court did not hold that the article
was "sufficiently prejudicial to cause the
trial to be constitutionally unfair," but
instead reversed because it sought to
assure "more sensitive conduct" on the
part of prosecutors in the future.

Judge Aldrich, anticipating claims of a
pre-trial prosecutorial gag rule, specified
four factors which were critical to the
decision: (a) the timing of the statement;
(b) the relationship of the prosecutor to
the trial; (c) the prominence of the state-
dent; (d) the nexus between the pub-
lished views and the issues in the prose-
cution.

Five U.S. Attorneys weren't convinced.
They claimed in a petition for a rehearing
that "(t)he decision not only chills the
United States Attorney's freedom of
speech, it eliminates it." They further
charged that the decision would destroy a
U.S. Attorney's ability to inform the pub-
lic of deficiencies in the judicial system.

In establishing the standard for attor-
neys while a trial is in progress, the court
cited the A.B.A. Code of Professional
Responsibility, Final Draft, Disciplinary
Rule 7-107(D). That section of the Code
recommends that "(d)uring the selection
of a jury or the trial of a criminal matter,
a lawyer shall not make . . . an
extrajudicial statement that a reasonable
person would expect to be disseminated
by means of public communication and
that relates to the trial, parties or issues in
the trial, or other matters that are reasonably
likely to interfere with a fair trial . . . ."

The Code, however, is only a set of
recommendations which may be modi-
ified by the individual circuits. Another
circuit, confronted with a challenge by 7
local attorneys that the Code was uncon-
stitutionally vague and overbroad, held
that rules which infringe on an attorney's
right of free speech while involved in
imminent or pending litigation are valid
only if specific and if the comments pose a
"serious and imminent threat to the
administration of justice." Chicago Coun-
El eyers v. Bauer, 522 F.2d 242, 249 (7th
Cir. 1975).

While acknowledging that the trial is
the portion of litigation most susceptible
to prejudicial publicity, the Bauer court,
in balancing the attorney's right of free
speech and the defendant's right to a fair
trial, held that A.B.A. Rule DR-7-107 (D)
was unduly restrictive. In addition, the
court held that the A.B.A. prohibition
against speaking on "other matters"
relating to the trial was unconstitution-
ally vague.

The conflict between the First Circuit's
"reasonably likely" standard and the
Seventh Circuit's "serious and imminent"
standard for an attorney's statement
made during trials is evident. With the
media's increasing intrusion into the
courtroom and society's mounting pressure for professional standards, the conflict will have to be resolved soon.

Harvey B. Fireman

A Break For Innocent Beneficiaries

Massachusetts has long denied the payment of life insurance proceeds to an innocent beneficiary when the insured's death was proximately caused by his own volitional conduct. But in Davis v. Boston Mutual Life Insurance Co., Mass. Adv. Sh. 1736 (1976), the Supreme Judicial Court reversed this trend, joining the majority of United States' jurisdictions.

In Davis, the insured was shot and killed by a police officer while in the commission of two felonies, including attempted murder. The S.J.C., on direct appellate review, reversed the trial court, holding that the innocent beneficiary could recover the policy's face value. However, the beneficiary could not recover under the double indemnity clause because the insurance contract specifically excluded double payment if the insured was killed while in the commission of a felony. The contract did not contain a similar provision relating to the policy's face value.

The Davis decision overruled Molloy v. John Hancock Mutual Life Insurance Co., 327 Mass. 181 (1951). In Molloy, the court refused, as a matter of public policy, to grant the innocent beneficiary the proceeds of two insurance policies where the insured was killed while robbing a Boston store. Neither policy contained express exclusions for payment where the insured was lawfully killed.

In allowing Davis recovery, the S.J.C. reasoned that to deny payment would deprive an innocent beneficiary not only the insurance protection paid for, but also the whole-life policy's accumulated equity value. In addition, the court was convinced the insurance company hadn't relied on prior case law in setting their rates.

The court did not consider whether insurance companies may properly exclude payment of the policy's face value by express provision where the insured's death was caused by his criminal conduct. But they may have provided a clue to the answer. After refusing to discuss the public policy arguments against allowing the beneficiary recovery under the double indemnity clause where such recovery was expressly denied by the insurance contract, the court stated that "an ordinary policy of life insurance, (however), stands on a different footing..." Harvey R. Uris

I'm Suing You . . . . Dear:

Massachusetts has joined the growing number of jurisdictions where one spouse may sue the other for injuries sustained in an automobile accident.

The ancient doctrine of interspousal immunity has been overturned by the Supreme Judicial Court only in relation to motor vehicle injuries. This decision, however, does not touch immunities which still exist for other personal torts, such as assault and battery, false imprisonment, defamation or injuries resulting from negligence.

The auto accident exception is promulgated in Blanche Lewis v. Larry C. Lewis, Mass. Adv. Sh. 1764 (1976), a civil action resulting from a 1973 accident in Agawam in which the wife was injured while a passenger in her husband's car. The case was sent to the Supreme Judicial Court on appeal by the plaintiff wife, from a summary judgment for the defendant husband. The decision, written by Justice Reardon, analyzes the history of the interspousal immunity doctrine, the many recent changes in other jurisdictions, and the heavy criticism interspousal immunity has received by such eminent authorities as Dean William L. Prosser and numerous law review articles in recent years.

The Massachusetts decision does not examine the impact, if any, of liability insurance on the car injury question between husband and wife, despite the fact that the availability of such insurance has been viewed as changing some of the arguments which bolstered the old interspousal immunity doctrine. See W. Prosser, Torts, 868 (4th Ed., 1971).

The fundamental basis for the common law rule of interspousal immunity was the special unity of husband and wife within the marital relationship. For most purposes the common law treated husband and wife as "a single person, represented by the husband," see Lewis, supra at 1765, citing Nolin v. Pearson, 191 Mass. 283, 284, 77 NE 890 (1906).

Women have always been regarded as a separate individual in a criminal action. However until the advent of the Married Women's Acts in the later part of the 19th century both personal and property rights, in fact the very legal existence of a wife, was regarded as suspended and merged into those of the husband during marriage. At times, the wife's legal existence was merged prior to and after the marriage.

Prosser ascribes this status of women to a mixture of Biblical and medieval metaphysics; the position of the father of the family in Roman Law, the property law of feudalism and the natural law concept of the family as an informal unit of government with the physically stronger person at its head, Prosser, (supra,) at 860.

The Married Women's Acts in almost all jurisdictions were designed to give the wife a separate, if still limited, legal identity. She was allowed to own and control her own property, to sue or be sued without joinder of her husband, and to be separately responsible for her own torts. She could maintain a tort action against her husband, however, only in regard to her property interests (conversion, fraud, trespass to land or chattels, negligent damage to property etc.).

Until the last few years, however, no American courts allowed one spouse to sue the other for a personal tort.

"That no cause of action arises in favor of either husband or wife for a tort committed by the other during coverture is too well settled to require citation or authority," said the Supreme Judicial Court as late as 1948 in Callow v. Thomas, 322 Mass. 550, 551-552, 78 NE 2d 637 (1948).

The reasoning for the old rule has been that personal tort actions between husband and wife would disrupt the peace and harmony of the home, which is against the policy of law. (Prosser notes, however, that the amount of peace and harmony remaining to be protected following and assault and battery could be dubious).

The advent of liability insurance has limited the peace and harmony argument, as the insurance company will pay the damages. It has, however, raised the issue of possible collusion between injured and insured when they are husband and wife.

Both the peace and harmony and collusion arguments were, however, set aside by the Supreme Judicial Court even before the Lewis decision in Sorensen v. Sorensen, Mass. Adv. Sh. 3662 (1975) 339 NE 2d 907, where family immunity was ruled out between parent and child. The court also ruled that the Massachusetts
statute on interspousal immunity, Mass. Gen. Laws ch. 209 sec 6, is a reference to, not an incorporation of the common law doctrine, and is therefore "susceptible to reexamination and alteration by this court." Lewis, supra, at 1776.

M.D.B.

The Last Word on Initiative Petitions... Who Has It?
The initiative petition to ban the private possession and sale of handguns in Massachusetts evolved into much more than the cause of People v. Handguns; it became a classic constitutional struggle for power. The ultimate question was whether or not the voters of Massachusetts retained an absolute constitutional right to initiate their own legislation where the General Court has either been silent or contrary to the initiative's wishes.

Amendment 48 of the Massachusetts Constitution provides in part:

"Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection."

This initiative power was exercised by People v. Handguns on December 3, 1975 when they presented to the Secretary of the Commonwealth the initiative petition to ban the private possession and sale of handguns. This petition was accompanied by 102,146 certified signatures of registered Massachusetts voters. The petition required signatures equal in number to 3% of the entire vote cast for governor in the preceding gubernatorial state election.

Pursuant to the provisions of Amendment 48, a petition receiving the necessary signatures is introduced into the House of Representatives where it may be accepted or rejected. If the petition is rejected by the legislature, as was the handgun ban, 197-35, the initiators must file additional signatures equal to .05% of all votes cast for governor in the last election. When this requirement is satisfied, the petition is placed on the ballot in the next state election. If approved by a majority of the voters voting on such a law, equal in number to at least 30% of all those voting for governor in the last election, then the measure becomes law.

Following this rather laborious procedure, People v. Handguns obtained the necessary additional signatures and filed the completed petition on July 7, 1976. However, while People v. Handguns was gathering the necessary signatures, the General Court was proceeding on their own in an attempt to thwart the anti-handgun effort. The legislature was relying on Pt. III §2 of Amendment 48 which provides:

"The general court may . . . submit to the people a substitute for any measure introduced by initiative petition, such substitute to be designated on the ballot as the legislative substitute for such an initiative measure and to be grouped with it as an alternative therefore."

The amendment further provides that the voters may vote for either one, or both, or neither of the measures, but that only the one receiving the most votes will become law. Therefore, by offering a legislative "substitute" that required mandatory sentences for 14 existing crimes if committed with a firearm, the legislature offered a substitute that would probably have received more votes than the more controversial proposal to ban handguns. This would have had the effect of defeating the handgun petition, even if a majority of the voters had approved of its passage.

People v. Handguns filed suit shortly after the House and Senate passed their "substitute" measure. Their complaint sought a declaratory judgement that the legislative substitute did not conform to the requirements of Amendment 48. They also sought an order prohibiting the Secretary of the Commonwealth from placing the substitute on the ballot as an alternative to the initiative petition.

The outcome of the suit depended ultimately upon the Court's interpretation of the words "substitute" and "alternative", as found in Pt. III §2. of Amendment 48.

The defendants argued that the language of the amendment granted a broad power to the General Court to propose as a substitute any measure dealing with the same general subject matter as an initiative petition.

The plaintiffs offered two theories in defining "substitute" and "alternative". First, they argued that the debates of the Massachusetts Constitutional Convention of 1917-1918 made it clear that the substitute was intended to be a constructive power of the legislature, wherein the legislature could use its legislative experience to perfect or amend initiative proposals.

Second, plaintiffs argued that even if the Court did not adopt the "perfecting" role of the substitute, the substitute must at least be a true alternative to the initiative. Measures are alternatives, they argued, only if they deal with the same subject and cannot exist side-by-side as law consistently and harmoniously. They proceeded to point out that the legislature's proposed substitute, which proscribed mandatory sentences for certain crimes committed with firearms, was completely compatible and could exist simultaneously with a law banning the private possession and sale of handguns.

In what was perhaps a surprise decision to many observers, the Supreme Judicial Court agreed with the plaintiffs' first contention. They found that Amendment 48 "presented to the people the direct opportunity to enact statutes regardless of legislative opposition."

Buckley v. Secretary of the Commonwealth, 1976 Mass. Adv. Sh. 2413, 2417. The Court found the Amendment was adopted to preserve in the people a vehicle for legislative enactment which could not be thwarted by the actions of the legislature.

In elucidating the guidelines for further legislative substitutes the Court said at page 2418:

". . . The General Court (has) a perfectly plausible right to edit, polish, or amend an initiative proposal while retaining in that process the sense of the proposal so revised."

The above-quoted passage would appear to grant a complete victory to the proponents of a strict interpretation of the term "legislative substitute." However, the Court went on to explain that permissible perfecting, amending, or editing of substitutes could include provisions that might increase or decrease the class of persons excluded from operation of law, if it were in a manner supportive of the "intrinsic objectives of the initiative."

Does this mean that in the instant case, the Court would have allowed a substitute that increased the class of persons excluded from the law to include all those except possessors of "Saturday Night Specials"? Or could the exceptions include former policemen, gun clubs, and target shooters? It would appear that the next suit in this area may center around the definition of "intrinsic objectives."

In any event, it is clear that the initiative petition survived the first storm. This was the legislature's first known attempt to subvert an initiative petition by substitute since the adoption of Amendment 48 in 1918. (Although substitutes were offered in 1920 and 1924, they never
appeared on the ballot, as the initiative petitions were not completed.) The Court made it apparent that the substitute cannot emasculate the initiative petition by offering unrelated, less controversial proposals. The substitute may be an edited, polished, or amended version of the initiative petition, but it must retain the sense of the initiative proposal.

Taken in view of the total legislative process, however, the Court ruling was not a final victory for either People v. Handguns or the proponents of a strong, workable initiative petition process.

Even assuming the initiative proposal had passed on November 2, it required extensive funding. The cost of compensating present handgun owners has been estimated to be between 45 and 125 million dollars. Even though Amendment 48 appears to make it clear that the General Court must raise such money as may be needed to carry the law into effect, it is relatively certain that a House of Representatives that voted 197-35 for the proposal's defeat would not have speedily procured the needed funds.

Second, Amendment 48 further provides that, subject to the veto power of the governor and the right of referendum by petition, the General Court may amend or repeal an initiative petition. Unless the People v. Handguns petition had won an overwhelming majority at the polls, it is quite possible that the legislature would have exercised its power of repeal, probably under the rationalization of the huge cost to taxpayers if the law were enacted. Simultaneously, the legislature would have had to circulate an initiative referendum, which would have followed the same procedures as the initiative petition, but which would have been aimed at negating the legislature's repeal of the original initiative petition. Success at such a referendum could have been difficult for the petitioner if, in the meantime, the legislature had enacted a "middle ground" statute, such as a Saturday Night Special ban. Many original marginal supporters of an outright handgun ban might defer to a more moderate ban on Saturday Night Specials.

How far the legislative ping-pong game might have gone is now subject only to speculation. The relatively strong and clear language of the Supreme Judicial Court must now await another challenge by the legislature before the true strength of the initiative petition process can be fully determined.

One thing is clear; if the initiative petition process is to remain a viable process for legislative enactment — reserving the "last word" in the people — then the success or failure of the initiative petition must come from a decision of the voters. If the legislature is successful in frustrating the initiative process, then the "last word" of the people will become illusory, and so will the term state "representative".

John Burwell Garvey
Lawyers' Ethics in an Adversary System.


Is it proper practice for a criminal defense lawyer to examine a witness he knows will commit perjury on the stand? Should the lawyer cross-examine a truthful and accurate witness for the prosecution in a manner that discredits his reliability or causes him to appear mistaken? May the lawyer properly furnish advice about the law to a client when he knows that advice may induce perjured testimony?

In 1966, Monroe H. Freedman, currently Dean of Hofstra University School of Law, offered an affirmative response to those and other questions in a Criminal Trial Institute lecture on legal ethics. As a consequence of that lecture, he became the subject of a four-months of disciplinary proceedings resulting in an unsuccessful attempt to secure his disbarment or suspension. In part prompted by the experience, Dean Freedman began to write articles concerning the areas of legal ethics and professional responsibilities. Lawyer's Ethics In An Adversary System is a codification of arguments and conclusions about the viability of the American Bar Association's Code of Professional Responsibility with prescriptive formulas for certain of its ambiguities.

According to the author, an attorney often must choose between a violation of the moral imperative to be truthful and a violation of the moral imperative to respect those confidences received in sacred trust. The legal profession, Freedman contends, has failed to achieve a resolution of the dilemmas presented by conflicting ethical values. For the most part, it has circumvented the difficult issues either by "simplistic generalization" or by promulgation of the fundamental systemic values — at the same time, avoiding the fact that a number of values operate conversely.

The lack of practical guidance in the Code presents the conscientious criminal defense attorney with what Freedman terms a "trilemma": he must determine all relevant facts about his client's case; he must maintain that knowledge in strictest confidence; and he must conduct himself — as an officer of the court — with complete candor. To be professionally responsible then, the lawyer must know everything, keep it secret, and disclose it — all at the same time.

Examination of the adversary system in the administration of justice, according to Freedman, reveals that the interests of the state are not absolute; the dignity of the individual is supreme. Constitutional protections, such as those of the Fourth and Fifth Amendments, that safeguard the rights of the individual, may impede and even supersede the search for truth in a trial. Thus, a defense lawyer's professional obligation may very well be to recommend that his client withhold the truth, in the same way that he has a duty to prevent the introduction of reliable evidence wrongfully seized or confessions involuntarily obtained.

Through the adversary process, Freedman contends, a judge (or jury) is optimally placed for purposes of formulating a fair and accurate judgment. Fair judgments, though, require adequate representation of the client, which, in turn, requires that the advocate be the recipient of full and free disclosures on the client's part. If the advocate were permitted to reveal what he had learned, he would be guilty of a gross violation of a sacred trust and would ultimately nullify the benefits derived from professional assistance. The elimination of the obligation of confidentiality could lead, the author postulates, to the dissolution of the adversary system itself.

Conversely, the author admonishes that a lawyer should not actively participate in the concealment of evidence or the obstruction of justice. To preserve the dignity of the individual and the adversary system for the administration of criminal justice the defense lawyer need only maintain the sacred trust of confidentiality.

As a corollary to the proposition that confidentiality is a mainstay in the adversarial process, Freedman contends that, in certain situations, an attorney must not disclose his suspicion, or even knowledge, of a client's prior criminal activity. Circumstances may dictate, furthermore, that a lawyer discredit a truthful witness and allow his client to furnish perjured testimony. To avoid the posture of an ethical dilemma, the lawyer can always withdraw from the case, but, Freedman points out, the client would merely retain the services of another attorney from whom he would, in all probability, conceal the incriminating information or evidence of guilt. As a consequence, the very same perjured testimony would eventually be presented in the courtroom.

The author's inferences, conclusions and directives are the result of a proficient, scholarly analysis of the questions posed by the Code. But certainly, acceptance of Freedman's ultimate judgments necessitates strict adherence to and reliance upon his basic premises.

Freedman's solutions, moreover, may serve the practicing criminal lawyer well but offer scant aid for the resolution of dilemmas presented in civil cases, the outcome of which affect the life and personal liberty of an individual client to a markedly lesser degree.

Whether one concedes to the author's point of view is immaterial. The book has already generated considerable discussion and controversy, and the legal profession's interest in it should intensify. It serves a valuable function as a beginning point for in-depth review of the ambiguities and conflicts contained in the Code, and is a perceptive, well-written and carefully documented commentary. In addition, the author has included the Code of Professional Responsibility, personal annotations and a comprehensive bibliography for further reference.

Susan Leach De Blasio
Senator Kennedy Comes To Suffolk One Day Before The Election

Why did Ted Kennedy come to Suffolk? Ostensibly the senator came to address the law school on criminal justice and the challenges confronting the legal community. No one was deceived. Even as a shoe-in for another term in the U.S. Senate, Mr. Kennedy felt compelled to do some old fashioned political stumping. In what was probably an off-the-cuff speech, Senator Kennedy touched upon a wide variety of issues in less than an hour:

Youth in politics... lets get the next generation involved as you (in the audience) had been during the sixties.

Economy... lets get the economy going again with more jobs. We need national leadership to put people back to work. We need price stability through full employment.

Energy... lets remove the Republican government in Washington that let the "oil boys" and the Arabs control this country. The people in Massachusetts need to heat their homes; we need a comprehensive energy policy.

Health care... we need a national health care system. It is a 'right' of the people, not a 'privilege' to have good health care at a reasonable price.

Education... the Republicans would have effectively cut aid to higher education by 20% if it were not for a Democratic Congress.

Taxes... too many loopholes exist for the rich. We need a change in the Internal Revenue Code.

Elderly... we need to keep Social Security up to the rate of inflation, something the Republican administration has not sought to achieve. The elderly need our help as well as our respect.

And finally, Senator Kennedy wound up his speech on criminal justice with: "all of these problems are complex, there are no easy solutions, and this is the reason I want to return to the United States Senate."

Suffolk Gains At The National ABA/LSD Convention In Atlanta

Suffolk law students John Hathaway, Marta Morales, Baker Smith, Kathleen Williams and Jane Van Danich, all attained national ranking this summer in the Law Student Division of the American Bar Association.

John Hathaway was elected vice president of the ABA/LSD at the annual ABA convention held in Atlanta this past August. John was the first student from Suffolk, as well as the first student from the first judicial circuit, to hold national office in the LSD.

Marta Morales was selected by the president of the national LSD to be a member of the eight-member standing committee for legal aid and indigent defendants.

Baker Smith was appointed chairperson of the National Law Day committee.

Kathleen Williams was appointed chairperson of the women's caucus for the national LSD.

Jane Van Danich was elected to be governor of the first judicial circuit.

It should be noted that with these appointments, Suffolk holds more positions in the national ABA/LSD than any other law school in the country. As Vice President John Hathaway was quoted as saying, "I hope our behavior in the posts will help finish the job of putting Suffolk on the map."

An Asset For Suffolk

Suffolk Law School is pleased to announce the appointment of a distinguished professor of law, Cornelius J. Moynihan.

Professor Moynihan received his A.B. from Boston College in 1926 and his LL.B. from Harvard Law School in 1929. He was law clerk to the justices of the Supreme Judicial Court from 1929 to 1931. He was a Professor of Law at Boston College Law School from 1931 to 1942 and 1946 to 1963, and was acting Dean from 1936 to 1937. He was a visiting professor at Cornell University Law School in 1960 and at the University of San Diego Law School in 1976. In addition, Professor Moynihan was an Associate Justice of the Superior Court of Massachusetts from 1963 to 1975. He is presently the chairman of the Massachusetts Advisory Committee on the Rules of Civil Procedure. Professor Moynihan's publications include: Preliminary Survey of Real Property; Introduction to Law of Real Property; and contributing author, American Law of Property.

The Outside Clinical Studies Program

The Outside Clinical Studies Program is not a course. It is rather a method of allowing law students who do or cannot enroll in any of Suffolk's clinical programs to obtain credit for a clinical type program which they may find for themselves. One goal of this program is the teaching of practical skills. The particular skills to be pursued are the following:

1. Client interviewing and counseling; this includes analyzing the problem and making appropriate referrals when necessary to professionals.
2. Fact-gathering and sifting.
3. Legal research of the problem.
4. Decision-making about alternative strategies.
5. Negotiation.
6. Professional responsibility.
7. Preparation for trial and appeal advocacy before tribunals.
8. Drafting of legal documents.

Another goal of the program is to inculcate in the student an understanding about the behavior of judicial and other governmental areas where there are noteworthy delegations of discretion, and to evaluate the impact of that discretion on those whose will or resources to resist official action is not formidable. Clinical training can be especially profitable in helping law students focus on the realities of government policy-making and rule-making, the execution of government policies, the application and enforcement of rules in individual cases, and the effect of such official activity on individuals and classes.

The purpose of such internships is to enable the law student to take advantage of the wide range of legal talent which exists in various governmental agencies. It provides the law student with a better
sense of the realities involved in governmental organizations. The students in this program will receive excellent training and supervision. A continuous feedback system is utilized in order to assure quality control. The student is thereby given a vantage point for discovery of how the governmental agency works or actually fits within the governmental hierarchy.

The students in Suffolk’s Outside Clinical Studies Program are deployed in various governmental (federal, state and municipal) departments or agencies and courts (federal, state and municipal) throughout the New England states. The program is a permanent part of the law school curriculum.

The prerequisites for procuring two hours credit per semester are as follows:
1. The student must not be enrolled in any other clinical program, or clinical type of program for credit.
2. The work must be for a government or non-profit organization or agency.
3. There must be no monetary compensation.
4. The work must be supervised by a lawyer.
5. The work must involve an average of at least 6 hours per week for 15 weeks.
6. The student and the supervisor must submit reports as required.
7. The project must be approved by the professor in charge of the program.

Any student interested in this program should contact Professor Charles B. Garebedian, Director of Clinical Programs.

It should be pointed out that the supervisory attorneys and judges involved with the outside clinical programs have been very pleased with the exemplary accomplishments and behavior of the students participating in this unique program at the law school, which instills in the students the attributes and skills required of an embryonic lawyer.

Alumni News

1928
John J. Gennaco, JD, retired from the John Hancock Insurance Company with which he has been affiliated for 25 years.

1932
Samuel M. Ianzito, JD, has retired as District Counsel of the Manchester Regional office and hospital, Manchester, New Hampshire. Alvin A. Toltz, JD, has retired from his position as Head of the Department of Vocal Music at Chelsea High School in Chelsea, Massachusetts.

1939
Thomas J. Maguire, JD, is starting his 26th year as Chief of Woburn Police Department, Woburn, Massachusetts.

1941
Judge George A. White, JD, of Plymouth will be honored when an oil portrait of him is permanently placed in the first court house of Plymouth County, Massachusetts.

1952
Edward G. Seferian, JD, a practicing attorney with law offices in Watertown, Massachusetts, has been appointed Town Counsel.

1957
Xenophon Speronis, JD, has been reappointed as director of the Massachusetts Restaurant Association.

1962
Judge Samuel E. Zoll, JD, was named Chief Justice of the Massachusetts’ District Court System.

1968
Attorney Stephen K. Reiner, JD, a practicing attorney in Boston, has written a 223-page, complete manual and guide for lawyers, accountants and other professional corporation advisors.

1969
Edward T. Downing, JD, has been promoted to Associate Auditor in the Accounting and Auditing Department at John Hancock Mutual Life Insurance Company in Boston, Massachusetts. John G. Ryan, JD, joined the Boston legal firm of DiMento & Sullivan as a partner.

1970
Nelson S. Baker, JD, has been appointed Commissioner of the Newton Community Schools in Massachusetts. Major Richard D. Brown, USMCR, JD, recently completed the Landing Force Planning School at the Naval Amphibious Base, Little Creek, Virginia. Edmund C. Sciarretta, JD, and Bernard A. Jackson, JD, formed a partnership this year in Fort Lauderdale, Florida.

1971
Philip F. Heller, JD, will join the Charles R. Alberti Law office in Lenox, Massachusetts. Robert Horton, JD, has been appointed as Town Counsel for Northboro, Massachusetts. Robert R. Moran Jr., JD, has been elected vice chairman of the Simsbury, Connecticut Cultural and Recreational Commission. Robert W. Price, JD, has been named to the legal staff of Friendly Ice Cream Corporation’s Real Estate Department in Waltham, Massachusetts.

1972
William Pagnano, JD, is the new assistant principal at the high school in Norwell, Massachusetts. Patrick E. Rondeau, JD, has formed a law partnership in North Adams, Massachusetts. Robert White, JD, is now employed in a supervisory management capacity by General Dynamics Corporation.

1973
Raymond Clement, JD, is the only full-time lawyer in the town of Groveton, New Hampshire. James J. Sullivan, JD has been appointed an attorney for regulatory affairs and the law division of the life, health, and financial services department at The Travelers Insurance Companies in Hartford, Connecticut.

1974
Ronald E. Curtis, JD, has joined the law firm of Magilnick, Simko and Elstein in Bridgeport, Connecticut. Peter T. Johnson, JD, has been promoted to Assistant Legal Counsel at Keydata Corporation in Wellesley,
Massachusetts. Paul F. LoConto, JD, has been named clerk of the Western Worcester District Court in Worcester, Massachusetts. Carol E. Najarian, JD, has been sworn in as a special assistant attorney general and is assigned to the department of Consumer Protection Division in Rhode Island. James J. Szerejko, JD, of Hartford has announced his association with the Athanson & Webber Law firm. Edward P. Smith, JD, has joined the law firm of Sepastian J. Ruggeri in Greenfield, Massachusetts.

1975
Walter J. Avis Jr., JD, has joined the law firm of Maguire & Maguire in Worcester, Massachusetts. John Conathan, JD, will serve as 1976 Cancer Crusade Chairman for Centerville. He is with the firm of Hayes and Creney in Hyannis, Massachusetts. Stephen J. Corcoran, JD, has joined the law offices of Attorney Richard P. Hamel in Amesbury, Massachusetts. Thomas H. Cozzolino, JD, has become affiliated with the law firm of Capuaro and Associates of Everett, Massachusetts. Joanne Ilis DeLong, JD, has joined the firm of Richard M. Howland as an associate in Amherst, Massachusetts. George Keches, JD, has been appointed as MBA Legislative Counsel. Robert C. McCann, JD, has become associated with the law firm of Swain & McCann in Worcester and Westboro, Massachusetts. John H. Pearson Jr., JD, has been re-elected to his second term as a Director of the B. F. Butler Cooperative Bank of Lowell, Massachusetts. Peter Philliou, JD, of Winchester, Massachusetts has been appointed Director of the Curriculum Center at Wentworth Institute and Wentworth College of Technology in Boston, Massachusetts. Louis A. Rizoli, JD, has been named as Legal Counsel to the Office of Majority Whip at the Massachusetts House of Representatives.

1976
Robert L. Eaton, JD, has been named Manager of Brokerage Services by Keystone Custodian Funds, Inc., in Boston, Massachusetts.

In Memoriam
Arthur H. Bastein, JD 26, of Marlboro, Massachusetts.
William A. Brady, JD 25, of West Harwich, Massachusetts.
Attorney Isador Brecher, JD 40, of West Hartford, Connecticut.
Theodore A. Burbank, JD 28, of Pembroke, Massachusetts.
Reynold H. Caggiano, JD 42, of Hyannis, Massachusetts.
Enrico Cappucci, JD 41, of East Boston, Massachusetts.
Vincent J. Celia, JD 30, of Winchester, Massachusetts.
Daniel J. Connolly, JD 69, of Lynn, Massachusetts.
James F. Cronin, JD 34, LLM 37, of Framingham, Massachusetts.
D. Edward Davis, JD 29, (David Korisky) of Santa Monica, California.
Alfred D. Foster, JD 26, of Nelson, New Hampshire.
William L. Gilligan, JD 24, of Lowell, Massachusetts.

Jonathan J. Headley, JD 72, of Cambridge, Massachusetts.
Stephen J. Jeeve, JD 49, of Laconia, New Hampshire.
Philip C. Keefe, JD 49, of Dover, New Hampshire.
John H. Leaky, JD 27, of Claremont, New Hampshire.
Allan K. Macler, JD 36, of New Boston, New Hampshire.
James F. Maher, JD 28, of Malden, Massachusetts.
Patrick J. O’Donnell Sr., JD 31, of Dorchester, Massachusetts.
Joseph W. Pollard, JD 29, of Taunton, Massachusetts.
Ray C. Tannar, JD 39, of West Natick, Massachusetts.
Kenneth W. Ulman, JD 38, of Sandwich, New Hampshire.
Gerard Williams, BSBA 72, JD 33, of Farmington, Maine.
Tatoul Zulialian, JD 37, of Belmont, Massachusetts.
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