The Advocate, Vol. 10, No. 1, 1978

Suffolk University Law School

Follow this and additional works at: https://dc.suffolk.edu/ad-mag

Recommended Citation
https://dc.suffolk.edu/ad-mag/33

This Magazine is brought to you for free and open access by the Suffolk University Publications at Digital Collections @ Suffolk. It has been accepted for inclusion in The Advocate by an authorized administrator of Digital Collections @ Suffolk. For more information, please contact dct@suffolk.edu.
An Interview with Alger Hiss
The brief people.

(Emphasis supplied.)
The Suffolk University Law School Journal

Table of Contents

An Interview with Alger Hiss: November 2, 1978 ................................................. 2
Conducted by Herbert Travers, Joseph P. Ippolito and Professor Charles P. Kindregan

The Central Panel Approach to Administrative Adjudication:
The Massachusetts Division Of Hearing Officers ................................................. 14
by John J. McQuade, Jr.

Exploring the Case for Imposing Limitations on the
Scope of Employer Rights to Employee Inventions ........................................... 22
by Barry David Josephs

Legal Briefs ............................................................................................................ 30
The New Products Liability Cases
The S.J.C.’s New Limits on Polygraph Evidence
How Do You Spell Relief? M.G.L. ch. 209A

Book Review .......................................................................................................... 37
Super Threats
One L
Lying

Suffolk Notes ......................................................................................................... 41
The Suffolk Transnational Law Journal
Alumni Placement Committee
Faculty Notes
Alumni Notes

The ADVOCATE is a publication of Suffolk University Law School. Our current circulation of 9,000 is centered in the New England area. The ADVOCATE is published three times a year: orientation, fall and spring issues. The orientation issue is distributed to law students only. The objectives of The ADVOCATE are to publicize the activities and outstanding achievements of the Law School and to present articles by students, faculty and guest writers on timely subjects pertaining to the law. All articles and editorials reflect the personal views of the authors and are not necessarily the views of the administration or faculty of Suffolk University Law School. Guest editorials by students and faculty are welcomed by The ADVOCATE, which recognizes its obligation to publish opposing points of view. Persons desiring to submit manuscripts, to be put on the mailing list or to communicate with the staff please address all letters to: The ADVOCATE, Box 122, Suffolk University Law School, 41 Temple Street, Boston, MA 02114.

All Rights Reserved
An Interview with Alger Hiss: November 2, 1978

Alger Hiss has led a life unique in American history. A 1929 graduate of the Harvard Law School, Mr. Hiss served as a law clerk to Supreme Court Justice Oliver Wendell Holmes. After several years as an attorney with corporate law firms, Mr. Hiss entered government service in the New Deal’s sweep to power. He served on the staff of the Agricultural Adjustment Administration (AAA) until July 1934 when his services were loaned to the Senate’s Nye Committee, which was then investigating the munitions industry. In September of 1936 Mr. Hiss became an assistant to Assistant Secretary of State for Economic Affairs Francis B. Sayre. During the war he first worked with State’s Far Eastern Division and later with the newly created Office of Special Political Affairs, where his chief responsibility was the formation of the United Nations, of which he was the first Secretary-General. After the war, Mr. Hiss assumed the presidency of the Carnegie Endowment.

On August 3, 1948 Whittaker Chambers, a senior editor of *Time* magazine, appeared before the House Committee on Un-American Activities (HUAC) and accused Alger Hiss of having been a fellow-member of a Communist Party group during the mid-thirties. Two days later, Mr. Hiss denied categorically the charge that he had been a communist and stated that, to the best of his knowledge, he knew no one by the name Whittaker Chambers. He demanded an opportunity to confront Chambers, but, by the time Mr. Hiss testified again, the committee had shifted the focus of its inquiry to whether Chambers had in fact known Mr. Hiss, and thus whether Mr. Hiss had lied concerning his lack of knowledge of Chambers. At an Executive Session on August 16, the questions centered on Mr. Hiss’s personal life and the details, both accurate and inaccurate, about which Chambers had testified. At this time Mr. Hiss revealed that the photos he had seen in the press and those that had been shown to him by the Committee reminded him of George Crosley, whom he had met while counsel to the Nye Committee. Crosley, a reporter interested in the work of the Committee, had rented an apartment that Mr. Hiss and his family had just vacated, — but upon which they still held a lease; further, Hiss said that he had given Crosley a very old car which had become unneeded when he purchased a new one. The interrogation ended with all in agreement that a meeting of Mr. Hiss and Mr. Chambers should take place.

At a HUAC subcommittee meeting at New York’s Commodore Hotel, Chambers was unexpectedly presented to Mr. Hiss by Congressmen Richard M. Nixon and John McDowell. Mr. Hiss stated that Chambers was probably the man he knew as Crosley, and he challenged Chambers to repeat his accusations in a forum where he would not be privileged from a defamation suit. Chambers did so on the radio program *Meet the Press*; Mr. Hiss responded with a libel action.

At a deposition session in Baltimore, Chambers flatly contradicted his earlier grand jury testimony that the group’s purpose was infiltration rather than spying and stated that Mr. Hiss had given him secret information. In order to support his shocking new charges, Chambers produced four notes (which Mr. Hiss conceded...
were written in his hand) and sixty-five pages of retyped State Department cables. Chambers explained that these materials had been kept for him by a nephew in New York since the thirties. The papers, known as the Baltimore Documents, were given by Mr. Hiss’s attorneys to the Justice Department. Subsequently, Chambers presented the FBI staff with five strips and rolls of thirty-five millimeter film which reproduced government documents; he did so, at least in part, because the Committee members felt betrayed that he had made his revelations in another forum. (Since the film had been stored briefly in prominent individuals; in personal correspondence of the Hiss family partnership with Harry Martin had terminated documents; he did so, at least in part, because the Committee members felt betrayed that he had made his revelations in another forum. (Since the film had been stored briefly in a pumpkin on Chambers’ farm, the documents are known as the Pumpkin Papers.)

A grand jury indicted Mr. Hiss on two counts of perjury, alleging that he spoke falsely when he denied giving the documents to Chambers and when he denied speaking to Chambers “in or about the months of February or March 1938.”

Because Chambers had alleged that the typing of the Baltimore Documents had been done by Mrs. Hiss, an effort was made by both the government and the defense to locate an old typewriter which had been in the Hiss home at the time of the alleged espionage; the machine, made by the Woodstock Company, had been given to the couple by Mrs. Hiss’s father, Thomas Fansler, when his insurance agency partnership with Harry Martin had terminated in the early thirties.

At the first trial, the presiding judge was Stanley H. Kaufman, the prosecutor was Assistant U.S. Attorney Thomas F. Murphy, and the chief defense counsel was the noted trial lawyer Lloyd Paul Stryker. It ended in a mistrial when the jury was unable to agree on a verdict. For the second trial Judge Henry W. Goddard presided, and Boston attorney Claude B. Cross replaced Stryker.

The prosecution’s case featured the testimony of Chambers, his wife Esther, and FBI documents expert Ramos C. Feehan. Feehan testified that the Baltimore Documents had been typed on the same machine as the Hiss Standards—personal correspondence of the Hiss family which had been typed on the Fansler-Martin machine. Henry Julian Wadleigh, a State Department contemporary of Mr. Hiss, who had previously admitted passing documents to Chambers, also testified. He denied passing either the Baltimore Documents or the Pumpkin Papers.

The defense’s case included Mr. Hiss’s own testimony and the character testimony of many prominent individuals; in fact, at the first trial Supreme Court Justices Felix Frankfurter and Stanley Reed appeared for the defense. Also testifying were Mrs. Claudia Catlett and her sons Perry and Mike. Mrs. Catlett had been a housekeeper for the Hiss family in the thirties. The Catletts testified that Mr. Hiss gave them the Fansler-Martin Woodstock in late 1937 when the Hisses changed residences. The date was significant because the documents were stolen in early 1938. The defense also presented two psychiatrists, Dr. Carl A. Binger and Dr. Henry A. Murray, who testified concerning Chambers’s personality. In addition, the defense introduced the typewriter they had found in the possession of junk dealer Ira Lockey—Woodstock serial number 230099—which they believed to be the Fansler-Martin machine.

The prosecution presented two rebuttal witnesses: Mrs. Edith Murray and George Norman Roulhac. Mrs. Murray, who had been the Chambers’ housekeeper, testified that she recalled the Hisses visiting her employers. Roulhac, who had been a boarder at the Catletts’, stated that the Woodstock machine did not arrive at that home until April 15, 1938. Mr. Hiss was convicted on both counts on January 25, 1950.

Mr. Hiss appealed, citing prejudicial conduct of the judge and the prosecutor, errors in admitting testimony, and insufficient evidence to support the verdict as grounds for reversal. When the appeal failed and he was in custody, Mr. Hiss filed a motion for a new trial, offering new evidence obtained by his attorney Chester Lane that the Woodstock introduced at trial could not have been the Fansler-Martin machine because the serial number indicated it was made after Fansler and Martin had purchased theirs. Mr. Hiss charged that 230099 had been a plant, a “forged” typewriter. To support his theory he engaged the services of typewriter engineer Martin Tytell, who endeavored to construct another machine whose idiosyncracies would match those apparent on the Hiss Standards. Also retained at that time were two Massachusetts handwriting experts, Elizabeth McCarthy and Evelyn S. Ehrlich, whose work cast doubt upon Feehan’s competence to distinguish among writing samples. Nevertheless, the motion was denied.

In the intervening years, much literature on the case has appeared, including In the Court of Public Opinion by Mr. Hiss (Harper Colophon 1972), Whittaker Chambers’s Witness (Random House 1952), John Chabot Smith’s Alger Hiss: The True Story (Penguin Books 1977) and, most recently, Allen Weinstein’s Perjury: The Hiss-Chambers Case (Knopf 1978).

In August 1975, Mr. Hiss was readmitted to the Massachusetts bar by the Supreme Judicial Court. In the Matter of Hiss, 368 Mass. 447.

Our interview with Mr. Hiss was occasioned by the filing, on July 27, 1978, of his Petition for a Writ of Error Coram Nobis to obtain an order vacating the convictions. The petition is based in large part upon documents obtained under the Freedom of Information Act (FOIA), 5 U.S.C.
Advocate: That brings me back to Mr. Hiss's original statement. I would characterize what we've been talking about so far mostly as relating to prosecutorial misconduct and the petition alleges, at least as I see it, prosecutorial misconduct in several forms, the maintenance of an informer within the defense, the pretrial statements given by Chambers to the FBI — the concealment of them from the defense, critical facts concerning the typewriter in which the government claimed the stolen documents were copied or abstracted — that these were kept from the defense, and that the prosecution suffered perjury to be committed by its witnesses without protest. All four of these bases of the petition seem to suggest prosecutorial misconduct, not your innocence, Mr. Hiss. I'm just wondering why at the outset you made the statement that you were not so much concerned with prosecutorial misconduct as with establishing your own innocence. I think you've characterized the petition as directed towards to characterize your innocence.

Hiss: I spoke of my desire of how the petition should be drafted. Counsel said to me early on, it would be very difficult to get any judge in the Southern District of New York after this passage of time to say I, Judge So and So, am convinced that Hiss is innocent. It should be possible to get a judge to say this was an unfairly obtained conviction because of prosecutorial misconduct and it will be expunged. This is counsel's question — that . . .

Advocate: . . . but the Supreme Judicial Court of Massachusetts went a long way down that road, toward conceding your innocence.

Hiss: I don't think so. If you read that carefully, I think you'll find that the Chief Judge said that they could not question collaterally the decision of the Federal Court. They had to assume my guilt. Now I have reason to believe, of course, the Chief Judge who wrote that spoke to a man of the New York Times, a special reporter on the judiciary, Goldstein, up in a meeting in Canada of the American Bar Association and indicated that the court actually believed me innocent. That's not what the case stands for.

Advocate: The case is revolutionary in that they no longer require a statement of contrition.

Hiss: I told them frankly that if that was necessary, I wasn't going to participate. Now let's get back to what the Professor has said.

Advocate: I can understand the advice of counsel in reference to this petition. Are you suggesting that there is other information that has since been made available to you by the Freedom of Information Act that would point in the direction of your innocence? I think since Watergate we have been subject to a smoking gun type of mentality.

Hiss: We have no smoking gun.

Advocate: Do you have anything that tended to point in the direction of your innocence?

Hiss: I will repeat myself on what I said at the outset, that the government's case was based on Chambers's testimony plus alleged documentary evidence. I think the petition and the facts as developed in court and in the documents we have from the F.B.I. demonstrate that none of the documentary evidence corroborates Chambers, therefore there was no credible provable evidence of guilt under the law as it then stood, unless you choose to believe Chambers. I have said all along that the test is the credibility of Chambers versus me. Under the law of perjury his testimony isn't enough. Therefore there was not legal probative evidence, in the case, of my guilt. This is my position, but if people want to believe Chambers, as obviously Weinstein does, that's their privilege. I don't think the courts will. My interest is not in the battle of books,

. . . if people want to believe Chambers . . . that's their privilege. I don't think the courts will . . .
but in the court's decision. Now can we go on with the typewriter issue a little further. As a lawyer, my chief objection to what the government did in the field of the typewriter, was that by withholding from us and the Court the information they had, they deprived us of the opportunity to cross-examine Feehan. We waived cross examination. We didn’t realize the frailty of the opinion evidence.

We had not ever handled a case, none of our counsel had, where opinions had been submitted in regard to typewriters and handwriting was involved. We quite literally thought of it, as Murphy said in his summation, like fingerprints. It must be the same typewriter, so we then devoted ourselves to demonstrating that we did not have the typewriter, which we believed, which I still believe, had we been able to cross-examine Feehan, had we been able to bring witnesses, other expert witnesses, like Mrs. McCarthy or Mrs. Ehrlich to contradict him, the whole thing would have been different. There in summation, Cross and Stryker would have been saying “It’s Chambers versus Hiss, and you’ve got two opinion experts; these documents don’t prove anything by themselves; they’re not immutable, they are just the opinion of a man whose judgment is very fallible.” This is my chief objection to what happened, we never had a chance to cross-examine Feehan and if you will examine his testimony in the first trial and compare it to the second trial, he is so much stronger in the second trial because he knows he is not going to be cross-examined. We have FBI documents in which the assistant prosecutor assumes we are going to produce witnesses against him which shows they don’t regard him as infallible and one of the memoranda says shouldn’t we get a second expert, if Hiss has two and we only have one, it won’t look good. But they didn’t have a second witness, that’s part of the reason why they decided no, they’d stick with Feehan. But, as a lawyer of some experience, this is where I put my finger on the dirt that was done to me. Sure, Edith Murray was thrown in as a very dramatic witness at the very end when we couldn’t investigate and I think this was a type of use of false testimony. I think she was perfectly honest, I think she was led to say things out of loyalty to the Chambers, for whom she worked. She was a rebuttal witness. I think she was the next to the last witness. Now the theory I have of how 230099 ever came into our hands is really very simple. Mr. Lockey, who ran the junk yard where it was found, was approached by my brother and Mike Catlett in, oh, I think February. He wasn’t at home. Mrs. Lockey said she knew nothing about the typewriter. They told her what they were looking for, and why. They thought it had come through Marlow and various other people to Mr. Lockey. They came back later because of Mr. Lockey, they wanted to talk to him. He then said, “I’m sorry, I just threw it out.” When he said he threw it out he meant in his own outdoor junk yard. They went out and looked and they found the one he had just thrown out, but it was a Royal. So they then said you’re mistaken, the one we’re talking about is the one you got from Marlow and so on and it’s an old Woodstock. No typewriter was found. Later, Mike Catlett came back to my brother Donald and said, “Look he has found it, he’s got the right typewriter.” Donald was so assured of this he simply called Ed McLean in New York. McLean came down, met Mike. Donald went away for the weekend as he planned to do and it was Ed who found the typewriter. We didn’t comment on the fact that it was workable, that it had been lying outdoors as everyone said for months, in the rain and snow; this is rather strange, but it never led us to think that it was the wrong machine. I think
I think Mr. Lockey was an honorable junkman. He had the chance to make a sale. If he could find the real old one, it must have been in miserable condition.

Mr. Lockey was an honorable junkman. He had the chance to make a sale. If he could find the real old one, it must have been in miserable condition; how could he sell that to this nice gentleman from New York who wants an old Woodstock? There were a lot of old Woodstocks in those days, so he gets one that looks like it, almost exactly the same kind as far as he can tell and he makes a sale. He gets $15. This is where I think the mystery becomes mysterious. I don’t accuse anybody of conspiracy. Now, we don’t need to contend that it was doctored. It may very well have been, but that’s a different issue. In other words, somebody else may have played a hand with Mr. Lockey, but I don’t need to go into that. I think Mr. Lockey simply sold another old Woodstock and Feehan couldn’t tell one old Woodstock from another as he demonstrated.

Advocate: So whatever doctoring you’re assuming would have happened after it had been found. You’re not suggesting it was planted.

Hiss: If there was any doctoring, it was done in the interim between the time that Donald and Mike first spoke with Mrs. Lockey and the time several months later when Ed McLean picked it up; I don’t assert there was any doctoring. There was some evidence, as you know, from what Dr. Norman and others have said that it may have been doctored. All I need at this time to prove and to have accepted is that it was not my typewriter that we got, and that this was withheld from us and had we known it and, had we known that Feehan had said that all three sets of documents came from the same typewriter and that this was a physical impossibility, we would have had a totally different ballgame.

Advocate: I know you may not want to assess blame, but do you in some way feel that counsel . . .

Hiss: . . . my counsel? No, positively not, I was there . . .

We have no smoking gun.
So when he said "Don't let him sign it"... after all, if you are an honorable prosecutor and you have confidence in your case, you're not going to keep the normal procedures from being followed, of having things signed that they believe to be a statement. So we regard that as highly improper. I'm glad to have you state it the way that you do because this is a trial run for what the U.S. Attorney's is going to say against us.

**Advocate:** I've always believed personally that prosecutors should have an open file, but of course even today they don't. As to the holographic statement by Mr. Chambers, some commentators have said all along that Chambers attitude toward you reflected possibly a homosexual attachment of one kind or another and there have even been reports that President Nixon has made this explanation to some people. Have you ever developed any, well let me ask you this, have you ever given any thought to what use would have been made of these statements, this holographic statement by Mr. Chambers at trial if you had had it. What would you have done?

**Hiss:** You will remember that both the psychiatrists who testified, testified that they felt that Chambers had homosexual tendencies. That testimony was based on very thin evidence and they said so. We had a number of reports, none of which panned out with one exception. There was one man who said yes, he had had a homosexual experience with Chambers at some kind of a convention when they were roommates. He said he woke up and Chambers was practicing fellatio on him. But, my counsel felt that one swallow doesn't make a summer. It would look bad, that we were trying to smear someone. Had we known that Chambers had admitted to a pathetic ten year period, this would not only have strengthened the testimony of the two psychiatrists, but we now know that this period in his life exactly coincides with the period in which he says he was receiving stolen documents. Many of the tales he tells about picking up documents late at night in deserted parks and street corners, are the kind of pickups of a lonely homosexual. He says in his statement there was no lasting relationship with any of these pickups. For a man of Chambers peculiar, I don't want to overstate it, character, he had an obvious gift of fantasy, which he certainly had as a writer, to have transposed these instances, of which he presumably was very ashamed (he wasn't a modern homosexual who feels perfectly justified), he was secretive, he hid it from his wife. I think this would've been a very telling argument that this was part of his fevered imagination. The meetings he had with people he said were conspirators could simply have been the people he was picking up. I think it would have much affected his credibility. Now you may ask why we have put it in such a minor position in the petition. That's because of the difference in times. This is a civil liberties organization, they defend the rights of people who are homosexuals. We certainly don't want to make... in fact we discussed for hours whether we should leave it out all together. The end conclusion was that this is a legal fact, it's one of the statements that was withheld and cannot possibly be squared with the law before *Jencks* that only signed statements... because it was signed. The whole thing was holographic.

**Advocate:** And wouldn't it have been useful in Dr. Binger's testimony?

**Hiss:** And also toward his general credibility, Chambers' credibility.

**Advocate:** In connection with Chambers' activities, wasn't Mr. Horace Schmahl primarily assigned to examining into the question of Mr. Chambers' homosexuality? That allegation does appear in some of the literature.

**Hiss:** If so, it's inaccurate because Weinstein is rather inaccurate. One of the documents that we have given as an exhibit is a defense trial pattern, a list of issues that the defense intended to explore which we found, for some strange reason, in Murphy's files. It's quite early in January or February. It shows how able a lawyer Ed McLean was because most of the basic issues were sketched out. That was one of the things which Schmahl was going for. The typewriter. I'd say the homosexuality was a minor issue. Chambers' history in terms of his credibility certainly was.

**Advocate:** If you had the inconsistent statements made by Chambers at trial, one of the possible defenses against Chambers' was the psychological motivation. If you had had the inconsistent statements it seems to me they would have gone against that defense because Chambers' statements made in 1946, didn't in any way try to implicate you in espionage, but only as a member of the Communist Party...

**Hiss:** If you try to ruin a man in terms of his career, that does not seem to be very kindly. You see, my theory of why Chambers made the charge of espionage is that it was very much a last minute thing, after I sued him for libel; it wasn't that he didn't want to hurt me before, but it hadn't occurred to him to try to hurt me in that way. So, that wouldn't bother our theory; inconsistent statements were helpful in showing that his testimony was a tissue of fabrications. Now, going back to the homosexual question. I can't tell you on how many occasions Harold
Shapero, who was Stryker’s chief assistant, one of the few survivors . . . I’d say half a dozen times Stryker said to me—“Alger, are you sure he never made a pass at you?” And thinking back as honestly as I can he made the most about his heterosexual conquests which sounded a bit unlikely, he wasn’t that attractive.

Stryker said—“It would clear everything up, the jury would buy that right away.” I don’t know if Stryker was right. Ed McLean in one of the documents of the defense files went to see Chambers at Westminster because Chambers claimed to have some things I had given him. Ed was the least psychiatrically oriented person I’d ever known. He asked him—what did Mr. Hiss give you? What was it?

Chambers said he gave me a love seat. We moved out of the apartment which Chambers occupied. There were a number of pieces of furniture we did not take with us, and one of those was a small sofa which I distinctly said sure you can have it. I wouldn’t have called it a love seat. Ed said, well he didn’t think that was a love seat. That upset him. Chamber’s said, “Oh, you want to see something that used to belong to Alger Hiss?” Now I’m almost exactly quoting from Ed’s memorandum of the conversation. He said Chambers went trotting upstairs, like a little puppy and he came back with two carefully folded pieces of ancient fabric. He said he heard a drawer being opened. Obviously these were fetishes of some kind, he’d been saving. He said in awe, “These used to be part of the slip covers.” Ed was so upset; he said there’s something spooky here and he said every time Chambers referred to my wife, he was very hostile and thought of every nasty thing he could say, but whenever he talked about me, it was as though he was doing me a favor with everything he’d ever said so that there’s no question that what Stryker, Cross, Binger, Murray, all believed that Chambers had some sort of peculiar homosexual attachment to me. Never overt, and this was like the things in Shakespeare’s phrase about ‘Hell hath no fury like woman scorned!’ He felt doubly damaged when I cut off relations, that was a rebuff as if he had had a real relation with me and I’d said get lost. So that statement would have made a tremendous amount of difference to the morale of my attorneys. But this is the kind of thing they believed they thought was somehow being kept from me, and I’m sure now Cross and Stryker were alive this would be one of the things they would find most reprehensible on the part of the government.

Advocate: Can I raise a question of Mr. Horace Schmahl, whose name has come up. He apparently was a defense investigator and your petition indicates on the basis of new evidence that he was co-opted to some extent by the prosecution. Are you saying that there is anything improper in a prosecutor interviewing a prospective defense witness or investigator as long as the prosecutor does not disrupt the defense tactics or planning or cause him to breach any confidential communication?

Hiss: That last clause is the trick. If Schmahl is the man who turned over this confidential outline of defense tactics, he’s obviously breached the confidence. I would think any prosecutor who talks to an employee of counsel on the other side whether a confidential investigator or a secretary should make that fact known. This was a secret. We never knew what Schmahl was telling in these meetings with the FBI or the prosecutor. Yes we do think that was improper.

Advocate: Do you have any evidence that Schmahl was in fact revealing defense tactics, confidential information to the prosecution?

Hiss: Yes, yes. I think some of those are cited in example the exhibits. The plan with regard to the typewriter was very important with regard to their determination that the typewriter which we in fact found was not the right one. He never told us that. They were ahead of us. He gave them information on Mr. Martin, Mr. Fansler’s partner. He gave them names of other people; yes, he was very helpful to them in their own investigation; after all should come from counsel not from the private investigator, particularly confidential.
Advocate: One of the cases in which I did get back to the exhibits, the exhibit that mentions that Schmahl was subject to being arrested for posing as an FBI agent. It also mentions that he was a suspected Nazi. That would suggest that, those charges, whether or not true, in the hands of the government would be enough to put a man who needed a license to operate under the thumb of the FBI.

Hiss: Exactly, right. That’s the implication. Now the same thing, jumping back to Chambers, Chambers having confessed in a holographic statement to his homosexuality which he was ashamed had put himself under their thumb in an unusual way. Now, all people who claim to be coconspirators who testify against their coconspirators are likely to be subject to the charge that their self-interest calls for them to tell the prosecutor just what the prosecutor wants. Chambers was in this respect subject to immediate prosecution for perjury. He had admitted lies, there’s just no question. He was saved by the government, because the Grand Jury sua sponte wanted to indict him, and they were told “Look, we don’t have any case against Hiss if his chief witness is being prosecuted for perjury.”

What kind of confidence does that show you really have in your chief witness if you only don’t indict him for perjury to make him a more respectable looking witness? In addition, they had his confession of homosexuality about which he was desperately anxious to hide. So he was under their thumb, and as the petition shows up, he met with them thirty nine times, from early January to just before trial. He was with them day after day, all day long. Think of how subject to influence this makes any witness. He was living with the prosecution. This is hardly the way that you get the most objective testimony of a witness.

Advocate: In a follow up question on the Schmahl aspect. Didn’t he leave the defense team’s employ at some time? If he was really under their thumb, it must have been a soft thumb pressure to allow him to leave.

Hiss: He was fired. We didn’t have any more money and he was being absolutely useless the last month. McLean said to me “We just don’t have the funds. He’s drawing down per diems; he’s going off on trips.” But that didn’t mean that we felt he was hostile.

Advocate: On the contrary, didn’t your lawyer offer him further work?

Hiss: That’s right; we tried to hire him back later when we had some money. If he had come in with information, we would have been very pleased, as a volunteer. He retained his confidential relationship with us right through the motion for a new trial. It was only when Chester Lane said to me “Did you ever know that Horace Schmahl was a double agent?” This must be based on the Morrow statement or some other statement. I said no. I had no such knowledge, but I did know that on one occasion Ed McLean said to me that Schmahl says he can get documents from New York from HUAC because he has connections with HUAC, what do you say?, and I said we’re not playing that kind of game. Tell him thanks, but no thanks. It’d be improper and I said to Ed “What would you have done if I said go ahead and do it?” Ed said, “That’s a different question, that’s an iffy question.” From then on Schmahl’s work wasn’t very helpful and he may actually, it now occurs to us he may have been trying to compromise us, getting us to accept improper documents that he got secretly from the House Committee — and then suddenly have it blown, which would have been very embarrassing to us.

Advocate: One of the other things in the petition with regard to Schmahl is that possibly the FBI made a deal with him based on not arresting him for impersonating an officer or an agent. Did you ever come up with any evidence that he was
advocate: actually impersonating an FBI officer or agent?

Hiss: If you look at the exhibits you’ll see that this is reported to the FBI, that he had. They think they could have prosecuted him. We didn’t know about it, he never told us he was impersonating an FBI agent.

Advocate: When did he do that? For your defense counsel?

Hiss: That I don’t know. In other words, there might have been other occasions, yes I think one of the charges is that when he was employed by us he told somebody he was working for the F.B.I., but they seem to have other instances.

Advocate: What I guess I would assume would be a key in the testimony because it points out one of those little concrete moments in time is the incident of the car purchase and where he got the money for it, the alleged $400 loan. Now this is an instance where you have agreed that prior inconsistent statements have been withheld, but aren’t the prior inconsistent statements at least quite curious in that if he had been prompted by the FBI why would he have gotten the numbers and the dates wrong? And if he wasn’t prompted by the FBI that was a stab in the dark.

Hiss: Our theory on that is that some people in the FBI were playing it straight, and some weren’t. And that he got a tip off about a withdrawal that I’d made at a particular time but he didn’t get the exact data, so he made a stab in the dark and used the wrong figure. But remember that before that his wife presumably on his say so had said that the money from the car came from his mother. So everything seems to us to indicate that it was a stab in the dark after he had been given partial enlightenment. It was a stab in the twilight let’s say, not the dark. Somebody said “Hey, did you know that Hiss had withdrawn some money? I don’t know how much it was, but it was a sizable sum of money.” After all a dozen FBI agents were working on this case, maybe more. I don’t know. We thought it was worth bringing up but if I was a U.S. Attorney I’d make the same argument you’re making in opposing me. The Judge will have to resolve it.

Advocate’s: Weinstein’s book ends up with a whole appendix on conspiracy theories. He mentions the various types that have been put forward. There’s a lot of them, and you mention that you didn’t support a lot of them. If you read Weinstein one might think that you did support one or two of these theories.

Hiss: There’s a lot of misleading implications in Weinstein’s book. For example, he says that he started out being very favorable to my point of view. I have absolutely no evidence to that. I would have thought it would have been improper for him to indicate that. He’s supposed to be a historian. In the article in the Nation Navasky says there was no written record that he had that point of view. I think that’s good P.R.

Advocate: As far as the various conspiracy theories go?

Hiss: I have never been a believer. I have believed that J. Edgar Hoover and the FBI did some pretty dirty tricks — call that conspiracy if you like — and I would say to Mr. Weinstein in the words of Patrick Henry if that’s conspiracy make the most of it. It is a charge I make. This was improper tactics on the part of the FBI and the prosecutor.

Advocate: How about Mr. Nixon?

Hiss: Well, that was clearly opportunistic. And I think he clearly prejudiced all the jurors. I think he had a great deal to do with obtaining the indictment. Particularly with preventing the indictment of Chambers. I suppose if Chambers had been indicted, it would have been somewhat of a standoff. I don’t see how they would have gone forward and prosecuted me with Chambers also indicted.

Advocate: I’ve never understood why a Junior Congressman, such as Nixon, would have any influence with the U.S. Attorney’s Office in a Democratic Administration.

Hiss: I don’t think he did. Now he got before the Grand Jury, that’s where his influence was, and with the public.

Advocate: As far as you know, was your indictment recommended by the U.S. Attorney’s Office?

Hiss: Yes. Positively. And they forstalled the indictment of Chambers before the Grand Jury by saying of course they are going to indict Chambers. I would love to see the Grand Jury records; I’d like to know what Chambers said, I mean what Nixon said. I’d like to know just what the prosecuting attorney said.

Advocate: Do you have any way of getting those in connection with the present petition?

Hiss: No, we tried, but were badly slapped down under the Freedom of Information Act, knowing that it did not perfectly apply; the government did not oppose; the same Mary Daly (of the U.S. Attorney’s Office) said look, there are so many references to the Grand Jury testimony in FBI documents, that we have gotten, because they are privy to them, it’s not quite fair-so much of it has now leaked, but not the part I’d be most interested in. So we made a motion before the very judge that now has the case before him.

Advocate: And the part you’d be most interested in is Richard Nixon?

Hiss: Nixon and what the prosecuting attorney said.

Advocate: Was that Mr. Murphy also?

Hiss: No, it was I think Donegan his assistant.

Advocate: Do you ascribe very much importance to both the statements recorded in the Watergate Tapes and the written statements in Six Crisis? Do you think those were slips or accurate statements?

Hiss: You know I’ve been doing my best not to give any support to the conspiracy theories. So it’s a question I would like to duck, but I won’t. I think when Nixon says the FBI found the typewriter it means they knew the typewriter we found was at Locke’s because there are too many other similar statements. A letter written of which I have a copy, by McDowell, says the FBI found it, written contemporaneously. There was a press item in December ’48 in Washington, saying the FBI found the typewriter. The man who wrote that was located; at that
time he was working for one of the major Republican candidates.

Advocate: Are you talking about Lasky?

Hiss: No, this is a more reputable fellow who said, "I have no idea now where I got the information but I must have believed it was credible otherwise I wouldn't have written it. It must have come to me as a leak from the committee. Then two committee reports which we paid no attention to then said the same thing. Then there was an article published in, I think the American Weekly, which used to circulate with Sunday newspapers, and the man who wrote that said he had access to FBI documents for his story about Edith Murray. In that he too said that the FBI found the typewriter. I think there must be something to this, but I don't think it was conspiracy. I think it may prove that they knew about the typewriter, they looked at it, they knew it had the wrong serial number and therefore left it where it was. I don't mean they planted it there, but they chose to walk by on the other side, and let us pick it up.

Advocate: For what strategic purpose was the typewriter introduced?

Hiss: I'm sorry to say that there was no strategic purpose. I insisted. I said, "Look, this is an important part of the evidence; we have sought it. I think everything ought to be above board and open. It can't hurt me because I got rid of it before the date of the documents but I think it ought to be in evidence." Somebody ought to talk to Harold Rosenwald and Harold Shapero and see if there was any opposition. I really don't know. I would have insisted. You see, we were absolutely convinced of the honesty of the Catletts. A very fine man who later became an NAACP lawyer, a black man who I think taught at Howard, I've forgotten his name, wished to be helpful to me personally, because I had signed a brief amicus before the Supreme Court about restrictive covenants. That was obviously a racist procedure and Phil Jessup and I wrote the brief amicus saying it was contrary to the Civil Rights Covenant of the United Nations Charter. And this man thought I had done something, with no benefit to me, on racial issues and he wished to be helpful. He met with them. Here he was, a friendly black lawyer . . .

After all, if you are an honorable prosecutor and you have confidence in your case, you're not going to keep the normal procedures from being followed, of having things signed that they believe to be a statement.

because we didn't want the New York lawyer Stryker or a Boston lawyer, like Claude Cross to disturb them. And he was convinced as to the accuracy of their story. So we had no doubt, we were surprised and shocked at the skill and the ruthlessness with which Murphy upset them; and he had them angry, calling names, saying 'the FBI put this down, not me, I didn't put that in the statement,' and then Murphy was able to say to the jury, well, if any of you believe that the FBI did anything wrong in this case, acquit this man. Today that would hardly be a good statement to make. But then, particularly that jury, really felt that he was charging them that they would be guilty of treason if they didn't believe that. That was quite a trial. If you read Mr. Murphy's flamboyant summation you'll see. Remember too, this, this is something nobody has gone into. In Murphy's opening in the first trial he stated accurately the law of perjury. "If you don't believe Chambers the government has no case." In Stryker's summation he kept going back to that--"if you don't believe Chambers there is no case." Pay no attention to all these corroborations; that only corroborates a supposed true statement." Murphy never said that again. This is quite accurate. This was the basic issue. Was Chambers credible or was I? Murphy was straightforward enough to state what was the rule of law at the time.

Advocate: I don't mean to be repetitive, but on an issue which we went by . . . in talking about the Grand Jury and Congressman Nixon's role in it, you said you would very much like to see the minutes of the Grand Jury, do you have any reason to suspect or to know what might be in it?

Hiss: Because there were press accounts almost immediately after in which he said what he had told them, that he had urged them to indict me, so I believe he did; but I can't prove it.

Advocate: Would that have any legal effect as far as you know for a witness to try to persuade the Grand Jury?

Hiss: At this time we're not attacking the indictment. I think there are various grounds on which to attack. This would simply please my curiosity, because I have never understood why the Grand Jury which voted by a divided vote—there have been various reports as to what the vote was—and I know they refused to indict my wife, even though they were asked to by the U.S. Attorney because a grand juror did report that.

Advocate: I've always wondered, why did you agree to meet with Mr. Chambers and Mr. Nixon in a New York Hotel? Why did you not demand a meeting in some public forum?

It's much simpler to know that all he (Chambers) did was to get access to a Woodstock and what I said at the time of sentencing, that this was forgery by typewriter, was in fact accurate, but not in the way I thought.
Hiss: I didn’t know Chambers was going to be there. I was asked if I would meet McDowell. I had known McDowell in some respect. McDowell called my office and said he was going to be in town and said he would like to see me so I said come to my office. He then called me and said it would be more convenient if you’d come over to the Commodore, which is just across the street, and before he hung up he said, “Oh, there will be one or two others here.” He might have said Nixon would be there, but he didn’t say it’d be the second appearance. And when I came in it was all set up for a Committee hearing. They said “You wanted to meet Chambers, you’re going to meet him.” I knew something was funny, that’s why I asked Chuck Dollard to go with me.

Advocate: Concerning Mrs. Murray, as I understand she did not testify at the first trial, she testified only at the second trial and in rebuttal, at the very end of the trial. She was a woman who had, between the time in question and the time of her testimony suffered a nervous breakdown. Wouldn’t it be consistent, you have suggested she was coached ...

Hiss: I wouldn’t go that far, I try to be subtle and say she was a suggestible witness. To me, a suggestible witness is somebody who learns what you want them to say and picks it up to please you. That isn’t strictly coaching. You don’t say “Look, say it this way. Now try it again.” But a suggestible witness can be imposed upon and I think she was such a witness. But I’d go as far as to say I think she was coached. It comes down to the same thing. I think she knew what they wanted her to say.

Advocate: Well apparently she first saw you in person at a very hectic, suggestive, as you allege, setting, at the courtroom where you were the focus of attention.

Hiss: No, I think you have misstated what the earlier interrogation shows. As I remember it, she said, “No, I don’t think I’ve seen either of these pictures.” She was told who they were. Sometime later she said, “This looks like somebody I know. Isn’t she an actress? This looks like a lady from Washington, yes I think maybe it was the lady from Washington. And then sometime later she said once there was a tall slender man with that lady, but at no time till she came up to New York did she say she could identify me. Then when she saw me at the landing — this would be a pretty easy identification.

Advocate: She did not say after looking at your photographs, of yourself and your wife, that they looked something like them?

Hiss: She might have. I’d have to go back to the documents.

Advocate: And looks something like, in regard to you whom she thought she’d only seen once and in your wife’s case whom she’d thought she’d seen four times that she looked very much like ...

Hiss: You’re now talking about the specificity of the charge we’ve made. This is the way it’ll be argued in court. If I were arguing this, I would want to examine the documents, before replying. In the documents we’ve got, there are the threads of what they eventually had her say, but I think it’s very thin. In a cross examination which may not have been put in the petition, she said that when first shown the pictures she had said I think I’ve seen them in the movies. Now, maybe that should be put in the petition. Maybe that’s stronger. On cross examination that was the first thing she told Claude Cross and of course she denied she was told the name. She said “I think I’ve seen them in pictures. Well of course she was very likely to have seen us on a newsreel. It was very much a part ... every time we went in and out of court, no I don’t think the Murray case is the strongest case. I really think she was a suggestible witness and it’s significant that they didn’t put her on in the direct
case where there was no way of investigating her, checking on her.

**Advocate:** But it's also consistent with the analysis that it was trial tactic discretion and not misconduct.

**Hiss:** And also with Victor Rabinowitz's belief that the first trial was a trial run and that they were there to strengthen the hand. Now I think it was a very skillfully done prosecution, the more I study it the more I give Murphy credit for unscrupulous ability. In that sense you can say that he was more able than my counsel, but only because he was willing to be unscrupulous and of course my counsel weren't. I've been very interested as the questions have come. I don't get even the suggestion that you find any impropriety on the part of the prosecution.

**Advocate:** I wouldn't assume that all...

**Hiss:** It may just be the way it came up in questioning.

**Advocate:** Perhaps if we were interviewing the prosecutor, we would've asked about nothing else... And I think perhaps you've picked that up because we expected a different kind of petition, and it raises the question that if the motion from the petition is granted that the legal judgment will be that the prosecution acted improperly but that we can't really hope for any ultimate legal judgment as to your guilt or innocence. Am I stating that correctly?

**Hiss:** Well, as you can tell from what I said before, I think the material as it now exists in the public record will indicate that none of the corroborative material was probative for its alleged purpose. In order to prove my innocence, it's quite possible that Chambers is telling the truth, but had nothing to back him up. Sure, I can understand people saying that; but it comes down, I think, to the validity of my testimony versus Chambers'. And I said that from the beginning. The credibility of two men. Actually, I think anybody who believes Chambers ought to have their head examined. He was a very strange creature.

**Advocate:** Well that's a very telling point especially in the context of why he held on to these documents. Now, he and yourself had some sort of relationship. Weren't you, or a person like you who was well respected and influential, the only type of person whom those documents could hurt—because to bring them forward he would have to implicate himself. The only way he could use them would be against a person who had more to lose.

**Hiss:** There may have been a blackmail in his mind when he saved them. See, we have not mentioned Malcolm Cowley. Malcolm Cowley was told by Chambers in 1947 that Frank Sayre was the head of a communist unit in the State Department and Cowley was so flabbergasted that he burst out, you know, Sayre was President Wilson's son-in-law. Every one of these documents could have been used to implicate Francis P. Sayre. Mrs. Chambers served as Sayre's brother's secretary. John Nenns Sayre was in the Fellowship of Reconciliation. Mrs. Chambers was a volunteer worker. So he knew. He was a magpie. He told Wadleigh a lot about Charles Darwin, Wadleigh's boss. Wadleigh asked him—"How do you know all about Charles Darwin?" He said, "I make it my job to know, to find out about people connected with people I know." He was a magpie, he picked up all kinds of things. He made charges, as we go through documents... I just sent two off to Gerard Piel, head of the Scientific American and he calls Gerry Piel a communist, which tickles Gerry Piel. There are 50 or 60 people that he alleged were to be communist and some he alleged to be spies. People asked me, "Why did he say this about you." He didn't at first, he picked on any number of people including R. E. Duggan, and the first person to be the goat was Harry White. White died of a heart attack and they had to get somebody else. And that's when they closed in on me on the afternoon on the day after White's death.

**Advocate:** Thank you, Mr. Hiss.

---

**All I need at this time to prove and to have accepted is that it was not my typewriter that they got... and that they knew it.**
The Central Panel Approach to Administrative Adjudication: The Massachusetts Division of Hearing Officers

The first important, independent administrative agency, the Interstate Commerce Commission, was created in 1887 to regulate economic activities among railroads. In the years that followed, a similar need for regulation presented itself at various points on the socio-politico-economic scene. To cope with these developing problems of public concern, a host of administrative agencies were created.

Most administrative agencies are vested with the power and authority to formulate policy in a particular sphere and to promulgate rules consistent with that policy; to perform in an investigatory/prosecutorial capacity to assure compliance with those rules; and to adjudicate in those instances where there are allegations of a failure to comply by those persons within an agency's jurisdiction. The major advantage to such broad delegations of power to a single administrative body lies in the speed and efficiency with which the agency can effectuate a new national policy. Yet these are, plainly, powers of immense scope, and equally plainly, they represent an "amalgam of functions which has been devised with little regard to constitutional theory."

The very powers which agencies must have to accomplish their tasks carry with them great and dangerous opportunities for oppression.

A combination of investigative and adjudicative functions in the administrative body does not, of itself, pose a risk of bias or prejudice violative of due process. Nonetheless, within the past 5-10 years, there have been several cases focusing on the legal and ethical issues raised under the traditional approach. Such an "administrative court" has existed on the federal level since 1946, and on the state level since the 1960's. Yet until recently, the Commonwealth of Massachusetts has failed to take any steps to alleviate the various due process concerns. The newly created Division of Hearing Officers offers an alternative method of administrative adjudication and may be the solution to many of the criticisms inherent to the more traditional approaches to administrative decision-making still employed in Massachusetts.

While the courts have been reluctant to actively mandate that the traditional approach to administrative adjudication be eliminated, many jurisdictions have voluntarily sought to improve their decisionmaking process. This article will focus on the Massachusetts Division of Hearing Officers and evaluate the Division's adjudicatory process in terms of an "ideal system." This system is one which features a judge-like decisionmaker who is independent, unbiased, legally competent and who also possesses the qualities of an expert, including specialized knowledge, awareness of agency policy, and a feeling for those governed by agency decisions.

The Law

A combination of investigative and adjudicative functions in the administrative body does not, of itself, pose a risk of bias or prejudice violative of due process. Nonetheless, within the past 5-10 years, there have been several cases focusing on the legal and ethical issues raised under the traditional system of administrative adjudication and when such a combination is unconstitutional. These decisions have propelled jurisdictions nationwide to make structural changes in their systems of agency adjudication. A brief discussion of several of these decisions is essential to a proper assessment of these recent changes.
It has been generally recognized that an impartial decisionmaker is required by the due process clause of the fourteenth amendment. This precept applies to an administrative law court as well as an ordinary court of law. The courts have, over the years, formulated various tests to determine when the risk of bias in adjudication becomes unconstitutional. Essentially, due process requires that the decisionmaker not be so biased either for or against a party as to be incapable of properly deciding his case according to the weight of evidence.

Until recently, the courts have been reluctant to disqualify a decisionmaker on the mere possibility of bias. While the commingling of investigative and adjudicative functions alone does not raise the risk of bias to an unconstitutional degree, the presumption of bias does arise in at least the following two situations: (1) Where the decisionmaker has a pecuniary interest; and (2) where he has acted as advocate for one of the parties involved in the controversy at issue. While there are other recognized grounds for the disqualification of an adjudicator, the above situations are of particular interest as they are the ones most commonly encountered in administrative adjudication.

A 1973 United States Supreme Court decision underscored the necessity of eliminating pecuniary interest in license revocation hearings by boards of registration. A large percentage of registration board members are also members of the profession which they are supposed to regulate. These boards are usually structured according to the traditional approach, that is, the members serve as both prosecutors and adjudicators. Conflict of interest, under such circumstances, is inevitable.

The case of Gibson v. Berryhill involved the Alabama Board of Optometry, a board consisting solely of private practitioners of the profession. The board, after conducting its own investigation, made a decision which had the effect of barring corporate employees from practice. Corporate-employed optometrists constituted more than half the optometrists in the state. The plaintiffs, all those who were delicensed, claimed that the board was biased and could not provide them with fair and impartial hearing in conformity with due process of law. The Supreme Court directed their attention, not to the issue of whether or not the board members were actually biased, but "whether in the natural course of events there is an indication of a possible temptation to an average man sitting as judge to try the case with bias for or against an issue presented to him." In other words, was there a presumption of bias?

The Court focused on the possible pecuniary interest of the decisionmakers in light of their ties with the profession. Nevertheless, the propriety of combining investigatory and adjudicatory powers in one body was an important factor in the court's determination. In light of both of these elements the court found a sufficient basis for a presumption of bias. In the words of the Court, "the board was so biased by pre-judgment and pecuniary interest that it could not constitutionally conduct hearings looking toward revocation."

The Sixth Circuit Court of Appeals mandated in American Cynamid Co. v. Federal Trade Commission that those who have formerly acted as advocate for one of the parties involved in the controversy at issue must not partake in the decision-making process. The F.T.C. decision was invalidated because one of the decisionmakers, the Commission chairman, had worked on the investigation of the case in his former capacity as chief counsel for a Senate subcommittee. The court noted that he had formed conclusions about factual issues involved in the case prior to the hearing. "We do not hold that the service of Mr. Dixon, (chairman of the F.T.C.) as counsel for the subcommittee, standing alone, necessarily would require disqualification. Our decision is based upon the depth of the investigation and the questions and comments by Mr. Dixon as counsel as shown by the record in this case." While the court's decision
Essentially, due process requires that the decisionmaker not be so biased either for or against a party as to be incapable of properly deciding his case.

was not based solely on the existence of a combination of functions by the decisionmaking body, the degree of bias engendered in light of all the circumstances of this case proved intolerable.20

It appeared that the courts were prepared to adopt a new stance regarding adjudicating boards' multi-function approach when the case of King v. Caesar Rodney School District21 was decided. The Federal District Court sustained the petitioner's due process objection to a preliminary hearing determination. The Caesar Rodney School Board had found just cause to terminate Mr. King's employment as a teacher. The Court held that because the board's unilateral investigation was so thorough and the minds of the board members so fixed that procedural guarantees afforded by a subsequent termination hearing had been rendered meaningless.22

In the case of Withrow v. Larkin,23 however, the United States Supreme Court abruptly laid to rest any notions that the combination of roles in a decisionmaking body was unconstitutional. The Court rejected the petitioner's claim that a decision by the medical board of registration, which possessed both investigatory and adjudicatory functions, was unduly biased. The Wisconsin Medical Examining Board had made a finding of probable cause for a civil action to revoke the petitioner's license to practice medicine. The decision was made after the board had conducted a closed, non-adversary, investigative hearing to determine whether Dr. Larkin had engaged in acts proscribed by Wisconsin statutes. Dr. Larkin claimed that the license suspension procedure violated due process in that the board was permitted to act as both investigator/prosecutor and adjudicator in the same proceeding.

The Supreme Court overturned the three-judge district court finding that once the board had conducted the investigation, Dr. Larkin's license could not be suspended without the intervention of an "independent decisionmaker."24 Mr. Justice White, speaking for the Supreme Court, stated that "the mere exposure to evidence presented in a nonadversary investigative procedure is insufficient in itself to impugn the fairness of the board members at a later adversary hearing."25 Thus, decisions by a body possessing both investigative/prosecutorial and adjudicative powers are not unconstitutional unless there is a showing of some other factor which indicates bias or a "closed mind on the part of the decisionmaker."

The contention that the combination of investigative and adjudicative functions creates an unconstitutional risk of bias in administrative adjudication must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers in the same individuals poses such a risk of actual bias or pre-judgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.26

The court displayed an unusual reluctance to interfere with procedural practices of agencies in setting a high standard of proof necessary to establish a due process violation.

The Court in Withrow failed to establish a new rule which would preclude administrative agencies from investigating facts, instituting proceedings and adjudicating issues. Instead, the Court reverted to the long established criteria necessary for disqualification of a decisionmaker. Failing to find either pecuniary interest or substantial pre-hearing familiarity, the Court refused to invalidate the board's finding. The Court seemed to blind itself to the potential for prejudice which exists whenever a decisionmaker has had prior dealings with the facts at issue in the case before him. While due process may not require that all parties be accorded the "full panoply of rights" due a criminal defendant,27 adequate notice and a hearing alone do not seem sufficient. A balance must be maintained between the rights of the individual and the public interest in promoting efficient administrative procedures.

Though the Supreme Court has been, as yet, unwilling to create stricter due process standards for agency adjudications, many administrative agencies have taken steps to alleviate procedural irregularities. Aware of the potential for interference by the courts, most agencies have made at least some effort, in recent years, to ensure that their adjudicative bodies comport with the most basic elements of due process.

Administrative Adjudication in Massachusetts

Presently, there is no uniform system of administrative adjudication in Massachusetts. Various structural approaches have evolved in response to recent judicial determinations. The approaches to administrative decisionmaking in Massachusetts can be separated into three basic variations:

1) The "internal separation" approach is employed mainly by smaller agencies. The agency hierarchy selects hearing officers from agency staff members. Internal measures, designed to maintain the hearing officer's independence are adopted.

2) The Massachusetts Labor Relations Commission is an example of another system of adjudication called the "single function" approach. In agencies handling a large volume of adjudications, full-time hearing officers are appointed to serve solely as decisionmakers and any mixture of functions is strictly forbidden.

3) The third alternative, adopted by the Civil Service Commission and an ever-increasing number of agencies, is called the "central panel" approach. Members of this central body of trained adjudicators are randomly assigned to the agencies on a case-by-case basis to conduct the adjudication on behalf of an agency.

Proponents of all three approaches seek the same objective — an independent, well-reasoned and expeditious decision. An analysis of these various systems of adjudication offers valuable
1. The Internal Separation Approach
Under the "internal separation" approach, all hearings before the agency are presided over by regular staff members of the agency who are specifically selected to serve in this capacity. This person will serve as primary decision-maker, issuing all procedural and evidentiary rulings and making all law/fact applications. In an effort to comport with fundamental due process requirements, agency policy usually forbids this person from interacting with anyone connected with the investigation or prosecution of the case. The adjudicator is, at least theoretically, considered insulated from intra-agency pressures and interference.

The principal advantage to this system is that the decisionmaker is an expert in the matter before him. As a staff member of the agency governing the disputed matter, he is equipped with a specialized knowledge of the often complicated and technical issues before him.

How important is expertise? Results of studies conducted in other states indicate that while at least some agencies do not identify the expertise issue as a serious concern, other agencies consider familiarity with the technical matters dealt with by the agency crucial to a fair adjudication.

On the questions of desirability of having hearing officers with legal training and experience, and having them independent of the agency or integrated into it, the weight of the evidence arising out of the years of experience of California's welfare administration with both types is on the side of social workers and integration.

Scholars also argue that in addition to the fact that such familiarity with precedent and specialized knowledge expedites the handling of cases, data indicates a much higher rate of reversal in proposed decisions of hearing officers who were just lawyers than of hearing officers attached to the agency who were also workers.

The advantages of the "internal separation" approach are significant. However, the strong tie between the decisionmaker and the agency leaves such a system open to severe criticism. Members of the same entity investigate, prosecute and adjudicate the cases before it. Measures have been taken to guard against bias. Though such measures would, in all likelihood, satisfy the superficial tests set forth by the United States Supreme Court, pressure may all too easily be exerted upon the decisionmaker, sometimes in the form of subtle and almost undetectable influences such as evaluation reports or promotion progress or even casual conversation with a fellow worker. Proponents of the system claim that "examiners develop a psychological attitude of imperviousness to those influences within the agency which outside parties may regard as detrimental." Just the fact that the system is susceptible to poor public perception makes the system unsatisfactory, however. A fairer balance between expertise and independence must be achieved and this is impossible where the adjudicator is closely ensnared in other agency affairs.

2. The Single Function Approach
Agencies such as the Massachusetts Labor Relations Commission are designed to handle a high volume of adjudicatory hearings. Hearing officers within these agencies are deployed according to the type known as the "single function" approach. That is, they are appointed, assigned and paid by the agency for which they adjudicate. This internal corps of hearing officers, often selected from amongst the agency staff, are usually lawyers who also possess an expertise in the primary areas of agency concentration. They are expected to divorce themselves from any allegiance to the agency and are answerable, in theory at least, only to their immediate superior, the agency's chief hearing examiner.

The "single function" system offers a body of adjudicators who possess such assets as expertise, case experience and legal know-how. Most of the officers have worked in investigative positions prior to their appointment as hearing officers. Their familiarity with the types of cases they will adjudicate allows for speedier hearings. And cognizance of governing statutes, current regulations and informal agency policies, both written and unwritten, all of which govern agency actions, is another important advantage to this approach. The system is far more conducive to a logical and well-reasoned decision than the "internal separation" approach.

Yet independence is not assured under either approach. As long as the hearing officer remains attached to the agency and therefore, subordinate to the agency hierarchy, whether in terms of pay, promotion, or simply, intra-agency reputation, there is a danger that his decisions will be affected by some subtle internal pressure. When professional destinies are at stake, compromise and, therefore, injustice is still a very real concern.

3. The Central Panel Approach
The Civil Service Commission and at least twelve other agencies require that all hearings be conducted by hearing officers from a "central panel" of trained adjudicators called the Division of Hearing Officers. Funded through a separate appropriation by the state legislature, the Division is a separate and distinct quasi-agency. Since the Division is pecuniarily self-sufficient, it is also quite independent of most agency influence intrinsic to the aforementioned approaches.

Hearing officers are appointed, often at random, by the chief of the Division to the agencies availing themselves of the Division's services. They are authorized to preside over the hearing, make rulings of law, evaluate all evidence, and formulate findings of fact. Some agencies, in accordance with a prior arrangement with the Division, concede total decisionmaking authority to the hearing officers. Other agencies allow substantial weight to the officer's decision while the agency commissioners retain the authority to make final rulings. Even in those situations where the hearing officer does not

A separate, independent organization whose sole function is administrative adjudication is the means most often used to eliminate the inequities under the traditional approach.
have the final say, this power to overrule is seldom invoked unless there has been some gross misinterpretation of agency policy or other misjudgment on the part of the officer.39
The “central panel” approach offers the highest degree of independence of the three systems discussed thus far. The system is a relatively new approach to administrative adjudication in Massachusetts. It may be the solution to the various due process problems inherent in either the “internal separation” or the “single function” theories.

The Division of Hearing Officers
1. Because of various complex political considerations, a centralized and independent administrative law court has never been established in Massachusetts. Over the years, various proposals have been advanced in an attempt to eliminate the incongruity of placing policymaking, prosecution and adjudicating functions all within the same agency.40
The Division offers an appealing alternative to the administrative law court systems created in other jurisdictions. Though founded in a rather “back-door” manner, it now offers a fair, objective, and efficient system of administrative adjudication. The Division has the potential to evolve into an adjudicative body equivalent to an administrative law court.
2. The Division of Hearing Officers was first established in 1974 by Mass. Gen. Laws ch.7 § 4H, as part of the Executive Office of Administration and Finance and originally intended to operate as a rate-setting board for state hospitals and other state facilities.
3. A 1975 amendment to Chapter 7, section 4H designated the Division as the adjudicating body for the Civil Service Commission and further expanded the duties of the chief hearing officer to include “appeals on behalf of other agencies.” The relevant portion of the statute reads as follows:

Any officer or agency of the Commonwealth authorized to conduct adjudicatory proceedings or to hear appeals from such proceedings may, subject to the approval of the secretary of the executive office within which such officer is employed or such agency is located, request the Division to conduct one or more classes of such proceedings or appeals on behalf of the officer or agency.42
Thus, other agencies may voluntarily avail themselves of the Division’s services and delegate their decisionmaking power to the Division. This was a significant milestone for this “back-door” administrative court as it opened up the Division’s services to other agencies.
4. The Division is staffed by fourteen full-time hearing examiners. All officers are hand-picked by the Chief of the Division, Irwin R. Glazier. Most of those chosen to serve as hearing officers have had considerable trial experience in addition to specialized training in such areas as administrative law, social welfare, accounting, prisoner’s rights and criminal prosecution. One other rather intangible attribute which Mr. Glazier has sought in those officers selected is a quality which he describes as “judicial temperament”. That is, the ability to listen, weigh all the facts and make objective applications of law. A good decisionmaker must be quick, able to think on his feet and keep his wits in difficult situations.
5. The salary for this most demanding position is $16,000-18,000 per year. This is hardly competitive with the earning capacity of a high calibre attorney in the private sector. Such a low level of remuneration may pose a problem in attempting to draw qualified applicants for hearing officer positions.
6. In addition to the fourteen senior staff members, Mr. Glazier has initiated a junior hearing officers training program.

Recent graduates of law school with outstanding academic credentials and proven writing ability are selected for this program. These junior officers research many of the issues to be decided by the senior officers and often play an active role in the decisionmaking process. They gradually undertake more responsibility until they are delegated cases of their own. This rather novel apprenticeship program provides the junior officer with an opportunity to grow into the role of a senior officer while also ensuring that decisions are made by experienced adjudicators.
7. The Division is funded via a totally separate appropriation by the state legislature. Annually, the chief of the Division submits his budget to the legislature. His estimations are rarely challenged. The estimated costs are based on the prior year’s expenditures plus an assessment of anticipated cost increases and service expansion for the year to come. The hearing officers’ salaries are funded directly from the legislative appropriation. The agencies have no fiscal ties to the Division as there is no charge for the Division’s services.
8. Procedurally, all administrative hearings and appeals before the Division examiners are governed by the Uniform Rules of Practice and Procedure. These rules, in format at least, resemble portions of the Massachusetts Rules of Civil Procedure. The Uniform Rules are currently being revised in an attempt to promulgate uniform rules of procedure which are applicable to all agency hearings. Uniformity of procedure is one of the major advantages of the “central panel” approach in that all parties are apprised of the procedural requirements in advance. Such rules are not left to the whim of the decisionmaker, varying from hearing to hearing and agency to agency.
Several of the provisions are worthy of note. Rule 3.1(b) accords any party appearing before the Division the right to be accompanied, represented and advised by counsel.43 Rule 5.5 provides for a “Pre-Submission Conference”. Such con-

The Division offers an appealing alternative to the administrative law court systems created in other jurisdictions.
ferences are encouraged for the following reasons: (1) the conferences provide an opportunity to simplify and clarify contested issues; (2) often, stipulations are obtained or other agreements reached which will avoid unnecessary proof; (3) the number of expert witnesses is determined; and (4) occasionally a settlement will be reached disposing of all issues in dispute. 44

One of the more unique provisions, Rule 6.1, provides as follows: "any party may, by motion, request that a hearing be held at some place other than the Division’s Offices, due to disability or infirmity of witnesses or where justice and equity would so best be served." 45 This rule has been interpreted to require "home hearings" when a party is unable to gain access to the Division Offices. 46 Rule 6.1 is reserved for only the most severe situations due to cost considerations. Nonetheless, when benefits disputes arise involving the Department of Elderly Affairs, even the aged and infirm have a right to demand a hearing of some sort.

Subpoena power provided by Rule 6.5 (a) 47 is the most important mechanism provided to the Division. Mass. Gen. Laws ch. 7, § 4H, authorizes the Division to subpoena witnesses, documents and other evidence. Such power has proven to be an effective tool in compelling the cooperation of the often recalcitrant agencies. The agencies must cooperate or face complete shut down of their operations.

One flaw evident under the current rules of procedure is the discovery provision. Rule 5.8 allows “discovery as of right to the same extent and in the same manner as provided by the Massachusetts Rules of Civil Procedure.” Such a rule may be abused by agencies or more affluent private parties who can afford to expend money and equally precious time on various discovery mechanisms. Less affluent parties who are litigating claims of immediate urgency are put to a considerable disadvantage. While the problem is not resolvable to the complete satisfaction of all concerned, the new rules, currently under consideration, should take a compromise position which is acceptable to both view points. 48

In the proceedings before him, the hearing officer is not encouraged to play an activist role. Occasionally, for purposes of clarification or to protect the rights of a private party proceeding pro se, the officer may supplement direct examination of the witnesses with questions of his own. However, such instances are rare.

All Division-conducted hearings observe ordinary court room standards of evidence with several important exceptions. Hearsay testimony is admissible into evidence but may only be utilized to corroborate non-hearsay testimony. The proceedings are generally far less formal than judicial proceedings. A more relaxed standard of relevancy is tolerated and evidentiary disputes are rare.

All decisions are those of the hearing officer who presides over the case. The chief never overrides or interferes with the decisions rendered. The evidence presented and the theory of administrative precedent 49 provide the basis of each opinion. Even the subtle pressures such as performance evaluation reports and salary determinations are removed from agency control. The influence of the various agencies is kept to a minimum.

An increasing number of agencies have opted to take advantage of the Division’s services rather than risk invalidation of their decisions by the courts on due process grounds. 50 Response from parties appearing before the Division officers has been favorable. 51 Agency officials and private parties have assessed the Division-conducted hearings as fair and speedy. There has been some criticism by the agencies, that the decisions are not always as well-reasoned as agency opinions could be. While there may be some merit to this contention, it must be remembered that the agencies have reluctantly surrendered their tradi-
Where the lack of expertise may pose a problem in a particular matter before the Division, often a specific decisionmaker will be assigned on the basis of his background or experience, to handle the case. For instance, a person with an accounting background is likely to be regularly assigned to rate determinations. Such officer will eventually acquire an even higher level of expertise in these matters. Most cases, however, do not require any particular expertise on the part of the decisionmaker. Thus, rotational assignment is sufficient in such cases as board of registration disputes. Usually such cases involve routine issues which require only an ability to make procedural and evidentiary rulings and apply law to facts.32

The most important structural defect in the "central panel" approach, as it exists in Massachusetts, is the non-binding effect of Division determinations. Depending on the agreement entered into by the agency with the Division, the agency may reserve all rights of final review of any decision rendered by a Division hearing officer. Thus, the officer's findings may amount to no more than a recommendation. This structural weakness is undoubtedly the result of the voluntary nature of the Division of Hearing Officers. This element considerably undermines the independence of the Division.

While this flaw should not be understated, its significance is overshadowed by the fact that more than 90% of all recommended decisions become final.53 Chief Glazier attributes this high acceptance rate to the fact that the opinions are well reasoned and tightly written and, therefore, difficult to overturn.

Conclusion

In the foregoing discussion, I have taken the position that, for purposes of affording fundamental fairness and objectivity to parties involved in administrative hearings, the decisionmaker should be independent, that is, insulated from all pro-agency influence and pressure. It is desirable to maintain both the appearance and reality of unbiased decision-making. Dangerous influences may be subtle and difficult to discern. Even the slightest risk that the integrity of a system of administrative adjudication may be compromised could engender harmful ramifications. Therefore, the system must be structurally arranged so as to ensure independence by those making the decisions for the agency.

Creation of a separate administrative court to preside over all agency adjudications in Massachusetts is one means of acquiring the desired element of independence. However, the Division of Hearing Officers offers a viable alternative approach to agency decisionmaking. To a great extent, objectivity and fairness are achieved in the adjudicative process without dramatically altering the roles and responsibilities of the agencies.

While the Division is superior to other, more traditional approaches, it is far from ideal. It's power and authority should be legislatively extended such that the Division presides over all agency hearings. Further, more weight should be given to the hearing officer's determinations such that they are reversible only on appeal to the Superior Court. Proper incentives should be established to draw talented legal personnel with diversified backgrounds to serve as hearing officers. Reforms such as these are consistent with effective administrative law and will promote a fairer and more efficient system of administrative adjudication.
A good decisionmaker must be quick, able to think on his feet, and able to keep his wits in difficult situations.

Footnotes

5. Professionalization of hearing officers has proceeded apace at the state level. California and Missouri are noteworthy examples. California adopted its unit of hearing officers for fifty-three state agencies via its Administrative Procedure Act of 1961 and Missouri created its adjudicatory machinery in 1965 in accordance with 11 MO. STAT. ANN. §§ 161.252 et seq. (Vernon).
12. E.g., Taylor v. Hayes, 418 U.S. 488 (1974), where the discussionmaker has been the target of personal abuse from one of the parties.
13. Beyond situations of this sort, courts have been reluctant to disqualify the decisionmaker.
14. J. Delaney, An Administrative Law Court for Massachusetts, 58 MASS. L.Q. 373, 376 (1973-74). In 1973, 80% or more of the board of registration members in Massachusetts were members of the profession.
16. Id. at 566.
17. Id. at 568.
18. 363 F.2d 797 (6th Cir. 1966).
19. Id. at 760.
20. Id. at 759.
22. Id. at 1214.
25. 421 U.S. at 55.
26. 421 U.S. at 47.
31. 13. Beyond situations of this sort, courts have been reluctant to disqualify the decisionmaker.
32. 37. 58 MASS. L.Q. 373 (1973-74).
34. 12. Id. at 1114.
37. MASS. GEN. LAWS ch. 7, § 4H mandates that all Civil Service appeals be conducted before the Division. However, other agencies may voluntarily avail themselves of the Division’s services.
39. Even as recently as 1973, Governor Sargent sponsored legislation which would establish an administrative law court. Filed as H. 6090, this 0 court would not have been part of the constitutional court system but would have been an independent tribunal within the Department of Consumer Affairs with its jurisdiction limited to matters arising out of the subject matter regulated by the more than 40 consumer agencies. The court would have been totally independent of the governor, legislature, secretary of consumer affairs (except for budgetary matters).
41. MASS. GEN. LAWS ch. 7, § 4H provides: “He shall hear, or assign for hearing, appeals filed pursuant to section thirty-six of Chapter 6A and such appeals assigned for hearing pursuant to sections forty-three and forty-six of chapter thirty-one.”
42. MASS. GEN. LAWS ch. 7, § 4 H.
43. Rules of Practice and Procedure, Rule 3.1 (b): “Right to Confer — Any party, individual or entity who appears before the Division or in a proceeding held under these rules, either by compulsion from, or request or permission of the Division, shall be accorded the right to be accompanied, represented and advised by counsel.”
44. Rules of Practice and Procedure, Rule 5.5: “Pre-hearing or Pre-Submission Conference — Whether or not a hearing is elected, the Division may, upon its own initiative or upon application of either party, call upon the parties to appear before the Division for a conference”.
46. Department of Elderly Affairs Regulation 3.5, interpreting 45 C.F.R. § 285.10(a) (8) (Fair Hearings Regulation requiring hearings at a “site convenient”).
47. Rules of Practice and Procedure, Rule 6.5 (a): “Subpoenas — The Division shall have authority pursuant to MASS. GEN. LAWS ch. 7, § 4 H, to issue subpoenas requiring attendance and testimony of witnesses and production of documents and other evidence in question in a proceeding.”
48. The revised rules are currently under consideration by Mr. Glazier.
50. See discussion supra, text pages.
51. Much of the following information is derived from interviews with Mr. Irwin Glazier and Mr. Michael Sentence (Junior Hearing Officer) in Boston (April 14, 1978).
52. Interview with Irwin Glazier, in Boston (April 14, 1978).
53. Id.
Exploring The Case For Imposing Limitations On The Scope Of Employer Rights To Employee Inventions

The scope of employer rights to employee inventions covers two broad areas at present; (1) a common law aspect wherein there has been no contractual agreement for assignment of the invention to the employer and (2) a contractual aspect, prevalent today, wherein the employee agrees under an employment (invention) contract to assign future patent rights to his employer.

Of paramount concern in invention assignment contracts are the issues of (1) the compensation to which the employee may be entitled under case law precedents or statutory provisions, (2) the extent to which such contracts may be enforceable if "holdover clauses" of long duration are included — holdover clauses are those in which an employee covenants to assign inventions made after the period of employment and (3) the extent of enforceability of the contract wherein the "subject matter" covered is overly broad, for example, wherein the employee covenants to assign to his employer, at his employer’s election, rights to all inventions made during the term of employment — even those inventions which do not relate to the employer’s business at the time of invention and were made with the employee’s own funds outside of normal business hours.

The issue of adequacy of consideration for the assignment of patent rights to the employer has been a frequently visited subject for scholarly critiques in recent years as well as a subject for proposed congressional legislation. However, in this country the Courts have consistently held that the employment itself is adequate consideration for such contracts and the employer therefore is not obligated to make additional compensation to the employee for an invention made in the course of his employment. The impact on the employee and degree of enforceability of employment invention contracts which are broad in scope as to subject matter, however, is a subject relatively overlooked even though such contracts are commonplace among large technical employers.

In this article, primary treatment will be given to the latter issue — the degree of enforceability of covenants of assignment which are broad as to the subject matter. The potential for unfairness to the employee and the bases at law and in equity for the modification of available remedies will also be discussed.

Employer Rights to Employee Inventions: The Basic Law

The law relevant to the scope of employer rights to employee inventions may be viewed as having two distinct branches for enforceability: (1) an employment contract branch which applies when the employee as a condition to his employment expressly covenants to assign inventions to his employer, and (2) a master-servant common law branch which applies in the absence of an express invention agreement.

Today almost all employers of technical people require that they sign an employment invention contract as a condition to employment. These contracts have generally been held specifically enforceable in equity, and the employment itself is adequate consideration for such contracts. For example in Buckingham Products Co. v. McAleer Manufacturing Co., the Sixth Circuit Court of Appeals stated: "Employment is consideration between the employer and the employee supporting the assignment and supporting a specific contract requiring the employee to assign inventions. The hiring of an employee is sufficient consideration." In Marshall v. Colgate-Palmolive Peet Co., the court stated: "A patent is property, title to which passes from the inventor only by assignment, and an agreement to assign will be specifically
enforced. As between employer and employee, rights are determined upon a contract for employment. "The invention contract as condition of employment has essentially replaced the master-servant common law in determining title to employees' inventions, since few employers would wish to support research activity without the guarantee of an employee's express covenant to assign patent rights resulting from inventions made during the course of such research activity."

The basic master-servant common law as to invention rights has been settled since United States v. Dubilier Condenser Corp. The traditional rule under the master-servant common law theory is that where a person is employed by another to make an invention ("hired to invent") and he succeeds in accomplishing the assigned task during the term of his employment, the employer is the equitable owner of the invention. The employer is not the owner of the invention where an employee who is not assigned the specific task of inventing
Today almost all employers of technical people require that they sign an employment invention contract as a condition of employment.

makes an invention even though the invention relates to the employee's field of employment and the employer's time and resources are utilized in making the invention. 11

In effect, under the master-servant common law the employer must demonstrate that the employee was "hired to invent" in order for the employer to acquire equitable title to the employee's inventions. Thus, in National Development v. Gray 12 the court stated that: "One by merely entering an employment requiring the performance of services of non-inventive nature does not lose his rights to any inventions that he may make during the employment . . . , and this is true even if the patent is for an improvement upon a device or process used by the employer . . . ." 13

Under the Master-Servant common law approach, in the case where an employee was not specifically hired to invent, the employer is generally entitled to a "shop right," a non-exclusive, non-transferable license to use the invention, if he can show some minimal contribution to the invention such as employee use of employer funds or facilities in making the invention. 14 Thus, where the employee inventor was not specifically "hired to invent", and in the absence of express covenants of patent assignment he makes an invention entirely unrelated to the business of the employer and without employer contribution, then rights to patents issuing on the invention belong exclusively to the employee. In this instance, since there was neither employer contribution nor connection between the subject matter of the invention and the employee's job, the employer will not be entitled to even a "shop right" in the invention.15

Because of the master-servant common law rule whereby the employer would gain rights to employee inventions only in very specific situations, technical employers today have come to rely on the employment invention contract in order to guarantee that employee inventions become assignable to the employer.

The Employment Invention Contract

Employer - employee invention contracts as a precondition to employment can and do vary as to terms and scope depending on the nature of the industry to which the employment pertains, the policies of the company employer, and the bargaining power of the prospective employee relative to the employer. The technical company employer usually will, as a minimum, claim equitable title and exclusive rights to all of the employee's inventions which relate to the employer's business made with employer funds during the term of employment regardless of whether or not the invention was made during business hours. In certain instances the contract may have "hold over" clauses which obligate the employee to assign any invention relating to the employer's business including inventions made by the employee during some limited period (e.g. one year) following termination of his employment. Such contracts have been held enforceable.16 Furthermore, it is still commonplace to find employment invention contracts among large industrial employers where-in the employer claims to retain, at its election, exclusive rights to all inventions which the employee makes during the term of his employment, even though some of those inventions may not relate to the employer's business and may have been invented during off business hours and with the employee's own funds.17

The argument may be presented that covenants of contract giving the employer exclusive rights, at his election, to all inventions made during the term of employment even as to those inventions which do not relate to the employer's business should be enforceable, since they were freely and voluntarily assented to by the employee. But in Guth v. Minnesota Mining Mfg. Co. 18 the court held that employment contracts under which the employer shall have rights to all the employee's inventions are not contrary to public policy unless the provision is limitless in extent of time and in subject matter of invention. In Guth the court held valid those portions of the contract wherein the employee was required to assign to his employer patents resulting from inventions made during the course of employment but invalidated other areas of the agreement which were limitless as to extent of time and subject matter. Thus, the court interpreted the employment contract narrowly, upholding those portions of the contract that were not unduly restrictive or inequitable and striking out those provisions that were deemed unconscionable. One can surmise that had the patent assignment provisions in the employment contract extended to assignment of inventions made outside the scope of employment and which clearly did not relate to the employer's business, such provisions would also have been stricken or reformed in keeping with the doctrine of unconscionability applied by the court in deciding this case.

The case of Dorr-Oliver Incorporated v. the United States 19 is one that presented issues of enforceability of patent assignment covenants assertedly broad as to scope of subject matter and as to duration. In Dorr-Oliver, Frassetto, an engineer, was employed by American Machine & Foundry Company (AMF) from 1951 to 1963 pursuant to an employment contract wherein he agreed to assign to AMF all inventions made by him in AMF's line of business during his tenure of employment and for one year thereafter. He worked on the development of missiles and space vehicle handling equipment while at AMF. He left AMF in 1963 and went to work for Dortech, Inc., a subsidiary of Dorr Oliver. Later that year while he was in the employ of Dortech, Inc. and using Dortech's funds, Frassetto invented an improved trailer for transporting palletized cargo. The parties agreed that the invention was conceived and reduced to practice during the year covered by the "hold over" clause in Frassetto's invention contract agreement with AMF. The contract with AMF obligated him to use his best efforts to: "invent, design, and improve machines, implements, appliances, methods, products and systems relating to or useful in connection with the following subject matter, namely: the machinery and devices and other products of the various kinds made, used and sold by AMF here-
and stated:

Frassetto never worked on cargo trailers at AMF, although AMF made cargo trailers in 1962, about a year before he left AMF. So far as the record showed, Frassetto knew nothing about AMF's trailers and had nothing to do with their manufacture.

The decision in this case turned on whether or not AMF was the rightful owner of the patent issuing on Frassetto's invention by virtue of the terms of the pre-employment invention contract which Frassetto had signed in 1951. Specifically, the central issues were (1) whether the scope of "subject matter" covered by the invention contract could equitably be interpreted to cover the subject matter of Frassetto's invention and (2) whether the one year hold-over clause was reasonable and within the scope of and related to the employee's former activities. The court held that since Frassetto never worked on cargo trailers at AMF (nor did the record show that he had knowledge of AMF's activities relating to cargo trailers) it was not reasonable to interpret cargo trailers as part of the "subject matter" which Frassetto agreed to assign back to AMF within one year after the termination of his employment. Furthermore, the record showed that the invention was conceived and reduced to practice while Frassetto worked for Dortech on Dortech's time with Dortech's money. Also, a factor which weighed heavily was that AMF had never sought to enforce the holdover clause against Frassetto. In sum, the court held AMF was not the legal or equitable owner of the Frassetto patent.

As to the issue enforceability of holdover clauses, per se, the court cited Guth and stated:

Holdover clauses are simply a recognition of the fact of business life that employees sometimes carry with them to new employers, inventions or ideas so related to work done for a former employer that in equity and good conscience the fruits of that work should belong to the former employer. In construing and applying holdover clauses, the courts have held that they must be limited to reasonable times (Guth, supra.) and to subject matter which an employee worked on or had knowledge of during his employment. Universal Winding Co. v. Clarke, 108 F. Supp. 329 (D. Conn. 1952)."20

It is established law that employment contracts are subject to the doctrine of unconscionability. Contract provisions may be held void and unenforceable where it is successfully argued that the offeror drafting the contract had "superior bargaining power" and that the offeree had "no meaningful choice" but to assent to the contract.22 This point is well summarized in Williams v. Walker-Thomas Furniture Co.,23 wherein the court states:

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by considering all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.24

In reality the average prospective technical employee has "no meaningful choice" but to sign the employment invention contract which his employer presents him, as a condition to his being hired. It follows that if all employers in a particular industry or in a particular narrow field of specialization offer essentially identical invention contracts at the hiring stage, the employee has in effect "no meaningful choice" but to assent to signing the contract upon the general terms submitted, otherwise, the employee cannot hope to ever work in his field of specialty.

In many technical specialties today such conformity of employment invention contracts exists; in these situations, the employer clearly has the superior bargaining position. When a situation of this type can be demonstrated it should be possible to persuade the courts that certain invention contract clauses, particularly those that are limitless as to time or subject matter are unconscionable and therefore unenforceable.

A Comparison With General Covenants Not To Compete, In Employment Contracts

It is settled in Massachusetts and in other jurisdictions that general covenants not to compete are unenforceable in employment contracts; covenants not to compete must be limited as to duration and scope.25 For example, in New England Tree Expert Co., Inc. v. Russel26 the court upheld as reasonable and enforceable employee express covenants not to compete for a period of three years from the date of termination or engage in any of the New England states in the same or any similar
The invention contract as a condition of employment has essentially replaced the master-servant common law in determining title to employees' inventions.

line of business as that carried on by the employer. The employer, the New England Tree Expert Co. was involved in the work of trimming and caring for trees and had offices and performed tree services in the New England states. Before rendering the decision the court took into great consideration the particular nature of the business in order to weigh the potential harm to the plaintiff New England Tree Expert Co., if the employment covenants were not enforced.

In Morgan's Home Equipment Corp. v. Marucci, the Pennsylvania Supreme Court held that general covenants by an employee not to compete after the termination of his employment are prima facie enforceable if they are reasonably limited as to duration of time and geographic extent. The court stated in Morgan that a general covenant not to compete imposes a greater hardship upon an employee than upon a seller of a business. The employee under a general covenant may encounter difficulty in transferring his particular experience and training to another line of work with which he is familiar, and hence his ability to earn a livelihood can be seriously impaired. Thus, generally, covenants not to compete are subjected to a much more stringent test of reasonableness than restrictive covenants ancillary to the sales of businesses.

In Massachusetts the rule governing covenants seeking to restrain trade or competition inserted in personal service contracts has been consistently applied by the Supreme Judicial Court ever since its opinion in 1933 in Becker College of Business Administration v. Gross wherein the court held: "A covenant restraining trade or competition, inserted in a contract for personal service, is not in itself invalid if the interest to be protected is consonant with public policy and if the restraint is limited reasonably in time and space." The rule pronounced in Becker College has been repeatedly applied by the Supreme Judicial Court and more recently in Marine Contractors Co. v. Hurley and in E. Blackwell v. E.M. Helides, Jr. Inc.

Furthermore, the courts in Massachusetts have traditionally reformed overly broad restrictive covenants in employment contracts independently of the issue of severability of the other contract provisions. Thus, where a covenant manifests overreaching on the part of the employer or is too broad in time, space, or subject matter it will be enforced only to the extent that it is reasonable. In All Stainless Inc. v. Colby, the court emphasized that:

In determining whether a covenant will be enforced, in whole or in part, the reasonable needs of the former employer for protection against harmful conduct of the former employee must be weighed against both the reasonableness of the restraint imposed on the former employee and the public interest.

The test of reasonableness that the courts have traditionally applied in Massachusetts permits covenants to extend to the use of confidential information which would unfairly subject its owner to injury. For example, in the recent case of E. Blackwell v. E.M. Helides, the court held that a real estate broker could enforce a covenant not to compete in a specified thirteen town area since that area "closely coincided with the area in which goodwill has been developed." A restraint based on information designated by the employer as "confidential" can remain in effect as long as the information remains valuable to competitors. Thus, information no longer of value to the competitors at the time of litigation cannot form the basis of the restraint.

Concerning the issue of duration for enforceability of restrictive covenants based strictly on customer connection it is of interest to note that the Supreme Judicial Court in the past forty five years of litigation has not enforced a restraint founded on customer connections exceeding a period of three years duration from the time of an employee's termination employment.

One may argue that covenants wherein the employee obligates himself to surrender rights to all inventions made during his term of employment, are covenants involving the transfer of ownership of personal property, namely patent property rights and are not analogous to employee contractual covenants not to compete. The argument might continue that since covenants to transfer patent property rights (tangible property) are not comparable to covenants not to compete (intangible restraint), the former need not be subject to the same test of reasonableness as to scope and duration.

- This argument is spurious and can be met by the following counter argument.

Employment invention contracts should equitably be subject to the same test of reasonableness regarding subject matter scope and duration as are general employment covenants not to compete. After all, if an employer by contract is able to gain rights at his election to all the employee's inventions made during the term of his employ, this gain is tantamount to a general covenant not to compete with respect to the technology covered by those inventions. This is so because as a matter of patent law the employee, just as the public at large, will be precluded from "making, using, and selling" any invention to which he does not have patent rights, for a period of seventeen years from the date of grant of the patent issuing on that invention. If the invention is a very basic one and broad patent claim coverage is obtained, an employee covenant to assign rights to the patent to his employer is tantamount to a broad covenant not to compete in the area of technology covered by the patent.

The court stated in Morgan that a general covenant not to compete imposes a greater hardship upon an employee than upon a seller of a business.
In fact, the covenant not to compete will be as broad as the invention is profound. An analysis of the leading Massachusetts case law reveals a clear intent of the courts to scrutinize restrictive covenants restraining trade or competition inserted in a contract for personal service and to enforce such covenants only to the extent necessary for the protection of the employer from unfair injury caused by the former employee because of some competitive advantage which he acquired during the course of his employ. The trend towards an even stricter scrutiny may be detected from a reading of the more recent cases and scholarly critique in this area. It has been advanced in recent scholarly treatment that stricter scrutiny is a definite reality and those who draft such agreements would do well to frame them carefully so as only to prohibit unfair competition and not attempt to restrain ordinary competition.45

The Massachusetts appellate courts have in recent years applied a stricter test of reasonableness that covenants restraining trade or competition must pass to be enforceable. Analyses of present Massachusetts case law concerning enforceability of covenants restraining trade or competition inserted in employment contracts reveal that in applying the test of reasonableness, in addition to the requirement that the covenant be limited in time and space, the courts require that there be sufficient connection with either the former employer’s customers to justify the restraint, or else a determination must first be made as to what type of information is confidential enough to impose the restriction on future employment. For example in All Stainless v. Colby the test of reasonableness applied by the court as to customer connections was: where they were the source of the employee’s competitive advantage the former employer is entitled to enforce enforcement of a covenant not to compete within the area from which those contacts were drawn.46 As to the issue of confidential information, the court, in E. Blackwell v. E.M. Heldes, Jr., Inc.46 first determined that a real estate broker’s listing cards containing descriptions of his customer’s real estate were, in fact, confidential proprietary information, and then held that since the use of such confidential information could unfairly subject the employer’s business to injury, enforcement of the former salesman’s covenant not to compete should be granted.47

Employment invention contracts should equitably be subject to the same test of reasonableness as are general employment covenants not to compete.

The present law concerning covenants restraining trade or competition leads to the conclusion that those provisions which purport to extend the employer’s rights to intellectual property which do not relate to the employer’s business and were not acquired with the employer’s funds should be stricken as unconscionable. Where there is no connection between the employer’s business and the subject of the inventive material, there is no real injury to the employer caused by the employee retaining rights to the invention. However, in keeping with the established common law “shop right” doctrine, the court would have a basis for awarding the employer a non-exclusive non-transferable license to use the employee’s invention, provided that the employer had made some minimal contribution to the invention.48

Invention contracts as condition of employment containing covenants giving the employer the election of retaining rights to even those inventions made during the term of employment but which may not relate to the employer’s business and which may not have been made with the employer’s funds are commonplace in many industries today.53 However, actual litigation squarely on this issue does not often occur, since seldom would an employer wish to pursue the course of litigating rights to an invention that does not at all relate to his business. However, it should be readily apparent that such covenants of assignment can discourage an employee from applying for patents in his own name on inventions he may have made outside the scope of his employment, since on each occasion he would have to obtain from his employer a waiver of patent rights to that invention, a process which may result in delay and frustration. This clearly runs contrary to the provisions of the Patent Clause of the U.S. Constitution (art. 1, §8, cl.8) which seeks to . . . promote the progress of the useful arts . . . by securing a limited monopoly for the inventor as a reward for his labors and as an incentive for others to invent. In the event of litigation and in view of existing precedent, in the absence of statute to the contrary, the employer may likely fear little more than court reformation of the litigated covenants (plus award of restitutionary damages) without severing the remaining contract provisions.54

Thus, if courts agree that there is an unfairness to the employee caused by employers requiring assent to an overly restrictive invention contracts the courts may consider imposition of a remedy stricter than reformation.55 A stricter remedy could take the form of severing the entire contract with the possible awarding of compensatory damages. Since compensatory damages to gratify the expectancy interest of an aggrieved party are normally difficult to establish,56 a more meaningful remedy would seem to lie through statutory revision under title 35 of the United States Code or under state statute expressly prohibiting restrictive invention contracts which extend to inventions made without employer funds and which do not relate to the employer’s business. A provision for minimum penalty for violation of the statute could also be affixed. Indeed statutory revision has been enacted in 1977 (effective August 1, 1977) in Minnesota.57 This statute could very well set a model for other states to follow. The Minnesota statute reads:

Any provision in an employment agreement which provides that an employee shall assign or offer to assign any of his rights in an invention to his employer shall not apply to an invention for which no equipment, supplies, facility or trade secret information of the employer was used and which was developed entirely on the employee’s own time, and (1) which does not relate (a) directly to the business of the employer or (b) to the employer’s actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by the employee for the employer. Any provision which purports to apply to such an invention is to
that extent against the public policy of this state and is to that extent void and unenforceable. No employer shall require a provision made void and unenforceable by subdivision 1 as a condition of employment or continuing employment.

If an employment agreement entered into after the effective date of this act contains a provision requiring the employee to assign or offer to assign any of his rights in any invention to his employer, the employer must also, at the time the agreement is made, provide a written notification to the employee that the agreement does not apply to an invention for which no equipment, supplies, facility or trade secret information of the employer was used and which was developed entirely on the employee's own time, and (1) which does not relate (a) directly to the business of the employer or (b) to the employer's actual or demonstrably anticipated research or development, or (2) which does not result from any work performed by the employee for the employer. 58

It is interesting to contrast the language of the new Minnesota statute with that in an earlier attempt to pass legislation restricting the scope of employee patent assignment in an employment invention agreement made as a condition of employment which appeared in Brown Bill. 59 This legislation was introduced pursuant to the Commerce Clause of the U.S. Constitution (art. 1, §8, cl. 3) and was designed to amend title III of the Labor Management Relations Act, 1947. Section 306 of the Brown Bill provided: It shall be unlawful for an employer to require as a condition of employment that any prospective employee of his or any of his employees agree to assign any patent or patentable invention to the employer or to maintain or enforce any agreement with any of his employees to assign any patent or patentable invention to the employer where such agreement was a condition of employment.

The language of Section 306 of the Brown Bill was overly broad and one-sided; it did not distinguish between patents on inventions which relate to the employer's business. Thus, the language of the Brown Bill was manifestly unfair to the employer, since it did not take into account the employer's contribution in the case of a "service invention" relating to the employer's business and made with the employer's funds. Furthermore, a restriction so broad, if enacted, would tend to stifle incentive for research and development expenditure on the part of industry and would therefore run contrary to the constitutional provision under the Patent Clause (Article I, Section 8) to promote the progress of the useful arts. The provisions of Section 306 of the Brown Bill had they been enacted would have likely resulted in countless legal disputes concerning enforceability in view of its great departure with well established case precedent. One would reasonably expect that the restrictions on patent assignment proposed in the Brown Bill (section 306) may have received greater attention had its language been narrowed in the pattern of the recent Minnesota statute. 62

Conclusion

Invention contracts which must be signed by employees as a condition of employment should be as subject to the test of reasonableness as are covenants not to compete in general employment contracts. They should be reasonably limited both as to subject matter scope and duration in order to be specifically enforceable. Invention contracts whereby the employer claims exclusive equitable title, at his election, to all of the employee's inventions made during the term of his employment, even as to those inventions made with the employee's own funds and which do not relate to the employer's active or prospective business at the time of invention, exhibit prima facie overreaching on the part of the employer and unreasonableness to the employee. This is particularly so when the technical employer clearly has the "superior bargaining position" and the prospective employee in effect has "no meaningful choice" but to assent to the contract as a condition to his employment.

Furthermore, "holdover" clauses in an invention contract wherein an employee covenants to assign to his former employer inventions made during a limited period after his term of employment expires are narrowly construed by the courts as to the time period for enforceability of the clause, the equities of the particular case and degree of connection between the subject matter of the inventions and the employer's business. 63 Thus, in construing holdover clauses the courts have generally held that they must be limited to reasonable time periods and to subject matter which the employee worked on or had knowledge of during his employment business, otherwise, they will be unenforceable. 64

If employment invention contracts would be litigated on the issue of the enforceability of covenants of patent assignment unreasonably broad as to subject matter scope or duration, under existing precedent such covenants would seem likely to be reformed by the court. As a minimum, those provisions which are deemed to be unfair to the employee would likely be stricken from the contract on equitable principles. 65 In cases of gross overreaching or fraud on part of the employer the court could also have bases in equity to sever the entire contract. 66 Under existing law, if the covenants at issue are deemed unenforceable the aggrieved employee inventor would also be entitled at least to restitutionary remedies for any unjust enrichment accrued to the employer. In view of the fact that very occasional litigation, on the issue of enforceability or unreasonably broad covenants of patent assignment, may not by itself suffice to discourage an employer from continuing to require that prospective employers assent to such covenants as a condition of employment. A more effective long term remedy to this form of inequity would seem to be one arising out of statutory provisions, rather than case precedent alone. Statutory provisions should require, under penalty of law, that covenants of patent assignment as a condition to employment must, to be enforceable, be reasonably limited to patents issuing on employee inventions resulting only from inventions made which reasonably relate to the employer's present or prospective business activity and made with at least some minimal employer contribution. A statute of that scope does not impose restrictions unfair to the employer and would free the inventor to pursue on his own the patenting of those inventions which he made on his own time, with his own funds and which clearly do not relate to his employer's present or prospective business. Therefore, it is submitted that the 1977 enacted Minnesota Statute, so limiting the scope of employer rights to employee inventions, should be a model for other states or for future Congressional legislation.
... the 1977 enacted Minnesota Statute so limiting the scope of employer rights to employee inventions should be a model for other states...

Footnotes
2. Attempts to legislate statutory requirements dealing with the issue of employee compensation for inventions have been made in recent years in the Moss Bill, H.R. 15512 (91st Congress, 1st Session) which was intended to reflect a balancing of the employer's responsibility and duties against the employer's contribution and in the Hart Bill S. 1321, S. 263 (93rd Congress, 1st Session) whereby employee compensation was to amount to a minimum of 2 percent of the profit. Neither the Moss Bill nor the Hart Bill has ever been enacted. Also noteworthy is the fact that the proposed Patent Act of 1975, Senate Bill S.2255 did not attempt to require employee compensation in excess of salary for inventions made during the course of employment.
3. See generally, cases cited, at note 4 infra and accompanying text.
5. 108 F. 2d 192 (6th Cir. 1940).
6. Id. at 195.
7. 175 F. 2d 215 (3rd Cir. 1949).
8. Id. at 216.
10. 269 U.S. 178 (1933).
13. Id. at 246.
14. Dubilier, supra note 10. The actual degree of employer contribution necessary to entitle the employer to a shop right may vary from one jurisdiction to another, but the wealth of precedent in this area suggests that normally any bona fide minimal contribution on the part of the employer will suffice to entitle him to shop right. See, U.S. v. Dubilier Condenser Corp., 269 U.S. 178, 53 S. Ct. 554 (1933); Toner v. Sobelman, 86 F. Supp. 369 (1949).
17. It is not uncommon for the industrial employer according to the terms of the employment invention contract to claim exclusive rights to all employee inventions and discoveries made during the term of employment whether or not made on the employer's premises or during working hours and to claim the right to determine at its (employer's) discretion whether or not to retain sole rights in and to such inventions and discoveries.
18. 72 F. 2d 385 (7th Cir. 1934).
20. Id. at 452.
21. Id.
22. Id.
23. Id.
24. 432 F. 2d at 452.
27. Id. at 449.
29. Supra, note 28.
30. Supra, note 28.
31. Id.
32. Id.
33. 281 Mass. 355 (1933).
34. Id. at 358.
37. See, e.g. All Stainless, Inc. v. Colby, 364 Mass. 773 (1974); See Metz, Recent Developments Concerning Employee Inventors Not To Compete, 12 NEW ENGLAND LAW REVIEW 647, 648, n.4.
39. Id. at 779.
41. See Blake, infra note 48 at 678.
43. See Metz, Recent Developments Concerning Employee Inventors Not To Compete, 12 NEW ENGLAND LAW REVIEW at 686, n. 184.
47. Metz, 12 NEW ENGLAND LAW REVIEW 647 (1977).
48. Metz, supra note 47 at 690.
49. See All Stainless v. Colby, 364 Mass. at 781.
51. Id.
52. Supra note 11 and accompanying text.
53. See note 14 supra.
55. The traditional alternatives available to remedy overly broad restrictive covenants are: 1) deny enforcement of the entire covenant; 2) blue pencil or strike out objectionable language without changing the import of the clause; 3) reform an overly broad restraint without regard to the severability of contract language; and 4) regulation by statute. See Blake, Employee Agreements Not To Compete, 73 HARK. L. REV. 625, 645, n. 78, 681-84; E.A. Corbin, CONTRACTS, Sect. 1390 (1962). Additionally, award of restitutionary remedy e.g. restitution for unjust enrichment, would be available in order to restore to the aggrieved party benefits that the wrongdoer has accrued. Where the benefits accrued to the wrongdoer are in the form of measureable profits the aggrieved party may have recourse in equity to require the wrongdoer to account to him for the profits that were made. However, the accounting for business profits realized in patent cases is traditionally difficult to measure due to the uncertainties involved in assessment of the profits. For application of the remedy of accounting for profits see, e.g. Hamilton - Brown Shoe Co. v. Wolf Bros. & Co. 240 U.S. 251 (1916).
56. Courts apply a strict standard before an award of compensatory damages can be made for loss of an expectancy interest such as a loss of expected profit (as opposed to actual profit). The general rule is that compensatory damages can be awarded if the loss sustained can be shown to have been a foreseeable b) unavoidable c) consequential and d) ascertainable by a measure of certainty. See e.g. Chicago Coliseum Club v. Dempsey, 265 Ill. App. 542 (1933). Traditionally, loss of expected profits resulting from loss of patent rights are particularly difficult to ascertain with measureable certainty.
57. MINN. STAT § 181.78.
58. Id.
61. See generally cases cited at note 4, supra, and accompanying text.
62. Supra, p. 27.
63. C.F. Guth v. Minnesota Mining & Manufacturing Co., 72 F. 2d 385 (7 Cir. 1934); Gas Tool Patents Corp. v. Mould, 133 F. 2d 815 (7 Cir. 1943); Dorr Oliver v. United States 432 F. 2d 447 (Cl. Ct. 1970).
64. Id.
65. See note 62, supra.
66. See note 55, supra.
The New Products Liability Cases

In a series of decisions this summer, the Supreme Judicial Court made substantial headway in the area of consumer protection. Spurred on by the recent legislative revision of many of the outmoded portions of the Uniform Commercial Code pertaining to products liability actions, the court has expanded the basis of a manufacturer's liability for defective products. The Commonwealth's highest court has assumed an active role but justifies its actions by maintaining that such action is necessary to meet "the emerging social needs of our time." The court's current emphasis on consumerism is a progressive step forward, a step long overdue.

In 1973, the Legislature amended Mass. Gen. Laws ch. 106, § 2-318 and abolished the privity requirement in breach of warranty actions. However, no provision was made for the retroactive application of the amended law. Cognizant of this, the plaintiffs in Swartz v. General Motors Corp., 1978 Mass. Adv. Sh. 1867, waived their warranty claims and based their claims on strict liability in tort as provided in the Restatement (Second) of Torts § 402A (1975).

This action arose when a 1967 Buick, containing two of the plaintiffs, surged forward on ignition, travelled 500 feet at high speed and struck a house. The driver of the car, her passenger and the occupant of the house were injured. The plaintiffs alleged that a "detent switch" was defective such that the accelerator was frozen in the open position — causing the car to become uncontrollable. The plaintiffs sought recovery from the manufacturer of the allegedly defective vehicle on the basis of strict liability in tort. They also asserted a claim for negligent design but since the "detent switch" in question was lost, this claim was based on conjecture. The trial court directed a verdict for the defendant on both counts. On appeal, the plaintiffs urged the Supreme Judicial Court to adopt the doctrine of strict liability.

The Supreme Judicial Court upheld the lower court and stubbornly refused to apply § 402A holding that "there is no 'strict liability in tort' apart from liability for breach of warranty under the Uniform Commercial Code, Mass. Gen. Laws ch. 106 §§ 2-314 — 2-318." Noting that the statutory change in § 2-318 was given prospective effect only, the court considered, and rejected, the possibility of applying the law retroactively. "No sufficient reason appears for us to engage in retroactive revision of the law as it existed before 1971" (the effective date of the amendment).

The court was satisfied that the present remedy under the warranty provisions of the Uniform Commercial Code is as comprehensive as that provided by § 402A of the Restatement. Yet in this case, an apparent tortfeasor was allowed to escape liability. Perhaps, had the plaintiffs not waived the warranty claim the court may have, in its discretion, applied § 2-318 retroactively. While the court did not absolutely close the door to such a possibility, the court failed to find, at least in this case, the appearance of "sufficient reason" to retrospectively revise § 2-318.

In a negligence action, the Supreme Judicial Court in Smith v. Ariens, 1978 Mass. Adv. Sh. 1857, found it foreseeable that snowmobiles, like automobiles, will be involved in collisions. Accordingly, a snowmobile manufacturer owes a duty to design its products so as to avoid unreasonable risks, foreseeable in the product's anticipated environment of use, including the duty to avoid post collision injury enhancement.

The plaintiff in Smith was seeking compensation for injuries suffered when her head struck protrusions of the brake bracket on the handlebars of a snowmobile. The snowmobile, driven by the plaintiff, had collided with a partially snow-covered rock. The plaintiff alleged that the snowmobile was negligently designed in that the unshielded protrusion of the brake bracket faced toward the user's head. Because of this negligent design, the plaintiff sustained more serious injuries on impact. Had the bracket been shielded the injuries to her face would have been less severe. The trial court found insufficient evidence of negligence and directed the verdict for the defendant.

The Supreme Judicial Court, in overturning the lower court decision, joined the current majority of more than thirty states which have adopted the "crashworthiness doctrine". This doctrine was first adopted in the case of Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). The court in Larsen held that enhanced injuries from collisions are foreseeable as incidental to the normal use of certain products and, therefore, manufacturers are liable for those injuries. While recognizing that the determination of design standards is normally the responsibility of the Legislature, the Supreme Judicial Court, citing Larsen, supra, stated that "the common law standard of a duty to use reasonable care in light of all circumstances can at least serve the needs of our society until the Legislature imposes higher standards."

Also noteworthy, the court in Smith assumed a pragmatic stance regarding proof of the identity of the manufacturer of a product. The only evidence of the manufacturer's identity was the presence of a decal which read "Ariens". The court reasoned that because a corporate trade name is registered and protected under statute, the appearance of that name on the product is sufficient to identify that corporation as the manufacturer.

In Back v. Wickes, 1978 Mass. Adv. Sh. 1874, the plaintiffs also sought to have the court adopt the "crashworthiness doctrine" only in a breach of warranty action against the manufacturer of a motor home. The motor home had, unexplainably, collided with a highway guardrail and, within minutes, burst into flames. Four occupants of the vehicle perished. Representatives of the decedents sought damages for wrongful death and a fifth plaintiff sought compensation for injuries received while attempting to rescue the decedents. The plaintiffs alleged that the manufacturer's design choices in positioning the fuel tank did not comply with good engineering practice and such hazardous design constituted a breach of the implied warranty of merchantability.

The trial judge had instructed the jury that misuse or abuse of a product would be a complete defense to warranty liability if the product was used in "an extraordinary or unusual manner." The
jury found for the defendant and the
plaintiff appealed this instruction claim-
ing that the evidence did not warrant this
instruction and that such charge was a
misstatement of the defense of product
misuse. The Supreme Judicial Court con-
curred with the plaintiffs and reversed
the jury verdict on the basis of the erro-
neous instruction.

The court held that the instruction on
misuse was "superfluous and misleading
in light of the lack of evidence that the
motor home had been misused or
abused." Furthermore, the court adhered
to a broad interpretation of the duty of
care owed by manufacturers to users of
its products. The "crashworthiness doc-
trine", adopted in Smith v. Ariens, supra,
was extended to products liability actions
brought under U.C.C. § 2-318. Goods are
warranted to be fit for ordinary purposes
including reasonably foreseeable risks in
the anticipated environment of use.

Though not an intended use, collision
with a guardrail is a reasonably foresee-
able risk and does not constitute misuse.

The adoption of the "crashworthiness
document" will unquestionably have dra-
matic impact on products liability litiga-
tion in the Commonwealth of Massachu-
setts. Certainly, such a measure is long
overdue. Nonetheless, the Supreme Judi-
cial Court has exhibited an enlightened
and progressive attitude in expanding
this area of the law in order to afford the
innocent consumer his just redress.

John J. McQuade, Jr.
The S.J.C.'s New Limits on Polygraph Evidence


Vitello and its companion case Moynihan stand for the proposition that polygraph evidence will only be admissible to corroborate or impeach a defendant's testimony. The court, in deciding to limit the use of polygraph evidence, recognized that the polygraph examination has not reached that point of scientific reliability where the guilt or innocence of a defendant should be dependent upon it.

In the 1974 case of Commonwealth v. A Juvenile, 365 Mass. 421, the Court set out guidelines for testing the admissibility of polygraph results into evidence, but did not attempt "to indicate in any precise manner what evidentiary purposes could be accomplished by the admission of evidence as to polygraph test results." Vitello p. 2607. Because this question was left unanswered, trial judges interpreted the Juvenile decision in contradictory ways. One trial judge allowed the evidence to be admitted as part of the Commonwealth's case in chief (Vitello), while another judge determined that polygraph results would be limited to corroborating the defendant's testimony (Moynihan).

The SJC upheld the trial judge's decision in Moynihan. Thus, the cases of Vitello and Moynihan take up where Juvenile left off.

The basic premise which underlies the polygraph method is that when a subject is lying, the lie causes a conscious conflict, which will be reflected in physiological responses beyond the subject's control. However, the Supreme Judicial Court observed that this assumption is not universally true. It does not take into account the subject who has successfully rationalized his actions, so as to rid himself of conflict. Such a person would not respond to the examiner's effort to arouse the subject's emotions. Vitello p. 2615.

The subject's mental attitude is also crucial to the reliability of the test. One of the examiner's prime responsibilities is to instill in the subject the belief that the polygraph method is a foolproof way of determining the veracity of the subject's statements. "If the subject does not believe in the infallibility of the process... the efficacy of the procedure is seriously compromised." Vitello p. 2615.

The examiner's role is the most controversial aspect of the whole procedure. In addition to instilling the subject with respect for the machine's ability to distinguish truth from fiction, the examiner asks the questions, and interprets the results. At the same time the examiner is observing the subject for behavioral clues of deception such as nervous mannerisms or failure to make eye contact. All behavioral clues and meanings are filtered through the feelings and attitudes of the examiner, which "constitute a substantial factor in the examiner's intermediate decisions — such as the choice of tests to administer and questions to ask." Vitello, p. 2618. The court notes that the test results themselves are meaningless without the interpretation and explanation of the examiner. "The machine is not independently capable of discerning truth from deception." Vitello p. 2617.

The court makes these observations to show that doubts still exist regarding the validity of the polygraph examination; it has not yet reached the point of "general acceptance." On the other hand, the court asserts that the polygraph examination has unique potential to be a tool of justice by serving as an aid in getting at the truth during a trial.

The court considered the question of general applicability of the test results "in order to arrive at a fair and workable scheme for the use of polygraph evidence." Vitello p. 2634. The court explained the policy reasons behind its decision to limit the admissibility of polygraph evidence to the corroboration of the defendant's testimony.

One important area of concern for the court is the jury and how the use of polygraph test results will affect its deliberations. Because the polygraph examination is scientific evidence, it is presumed to have "mystic infallibility" in the eyes of the jury. Since the polygraph results reflect directly on the question of the defendant's guilt or innocence, the court is concerned that the jurors will be swayed unreasonably by the test results; which results, as noted earlier, may not be a valid or reliable indicator of the defendant's truthfulness in answering the questions.

The court is concerned that the use of polygraph test results will be an intrusion into one of the traditional functions of the jury — judging the credibility of the witnesses for themselves. As the court states, "what is here at stake is the appearance of justice and the preservation of the perception that conviction rests on the judgment of one's peers." Vitello p. 2626. The Massachusetts Supreme Judicial Court is not ready to forego the traditional adversarial trial process for a scientific trial.

A further concern expressed in the Vitello decision is the burden which general admissibility of polygraph test results would place on trial resources. Not only must the judge satisfy himself that the examiner is fully qualified as an
expert witness, but also that the whole testing procedure was proper, that the subject was amenable to testing, and that the test questions were appropriately asked. Additionally, the substantial time factor involved in allowing all the polygraph evidence into the trial would impinge on the efficient operation of the trial system. These policy considerations led the court to conclude that polygraph examination results will not be generally admissible.

The court rejects allowing polygraph evidence to be used either to prove the innocence or the guilt of the defendant. Regarding using the test to prove guilt, the court employed a balancing test, and found that whatever benefits there may be to allowing such evidence into the trial for the purposes of establishing guilt are outweighed by the costs. Again, the court cited the complexity of the interrelationship between the machine, the subject and the examiner and the fact that "the examiner's ultimate conclusion regarding truth or deception depends to a considerable extent on the examiner's subjective perceptions and intuitions." Vitello, p. 2633. The court in a footnote states that the most glaring deficiency of the polygraph method is the potential for mistaking innocent anxiety for guilt. The Vitello holding, forbidding the use of such evidence to establish guilt or innocence, would limit that problem, by relieving the subject's anxiety over how the test results will be used.

Additional factors were considered when the court said that polygraph evidence could not be used to prove the defendant's innocence. For one thing, the prosecution must accept the questions and answers which the examiner posed to the subject, and cannot open up new areas of questioning. More important, however, is the fact that increased use of polygraph test results will have a destabilizing effect on the validity of the test results. As the polygraph test is increasingly used, more will be learned about its operation, and it will be easier to learn how to manipulate the test results. Defendants and defendants' lawyers will learn how to increase their chances of beating the machine. The essential element for test reliability, the subject's belief in the test's infallibility, may be actually present or it may be faked by a defendant who knows how to get the polygraph test results to work for him.

The court next turned to the ultimate issue of when and why polygraph evidence will be admissible. As stated previously, the Vitello decision held that polygraph evidence can be admitted for the sole purpose of impeaching or corroborating the defendant's testimony. The court notes that an acceptable method of impeachment a witness's credibility is to attack his reputation for truth or veracity. The court held that this kind of "character" witness testimony is analogous to the admission of polygraph evidence. The court believes that the polygraph test is a very quick and easy method of attacking the witness's credibility. "Indeed, we think it is accurate, based on our analysis of the role of the polygraph examiner ... to describe an examiner as a potential 'expert character witness'." Vitello p. 2636. The examiner would be testifying in the limited area of the defendant's credibility as a witness; and not on the question of the defendant's guilt or innocence. This evidence can be admitted even before any direct attack made on the credibility of the defendant's testimony. Vitello, p. 2636, fn. 25.

If a defendant with a criminal record takes the polygraph test and the results are in his favor, he is faced with a dilemma. Should he exercise his constitutional right not to testify, or should he testify and hope that the positive results of the polygraph will outweigh the negative factor of his criminal background? The court held that this dilemma may actually aid the trial court since "by thus providing encouragement for defendants to testify, the capacity of the trial process to determine the truth will be significantly increased and the perception of fairness and justice will be enhanced." Vitello p. 2647.

On the other hand, what happens to the innocent defendant who takes the polygraph test and the results come out against him? The court handles this situation by saying that "the defendant may protect himself from this very damaging evidence by forfeiting his rights to testify." Vitello p. 2638. Although the court realizes this is not an ideal situation, it "achieves the optimum balance of policy considerations as they exist at this time."

Frances Lippa

How Do You Spell Relief?
M.G.L. ch. 209A

Far from consuming excess stomach acid, a new Massachusetts law, Mass. Gen. Laws ch. 209A, has occasioned dyspepsia and confusion among members of the bench and bar, as well as the litigants themselves. This, of course, is a mere conclusion and the purpose of this article is to describe ch. 209A sufficiently to enable the reader to judge the merits of An Act providing certain temporary protection for persons suffering abuse.

I. The Statute Generally

A. Introduction

On July 17, 1978, the legislature inserted ch. 209A, via chapter 447 of the Acts of 1978, into the General Laws of Massachusetts. Immediately a problem arose: what was the effective date of the bill? Since no such date was inserted in the text of this law, some courts considered it a "90-day bill", effective October 16, 1978, although the administrative offices of all three courts (district, superior, and probate) concluded that it was a "30-day bill", effective August 16, 1978.

To resolve this type of difficulty, the Chief Administrative Judge, under recent court reform, should issue a memorandum promoting uniform interpretation, since problems of this nature are certain to recur. Better still, the legislature should simply specify the effective date of the bill and end any speculation.

B. Some Definitions

"Abuse", as used in the statute encompasses attempted or actual physical harm or threatened imminent serious physical harm. Coerced sexual relations is also included, an obvious expansion of traditional notions of abuse.

Application of the statute is limited to "family or household members." This class is composed of any household member, spouse, former spouse, minor child or blood relative.

One inevitable result of this classification scheme is to encourage those who co-habitate, unmarried, to seek relief. Without commenting on the social or moral desirability of this arrangement, the court is in the awkward position of entertaining a complaint of a misdemeanor by one who may be committing a felony. See Mass. Gen. Laws ch. 272, §16. Also, since a restraining order is a potential remedy, perhaps the equitable doctrine of "unclean hands" should be regarded.
As to jurisdiction and venue, proceedings may be commenced in any district, superior, or probate court of the county in which the plaintiff resides. An abused person also has the option of bringing the action in the county of a new residence if he has left his residence to avoid abuse.

II. Relief Available
A. Judicial Remedies
1. Types of relief.
An abused person may request any order which will protect him from abuse, including: a temporary restraining order; an order to refrain from abuse; or vacate the household; or pay temporary support; or pay monetary compensation as a direct result of the abuse (including moving expenses and attorney fees).
2. Greater accessibility.
The enactment expressly provides for the weekend availability of a district court judge to grant relief. Although no mention is made of access after court hours on weekdays, relief must also be available then to comport with the purpose of the statute.
3. Duration of court orders.
A weekend order expires at the close of the next day the court is in session. Ex parte relief, granted during regular court hours, terminates no later than five days after issuance of the order. Upon expiration, or in lieu of these temporary orders, a hearing is scheduled. If the defendant does not receive notice of this hearing, the court, consistent with due process, cannot continue a temporary order and should dismiss the complaint. Any relief then granted must be for a fixed period, not to exceed one year.

This one year provision is a subject of statutory conflict. An order to vacate the marital home (Mass. Gen. Laws ch. 208, §34B) is one type of relief allowed by ch. 209A. However, §34B limits the order to vacate to ninety days; thus, the question arises — Which limit is appropriate?

Application of Bellene Hotel Co. v. Building Commissioners of Boston, 299 Mass. 73 (1937), solves this problem:

A statute which is apparently intended to cover the entire subject to which it relates, including a remedy for its infraction, supersedes other provisions of law relating to that subject.

Thus, the one year limit should obtain.

When the granted relief expires, the court may extend any order, upon plaintiff's motion, for any additional time required to protect the plaintiff from abuse. How, then, can this act be described as temporary relief when, by its express terms, an order may remain in effect indefinitely? One explanation might be that the court may modify its order at any time upon motion by either party.


By availing himself of ch. 209A, an abused person is not precluded from obtaining any other available civil or criminal remedy. The possibility of multiple liability for a single incident is discussed infra.

B. Police Assistance

This law mandates that a law officer use all reasonable means to prevent further abuse, including: 1) remaining on the scene, including staying in the dwelling unit; 2) assisting the victim to obtain medical treatment, including driving to an emergency room of a hospital; 3) Bilingual oral and written notification of ch. 209A rights (currently administered via a Miranda-type card); 4) arresting for a felony if probable cause exists; 5) arresting for a misdemeanor committed in the officer’s presence, or a misdemeanor committed pursuant to M.G.L. c. 208, §34C (i.e., committed by violating certain court orders).

Does “misdemeanor in officer’s presence” mean any misdemeanor or only an abuse-related misdemeanor? Since the intent of the statute is to prevent abuse and not to expand police power generally, the reference must be to abuse-related misdemeanors only.

III. Due Process.

A. Pre-Hearing Notice.

In cases of imminent danger, the abuse legislation allows for a temporary order without notice, but requires immediate notification of the defendant to appear at a hearing scheduled within five days. There the defendant may be heard on the question of continuing such temporary order.

Notice is not explicitly provided for in non-emergency situations, but there the applicable rules of court govern. For district court see District/Municipal Courts Rules of Civil Procedure 6, 12, and 81.

B. Notice After Hearing.

One recommendation is for the court to deliver the order to the proper police department for service with return of service required. The Clerk-Magistrate should send a copy of the order to the defendant by certified mail.

C. Denial of Due Process.

Not infrequently, the party-defendant is not married to the plaintiff but absorbs the bulk of the living expenses. By what legal theory does the court obtain power to deny such defendant access to his apartment and property, where there is no legally recognized bond between the litigants? More precisely, at what point in time does an unmarried cohabitant acquire a sufficient property interest to render a taking of property legally justifiable in the courts?

Many courts have thus far ignored this rather prickly question; but avoiding confrontation with this issue will only engender anger and disrespect for the legal process. Perhaps the courts should admit a lack of power in this area and leave the parties to their other civil or criminal remedies.

IV. Penalties

A. Statutory Penalties

Mass. Gen. Laws ch. 208, §34C provides that a violation of ch. 209A is a misdemeanor, punishable by a fine of no more than $5,000 or imprisonment for not more than 2½ years or both. This penalty is the source of another statutory conflict.

The criminal trespass statute, Mass. Gen. Laws ch. 266, §120 also provides a penalty for violation of ch. 209A: “a fine of not more than $100 or imprisonment for not more than 30 days or both.” Which penalty prevails? One solution, not entirely satisfactory, is to use the penalty provided pursuant to the section under which the criminal complaint is filed. A better solution is to eliminate such inconsistencies prior to enactment.

B. Contempt Power Considerations

Absent a contrary constitutional provision, the legislature is powerless to limit or regulate the court’s inherent power of contempt in Massachusetts. See Opinion of the Justices, 314 Mass. 767, 777-781 (1943).

Additionally, “...a punishment for contempt does not bar a prosecution for acrime based on the same act.” Dolan v. Commonwealth, 304 Mass. 324, 344 (1939).


It seems, then, that a violation of ch. 209A is punishable as contempt as well as a criminal offense.

V. Triple Jeopardy

A single incident may support criminal convictions in three separate proceedings, as the following illustration points out. Suppose a defendant strikes a woman with whom he lives. She files a complaint for assault and battery in district court and, while that case is pending, obtains a restraining order and an order...
to vacate from, say, the probate court, under ch. 209A.

What happens when the defendant violates the order by knocking on the door of his own apartment in an attempt at reconciliation? He can be brought into district court for violation of the ch. 209A orders and convicted of this misdemeanor. Meanwhile, he may appear before probate court in a contempt proceeding prompted by violation of that court’s ch. 209A order. In addition the defendant may be convicted of assault and battery in the district court proceedings. It seems quite harsh that the established legal mechanism for resolving assaults and batteries should be enlarged to the extent of posing a triple threat for a single incident.

VI. Suggestions.

1. Repeal ch. 209A and enlarge similar statutes already on the books, such as: ch. 208, §18 and § 34B; ch. 209, §32, with less sweeping measures and greater awareness of due process.

2. If ch. 209A is retained, inconsistent provisions must be reconciled by amendment and judges should impose strict dispositions to eliminate use of the courts as an apparatus of intimidation by those not truly abused.

3. As a minimum, amending legislation should confer exclusive jurisdiction over ch. 209A complaints to the probate court. This would ensure attention by the tribunal most experienced in family matters and would prevent two courts from unknowingly ordering both parties to vacate the home.

4. Establish a priority response system for abuse cases. Protective police custody of a potential defendant would protect all parties and allow an emotional situation to cool to rational proportions. The courts should respond by scheduling immediate hearings with appropriate dispositions more consonant with personal liberty.

VII. Conclusion.

There is no question that preventing household member abuse is a very timely and legitimate subject for concern. Unfortunately, its emotional appeal can prompt simplistic solutions to the extremely complex problem of intra-family conflict. Any law relating to family life must be drafted with painful precision to avoid trampling the very values it seeks to promote.

E. J. Pallotta, Jr.
Super Threats — How to Sound Like A lawyer and Get Your Rights on Your Own


Super Threats provides consumers with a quick, simple, and effective means of demanding and obtaining their rights without professional legal assistance. The attorney-authors provide a rational approach to confronting various consumer problems. They introduce the reader to the methods of pursuing one's rights and explain the format and use of the initial "polite complaint letter" and the follow-up "super threat letter." The authors then apply their procedure to specific consumer problems including the following recurrent ones: troublesome neighbors and animals, tenant problems, product warranties, deceptive trade practices, credit problems, dealings with the Internal Revenue Service, and insurance coverage.

The authors propose the use of the "polite complaint letter" as the first step in the consumer's battle for his/her own rights. Common sense dictates that a well-written properly directed letter is more likely to elicit a favorable response than a "crank letter." Striker and Shapiro guide the reader through the process of writing an effective complaint letter. The "polite complaint letter" should be neat and businesslike with proper address, date, and headings and sent by certified mail. It should contain a short caption which will immediately alert the recipient to the gist of the complaint. The body of the letter should set forth the problem with the minimum number of facts necessary. This will include any appropriate dates, transaction numbers, etc. as well as a review of the consumer's previous unsuccessful attempts to redress the problem.

The "polite complaint letter" can be distinguished from the "crank letter" in that the tone of the letter should remain calm and rational and contain no personal threats or insults to the recipient. It should be a concise statement of the problem with a demand that specific action be taken to remedy the situation by a specified date.

Where the "polite complaint letter" fails to elicit a favorable response the authors propose step two — the "super threat." This is nothing more than intimidation techniques widely used by attorneys to precipitate action. The "super threat" appears formidable. It is in the form of a "Notice" with a business letter heading, a caption stating the basis of the complaint, and a heading identifying the breach or liability on the part of the recipient in the form of "Notice of Breach" or "Notice of Liability." The notice should state the duty owed, the rights impinged, and cite some legal authority to justify the consumer's position as well as to intimidate the recipient. "All flourish of legalese" are highly recommended by the authors.

The next paragraph of the "super threat" is the "Statement of the Complaint" which is a short, concise paragraph, easily adapted from the earlier "polite complaint letter," describing the problem. A paragraph headed "Demand for Action" should insist that the problem be remedied by the recipient in an appropriate or stated manner by a specified date. The "Ultimatum" paragraph should warn that if the demand for action is not complied with, further specified action will be taken. It should further advise the recipient that if the consumer is forced to initiate further action to gain redress, the recipient may be liable for damages beyond the cost of simply resolving the problem. Use of appropriate Legal authority should be used to show that compensatory as well as punitive damages and attorney fees may be imposed by the court.

The "super threat" is designed to "go for the jugular" and threaten the recipient with monetary liability about which he or she is uncertain. Hopefully, the recipient will react to the "super threat" by considering it in his best interest to comply with the present demand and not to expose himself to the possibility of increased liability later.

The "super threat" gives the consumer leverage over the recipient, derived from the lopsided relationship between what is being demanded and what is being threatened if compliance is not forthcoming. The consumer is asking only for his "just deserts" but warns of his legal right to make the other party "pay dearly." It should appear to the recipient to be a fair trade-off and to be to his benefit to comply with the consumer's demand as set forth on the "super threat."

The authors' method of self-help for the consumer is a clearly workable procedure for the consumer problems exemplified in the book. The authors delineate the scope of the problems and state the applicable substantive law. Nevertheless the problem remains that the consumer may be unable to identify the issue or have knowledge of or access to the substantive law in his jurisdiction which is helpful in utilizing this method of remediation. Although the book is directed to the consumer layperson, it is of interest to attorneys who may also need a lesson in the art of intimidation.

Julie A. Fitzgerald

One L


"Trip on a runaway carousel" is the phrase used by Scott Turow in his autobiography One L to describe a situation which arose in one of his first year classes at Harvard Law School. Although Turow was specifically referring to his attempts to grapple with two seemingly opposite decisions by two different courts on what appeared to be the same set of facts, the term "trip on a runaway carousel" is also descriptive of the first year of law school in general. Perhaps this is true of the law because there is no definitive end in the study of law, there are no "right" answers and conceivably there can be two different answers without either being wrong. Turow was perturbed that despite this inconsistency in the law it is simultaneously proclaimed as a system of justice for all.
This was only one of the mysteries by which Turow would be confronted as a first year law student. It wasn’t far into the semester before Turow questioned the adequacy of the law to provide justice and the competency of the law schools to teach it. Undoubtedly, many first year law students have questioned the system they so desperately wanted to join and the traditional procedures to which they are subjected. From Turow, they demanded a sacrifice which he believed himself unable to make — the endurance of that first year.

As Turow proceeded through the weeks and months of that first year, nothing seemed quite as it should be. The competition was more vehement than he imagined. Because of the Socratic method of teaching, the classroom atmosphere was one of intimidation and tension and not conducive to intellectual exchange. Personality changes were the obvious sign of the trenchant impact of that first year. The fellow students he met in September were so altered as to be unrecognizable by the end of the year. Under the pressure of final exams even Turow evinces the competitive spirit which he so proudly denounced in the beginning of the year. Turow was paying dearly to become a lawyer.

Although Turow only repeated what has been rumored for years about the first year of law school, he is thorough in relating the experiences and the feelings of his class during that year. But Turow’s narrative would not be especially appealing to anyone who has survived the first year, simply because it would be so familiar. Because that first year is an experience akin to no other, the book would be most beneficial to the individual contemplating the study of law, or for those students in that first year who find themselves questioning their sanity. For the prospective student perhaps this insight would foster the answers to essential questions such as whether the individual is ready to endure such hardship as law school. For the upper classmen or graduate it’s only a recapitulation of an experience that probably seems remote but is nonetheless unforgettable.

Yolanda R. Mitchell

Lying: Moral Choice in Public and Private Life


Are “white lies” harmless?
Is it right to lie to liars?
Should a lawyer lie to protect his innocent client from being convicted?

These are some of the moral questions posed by Sissela Bok in her book, *Lying: Moral Choice in Public and Private Life*. The purpose of this book is to fill an information gap in this largely ignored area of ethical inquiry, by evaluating the excuses of persons who intentionally lie. Bok asks the question, When is it justifiable to lie? By developing procedures for answering this question, Bok hopes that we can reduce the level of distrust for institutions and individuals throughout society.

There will be less confusion as to when lying is really necessary and not just acceptable because “everybody does it.” *Lying* is a valuable guide for all those who denote dishonesty yet unwittingly practice it daily.

Bok, who teaches ethics and decision-making at the Harvard Medical School, found through an initial inquiry into the use of placebos that deceptive practices were a common occurrence in the health field. She observed that while those who deceived patients rarely questioned the morality of what they did, those who were deceived often felt a great sense of loss. Recognizing these same attitudes and reactions to be present in other fields, Bok expanded her inquiry. She draws from the teachings of ancient and medieval moral philosophers to answer ethical questions raised in literature, professional practices, and in everyday situations.

The essential distinction which must be drawn when inquiring into the justifiability of lies is the difference between the perspectives of the one who lies and the one who is lied to. While the liar may feel his lie is harmless, the one deceived nearly always feels cheated in having had his decision-making choices limited. Does this mean we should never lie?

Absolutists, St. Augustine and Immanuel Kant among them, would have replied with an emphatic Yes! One Greek of similar persuasion, Crtylus, went so far as to refuse to speak, believing all speech to be uncertain and therefore false. Bok rejects this notion as impractical and unnecessary: Why should we not lie in jest? Or intentionally mislead a murderer hunting for another victim? She also rejects the other major viewpoint, that of the utilitarians. They weigh the good and bad consequences arising from lies to determine the justifiability of the lie. However, they fail to consider any inherent evil in the lie itself. Thus if telling the truth and lying achieved the same results, there would be no reason not to lie.

To illustrate the shortcomings of both the absolutist and utilitarian approaches, Bok examines the “white lie”. The trouble with white lies is that they are not always as harmless as they seem to be to the liar. Social niceties may often be lies, technically speaking, but they are recognized as the convivialities they are. No one is misled so no harm is done. When lies are harmless, the absolutist approach is absurd. There are other situations where lying is harmful but not believed to be so by the liar. For instance, the doctor who prescribes placebos for a patient may feel he is engaging in a necessary and beneficial deception for the patient. The patient, on the other hand, upon discovering the deception, may feel cheated and betrayed by someone he has solemnly trusted. The utilitarian approach is inadequate in determining whether or not one should lie since the consequences (a cure in this case) may be the same.

So, when is it permissible to lie? If an excuse were all that was necessary to justify lying then nearly all lies would be justifiable. However, some excuses are less valid than others. Several excuses are offered by those who deliberately lie. Lies are necessary to:

1) avoid harm (a lie to prevent a patient’s heart from collapsing, lies by wrongdoers to avoid punishment)
2) produce benefits (benefits received from social science research which uses deceptive research methods)
3) promote fairness (lying to kidnappers, lies necessary to protect confidentiality)
4) promote veracity — lying is necessary to show the “true” picture (using mashed potatoes for ice cream in a TV commercial because ice cream would melt under filming lights.)

Which of these excuses is justifiable and when? Since the perspective is most important, “the question is not so much what the right choice might be but rather who should make the choice and what are
the procedures for choosing.” Bok advances a test of public justification to determine the acceptability of a lie. By employing persons of diverse perspectives to rule on the reasonableness of a particular kind of lie, a collective determination as to the justifiability of the lie can be obtained. This enables a line to be drawn between reasonable and unreasonable lies by considering the views of all those affected by a lie. Thus, a community might endorse the use of unmarked police cars to trap the unwary speeding driver. The driver may feel deceived, but the deception has been approved by others with similar interests, not solely by the local police department which has its particular interests.

Some common lies which appear justifiable to a liar are examined. Bok endorses the use of lies in a crisis situation such as the case where the murderer requests information as to where his intended victim has gone. Lies here are justified by the limited time available to make a decision, the fact that the lie prevents injury or death to innocent life, and the knowledge that this is an isolated occurrence of lying.

Another type of lie, lying to liars, is justifiable if both the deceiver and the deceived recognize the fact that lies may be used— as in a poker game or in negotiations. However, lying to expose corruption— for example, posing as a patient in order to uncover wrongdoing in a hospital— is contradictory on its face. Deception used in this manner only encourages more deception. And how can one know for sure that the other party has really done wrong?

The use of the test of public justification might appear to be an answer to difficult ethical questions. But usually, liars do not want an objective acceptance of their behavior. It is easier to continue to accept one’s own subjective justification, rational or irrational. Thus, while a lawyer may feel it necessary as a matter of professional duty to lie for a client, he would probably strongly object to a jury being informed that lawyers sometimes feel compelled to build cases upon perjured testimony.

The value of Lying is that it increases our awareness of just what constitutes a lie. Following the Vietnam War credibility gap and the Watergate coverup, just what the public regards as deception is not clear. The confusion becomes apparent when one finds little questioning of Sixty Minutes’ style of investigative reporting, engaging in deception to fight deception, and when one observes the electorate’s reactions to lying by public officials. In this year’s elections, five of seven congressmen and senators were reelected despite having admitted wrongdoing.

One deficiency in Bok’s method of solving the problem of lying is in her abstract solutions to the problem. In the field of business she proposes no substantive changes. While she advocates reducing the incentives to deceive and increasing those to speak honestly, she offers no practical suggestions as to how such schemes might be implemented or what the incentives might be.

The obstacles to achieving what she proposes are not always clear. She hypothesizes, “If the public could debate these issues,” there would be fewer deceitful practices. She never indicates what prevents the public from debating these issues now or has prevented that discussion in the past.

Lying makes us aware of the deceptive practices we engage in daily. It provides a blueprint for restructuring our conceptions of lying and should be read by all those who still believe that honesty is a virtue.

William Bowling
The Suffolk Transnational Law Journal

The Suffolk Transnational Law Journal focuses upon current developments in private international law. Emphasis is placed upon international law of business transactions, comparative substantive procedural civil law, immigration, admiralty, and conflicts of law.

The faculty of the law school has voted to accord the Journal status as the law school's second law review. Students completing a Note or Comment for the Journal may satisfy the law school's writing requirement if the writing is approved by a member of the Advisory Board. The Journal's faculty advisor is Professor Stephen Hicks.

The first volume of the Journal contained student articles concerning recent changes of trademark policies within the EEC, recovery in the United States for mental distress injuries under the Warsaw convention and the recent Supreme Court Case of Dunhill v. Republic of Cuba. The second volume, published in July, includes students articles on aliens, a discussion of the fisheries regulation case of Douglas v. Seacoast Products, Inc. as well as a discussion of United States legislative developments.

This year's staff is comprised of eleven editors and eighteen staff writers. The staff was chosen this fall through a series of interviews and a writing competition. This year the Journal will publish two 200-page issues. Next year the Journal hopes to expand its staff to 25-30 writers and publish three issues.

The Journal encourages subscriptions from the school's alumni. The current charge requested is $3.25 per issue or $6.50 for the current year. Correspondence should be directed to:

Editor-in-Chief
Suffolk Transnational Law Journal
Suffolk University Law School
41 Temple Street
Boston, Massachusetts 02114

Alumni Placement Committee

Due to the collective efforts of Professor DeVico of the Placement Office, the SBA, and the response from loyal Alumni, the Alumni Placement Committee has been formed to further aid the Suffolk student in realizing career alternatives and the means by which to pursue them.

Thus far, the program's format has been two-fold: to bring in Suffolk alumni to explain the type of legal work they do and what qualifications are needed; and, secondly, to have the alumni conduct simulated interviews with "prospective" employees to explain effective interview techniques for the different areas of legal endeavors.

Alumni who have contributed their time and experience are: Leonard Angello, Guy Carbone, Michael Donavon, Harvey Fleishman, Leonard Henson, Richard Leahy, Paul Lyon, David Saliba, Lawrence Scofield, Marie Taylor, and John Lacy.

Future projects for the Committee include a session for students interested in applying for court clerkships and lectures on interview techniques and qualifications for government agencies, the District Attorney's Office, and large and small-sized law firms.

Brian P. Harris

Faculty Notes

Professor Milton Katz recently published an article titled International Legal Studies: A Vitalizing Component, 29 Harvard L. S. Bulletin 16 (Spring, 1978). Professor Katz is continuing his work in science and law, serving as co-chairman of the A.B.A.-A.A.L.S. National Conference Group of Lawyers and Scientists. He recently chaired a workshop which resulted in the publication of Technology, Trade, and the U.S. Economy by the National Research Council Assembly of Engineering (1978). Professor Ed Bander has published a new book titled Legal Research and Education Abridgment (Ballinger, 1978). Professor Bander is also preparing a book on Mr. Dooley. He has taken a public position as an advocate of civil liberties for short people. On a slightly more serious note, Professor Bander has published comments in recent issues of the Journal of Law and Social Change and the Law Library Journal. Professor Thomas McMahon, who is active in several professional organizations dealing with trademark law, is currently researching an article in the Intellectual Property field. Professor Alvan Brody was recently appointed a member of the subcommittee on appellate procedure on criminal rules by the Supreme Judicial Court of Massachusetts. Professor Marc Perlin is revising the Massachusetts Practice Notes for Josephson's BRC Bar Review Course. Professor Charles P. Kindregan has been appointed to the Advisory Committee on the Journal of Legal Education for a three-year term. Professor Kindregan recently published an article in the Legal Malpractice Review (June-July, 1978), and wrote a chapter on the Historical Background on Promotion of Access to Legal Services for a book titled Public Interest Litigation, published by the Practicing Law Institute. Professor Thomas R. Finn has published an article titled Mental Health Advocacy Systems in the Mental Disability Law Reporter. Professor Lisle Baker has published an article on Local Zoning, Regional Planning, and State Tax Incentives for Environmental Protection in Natural Resources Lawyer 737 (1978). Associate Dean Herbert Lemelman has written the supplements to Volumes 26 and 27 of the Massachusetts Practice Series, published by West Publishing Company. Professor Charles Garabedian is teaching the Civil Litigation Workshop at Suffolk University Law School during the second semester of the current academic year. This practice-oriented experimental program creates a simulated law firm for the participating students.
Alumni Class Notes

In Memoriam
Jacob Shactman, JD '21, of Ft. Lauderdale, Florida and Swampscott.
James McCaffrey, JD '29, of Medford.
Harry Flashenberg, JD '33, of Malden.

Alumni News

1968
Michael D. Zibel, JD, has been promoted to associate professor of law at Babson College in Wellesley.

1969
John B. Eames, JD, presently maintains a private law practice in Littleton, New Hampshire.

1971
Philip J. Adams, JD, has joined the law firm of Blume, Elbaum and Fischman in Hartford, Connecticut.
Phillip F. Heller, JD, has been named town counsel in Pittsfield.
Alfred E. Saggese, Jr., JD, has been cited as B'nai B'rith "Man of the Year" by the Ocean Lodge, B'nai B'rith, Temple Tifereth Israel, Winthrop. A. James Whitney, JD, is in the private practice of law in Dudley.

1972
William J. Sondej, III, JD, maintains a law practice in Holyoke.

1973
Joseph DeAngelis, JD, is a practicing attorney with the firm of Letts, Quinn and Licht in Providence, Rhode Island. Edward L. Lynch, JD, is in the private practice of law in Lynn.

1974
Nicholas J. Chapman, JD, has been promoted to tax officer at the Arlington Trust Company in Lawrence.
Michael P. Compos, JD, is currently working at Brewer and Lord Insurance Agency in Boston. Thomas A.

Kenefick, III, JD, is associated with the law firm of Cooley, Shrair, Alpert and Labovitz in Springfield. Charles W. Langone, JD, is a practicing attorney in Somerville. R. Bruce MacDonald, JD, is a practicing attorney in Dedham. Joseph J. Maher, JD, is a practicing attorney in Dorchester.
Jonathan D. Parsons, JD, is the assistant minister for Trinity Congregational Church in Gloucester.
Anthony E. Penski, JD, is the town counsel in Athol.

1975
Lillian M. Almeida, JD, is currently engaged in the private practice of law in Rhode Island. Eugene W. Downing, Jr., JD, is employed as an advocacy attorney for the Office of Consumer Affairs in Arlington and Belmont. Gerald Glasser, JD, has joined the law firm of Paul D. Hunter and Paul M. Kalil, JD '68 in Springfield. Frederick J. Griffin, Jr., JD, has become a special assistant to New Hampshire House Speaker George Roberts Jr. Francis E. Hartig, Jr., JD, is a practicing attorney with the law firm of Bourke and Bourke in South Natick. Luke J. Meehan, JD, has joined the law firm of Doherty, Wallace, Pillsbury and Murphy in Springfield. Michael E. Rubin, JD, is a member of the Somerville law firm of Dropkin, Perlman, Leavitt, Shuman and Rubin. Scott E. Woodman, JD, is currently the city attorney in Dover, New Hampshire.

1976
Jeffrey N. Berman, JD, is an attorney in the advance underwriting sales organization at State Mutual Life Assurance Company of America in Worcester. Gerry A. Blodgett, JD, is in the practice of patent and trademark law with the law firm of Norman S. Blodgett in Worcester. John A. Christopher, JD, has recently been sworn in as a special assistant district attorney for the Lynn District Court. John A. DeLuca, JD, is presently employed as assistant clerk of courts at the Framingham District Court. William H. Kettlewell, JD, is an assistant district attorney in Middlesex County. Joseph Markarian, JD, is an attorney with offices in Boston. Kathryn A. Morris, JD, is an assistant district attorney for Essex County. William A. Mulvey, Jr., JD, is a practicing attorney in Portsmouth, New Hampshire.

1977
Philip C. Bateman, JD, is currently employed by CNA Insurance Company in Boston. Catherine E. Durkin, JD, is associated with the law firm of Mawn and Mawn in Woburn. Joseph A. King, JD, is a staff sergeant at State Police Headquarters in Middleboro. Paul F. Meagher, JD, AB '74, is presently employed as an administrative assistant to Senator Robert Wettmore. Gary R. Pannone, JD, is associated with the law firm of John Martinelli, JD '70 in Providence, Rhode Island. James N. Papatones, JD, is currently in the general practice of law in the York County area of Maine. Robert J. Rahill, JD, is in the private practice of law in Pawtucket, Rhode Island. Peter P. Slepchuck, Jr., JD, is in the private practice of law in Springfield. John G. Tardif, JD, has opened a law center at Town Hall Square in Winthrop.

Alumni: If you have news for the Advocate or would like information concerning future alumni programs, please contact the Office of Alumni Activities, Suffolk University, Beacon Hill, Boston MA 02114 or call (617) 723-4700, Extension 129.
**ANDERSON SECRETARIAL AGENCY**

LEGAL SECRETARIES
PARALEGAL PERSONNEL
EXECUTIVE SECRETARIES
MT/ST TYPISTS

Personnel available for
evenings, weekends and
holiday emergencies.
TEMPORARY AND PERMANENT
Rita C. Anderson

(617) 523-5668
1 COURT ST. BOSTON

---

**ROUTHIER LEGAL PERSONNEL**

Suite 1018
53 State Street
742-2747 742-0233

LEGAL SECRETARIES
TEMPORARY
and
PERMANENT

BOSTON'S OLDEST AND MOST PRESTIGIOUS
SPECIALISTS IN
LEGAL SECRETARIAL PLACEMENT

Experienced legal secretaries
and typists by the day, week or
long term. Also evenings, Sat-
urdays, Sundays and holidays.

Our reputation for success-
ful permanent placement is
unexcelled.

---

**The McCarthy Girls**

PERMANENT and TEMPORARY Placement of Unexcelled
LEGAL SECRETARIES, PARALEGALS and CLERICAL STAFF.

140 FEDERAL STREET, BOSTON
Telephone 423-1500
SUFFOLK UNIVERSITY BOOKSTORE

LAW BOOKS

NEW AND USED CASEBOOKS

AND HORNBOOKS

BOUGHT AND SOLD

GILBERT OUTLINES
SMITH LAW REVIEWS
NUTSHELL SERIES
DICTIONARIES
SUPPLEMENTS — REFERENCE BOOKS

PERSONALIZED PLAQUES - PAPERWEIGHTS

GIFT ITEMS

SUFFOLK LAW SCHOOL CHAIRS

AND

CLASS RINGS

SUFFOLK UNIVERSITY BOOKSTORE

41 TEMPLE STREET — BOSTON, MASS. 02114

TELEPHONE (617) 227-4085
The Best Start
Towards The Best Image:
File A Getchell Brief!

ADDISON C.
GETCHELL
& SON, INC.

DESIGNATED PRINTER OF DECISIONS FOR
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

Addison C. Getchell & Son, Inc.
160 North Washington Street, Boston, MA 02114
(617) 227-4870
The Lawyers’ Printer since 1870