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The Suffolk University Law School Journal

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Attorney Advertising: Where Are We?

By Sherrie Rose Talmadge

Sherry Rose Talmadge is a second year day student.

Today the legal profession stands in the thick of debate in its attempt to determine the extent to which the shackles on lawyer advertising should be removed and how far the perimeters of lawyer advertising will reach. This article will relate the position of the ABA, focus on the status of the issue in Massachusetts and what has been the position taken in other jurisdictions, with an emphasis on the issue of electronic broadcast media usage.

The case to open the door to attorney advertising was *Bates and O'Steen v. State Bar of Arizona* 

The appellants were Arizona attorneys who opened a law office they called a “legal clinic” in March 1974. Their stated aim was to provide legal services at modest fees to persons of moderate income who did not qualify for governmental legal aid. They accepted only routine matters, e.g. uncontested divorces and adoptions, and kept costs down by standardizing forms and office procedures. Because they set fees to have a low return per case, they depended upon substantial volume. After two years they concluded that the practice could not survive without advertising their fees to attract clients. On February 22, 1976 they placed an ad in the *Arizona Republic*, a daily newspaper, listing fees for certain services. The appellants conceded that the ad violated Disciplinary Rule DR 2-101 (B) in Rule 29 (a) of the Supreme Court of Arizona. Both were suspended for one week, and their challenge was rejected by the Arizona Supreme Court.

When the United States Supreme Court reviewed the *Bates* case the Court applied a first amendment analysis. The Court cited *Virginia Pharmacy Board v. Virginia Consumer Council*, a case in which the Court had considered the first amendment validity of a Virginia statute declaring that a pharmacist was guilty of “unprofessional conduct” if she or he advertised prescription drug prices in the face of a statute prohibiting such an advertisement. The Supreme Court held such commercial speech was entitled to the protection of the first amendment.

The narrow issue examined in *Bates* was whether attorneys may constitutionally advertise prices at which routine services will be performed. The Court examined the reasons given for the ban on advertising. The argument that price advertising would have an adverse effect on professionalism presumed that attorneys should conceal from their clients and the public the fact that attorneys earn their livelihood at the bar. However, the ABA’s Code of Professional Responsibility Ethical Consideration EC 2-19 (1976) advises an attorney to reach “a clear agreement with the client as to the basis of the fee charges to be made” and to do this “as soon as feasible after the lawyer has been employed.”

The Supreme Court doubted that attorneys would or could advertise fixed prices for unique services. The Court held that the services that lend themselves to advertising are routine ones. Moreover, we see nothing that is misleading in the advertisement of the cost of an initial half-hour consultation. The ABA’s Code of Professional Responsibility, DR 2-102 (A) (6) (1976) permits the disclosure of such fee information in the classified section of a telephone directory. If the information is not misleading when published in a telephone directory, it is difficult to see why it becomes misleading when published in a newspaper.

Though an advertisement does not provide a complete foundation on which to select an attorney, at least some relevant information needed to reach an informed decision is available. The prohibition of advertising serves only to restrict the information that flows to the consumers.

It has been argued that advertising serves to encourage the assertion of legal rights in the courts. The bar acknowledges that “the middle 70% of our population is not being reached or served adequately by the legal profession.” Among the reasons cited were the fear of cost and inability to locate a suitable lawyer. A rule allowing restrained advertising would be in accord with the bar’s obligation under Ethical Consideration EC 2-1 (1976) to “facilitate the process of intelli-
gent selection of lawyers, and to assist in making legal services fully available.”

In the absence of advertising the attorney may not be subject to blanket suppression. Essentially, the Court agreed with the dissenting judge in the lower court opinion who wrote that “the issue should be framed in terms of ‘the right of the public as consumers and citizens to know about the activities of the legal profession.’”

For commercial speech appropriate regulators are established to restrain false, deceptive or misleading advertising, and to some extent control the time, place and manner of advertising. In footnote 37 of the Bates opinion, the Court noted that a determination of whether an advertisement is misleading must consider the legal sophistication of its audience. Thus, different degrees of regulation may be appropriate in different areas. The Bar, the Court held, will have a special role to play in advertising flows freely and cleanly — especially in the controversial area of electronic media advertising. For, as Mr. Justice Powell wrote in his dissenting opinion: [II]t is clear that today’s decision cannot be confined on a principled basis to price advertisements in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means, for example, magazines, signs in buses and subways, posters, handbills and mail circulations. But questions remain open as to time,
Though the advertisement does not provide a complete foundation on which to select an attorney, at least some relevant information needed to reach an informed decision is available.

place and manner restrictions affecting other media, such as radio and television. In response to Bates, in August 1977 the ABA formed a task force on lawyer advertising and drew up two alternate proposals to amend the current disciplinary rules in keeping with the Court decision. "Proposal A" is primarily regulatory, specifically authorizing certain prescribed forms of lawyer advertising if approved by state authorities and would seek in advance to channel commercial announcements. Following the approach of several federal regulatory agencies, e.g., F.D.A. and S.E.C., this proposal calls for reliance on "after the fact" enforcement to discipline persons violating the regulation. It retains many disciplinary rules which specify the categories of information which can be published including the field of law practice concentration, education, client reference; and it adds fee information re: contingency fees, range for certain services, hourly rate, charges for 'specific' legal services and directs that the description of which can not be misunderstood or deceptive. Proposal B is fundamentally directive, allowing publication of all information not "false, fraudulent, misleading or deceptive"; and providing guidelines for determination of improper advertisements, which would be subject to "after the fact" discipline by state authorities. "Proposal B" adopts general anti-fraud standards, and as to fees, would authorize the same kind of information permitted under "Proposal A" subject only to anti-fraud provisions.

The ABA House of Delegates adopted "Proposal A", but "Proposal B" was authorized for distribution to state bar associations. Because of the novelty of lawyer advertising, limitations of the present disciplinary system, and the fact that advertising is a possibility for other professions, the task force recommended that a Commission on Professional Advertising be established to monitor developments at the state bar level. At its August 3, 1978 meeting, the House of Delegates, the policy making body of the association, recommended that the Code of Ethics be amended to include use of television advertising by attorneys. The recommended additions to Model Code Section Ethical Consideration EC 2-8 cautioned attorneys to avoid laudation, testimonials, and comparative statements of performance records. After six months of hearings the Commission found that "legal advertising is warranted and necessary to convey sufficient information to the public so they can make an informed choice when seeking legal assistance, ... . Sufficient protections have been provided to protect against misuse of television advertising by lawyers." The factors considered by the Commission were: 1) the major unmet need for legal services; 2) advertising fulfills the bar's obligation to make available to the public information sufficient to make informed choices on legal services; 3) radio and television are the only methods of informing many members of the public; 4) some lawyers and law organizations have effectively used television advertising while print media ads have been substantially less effective; 5) television advertising by individual lawyers will allow for experimentation with new and different delivery methods which hopefully will broaden the availability of legal services and which will reduce the costs of such services; 6) there should be no distinction between rules governing group or institutional advertising and those for individuals; 7) many state regulatory bodies have promulgated rules permitting television advertising by individual lawyers as well as by institutions and groups; 8) television advertising has some built-in safeguards, including the high cost which mitigates against abuses caused by frivolous use of the medium. The Massachusetts Supreme Judicial Court has not yet issued a ruling concerning Massachusetts Rule 3:22. The following groups submitted proposals or comments on lawyer advertising to the

The Massachusetts Bar Responds to Bates
The Massachusetts Bar Association (MBA) offers a narrow interpretation of Bates, and presents a proposed rule change which closely parallels the ABA's "Proposal A". The conceptual premises which underlie the MBA's brief focus in on the "reasonable restrictions on the time, place and manner of advertising." The MBA proposal would exclude those ads which are designed to sell rather than to inform — to create a need for legal services and not to aid a consumer in the selection of a lawyer. Such ads are not clearly excluded by the "unfairness restriction" such as that in "Proposal B" — that ads should not be unfair, false, misleading or deceptive. The MBA concluded that the prohibition of only 'false', 'deceptive', 'unfair' or 'misleading' statements by lawyers would provide insufficient protection for the public. Further, they argued, the prohibition of unfair statements would also have a chilling effect on the protected speech of lawyers if a broad or vague definition were applied to the word 'unfair'. The MBA felt that the ability of a printed advertisement to create a misimpression even though it contains no actually false statement would be magnified a hundredfold for electronic media advertisements because such ads cannot ordinarily be carefully examined for subliminal misimpressions by any but expert listeners. It has been argued, with respect to lawyer advertising, that "at the present time, we have inadequate data to make such policy decisions." In the absence of a requirement by the United States Supreme Court the MBA has submitted that advertising by lawyers on broadcast media should be banned, at least until the development of experience and information on lawyer advertising in print media. A further element of the MBA proposals would prohibit a lawyer who chose to advertise fixed fees from withdrawing from the obligation to perform the advertised services at the fee advertised; the only question would be
whether the legal service rendered is what was described in the advertisement. In a manner similar to the ABA proposal, MBA proposal DR 2-101 (E) seeks to prevent deception by requiring advertised fees to remain in effect for specified minimum periods of time.

The Massachusetts Consumers' Council petitioned the SJC for very liberal standards to guide lawyer advertising. The Council has a history of actions seeking the repeal of legal bans on advertising of professional goods and services. Having worked with other professions attempting to develop regulations for their advertising, the Council's principle is that truthful and accurate advertising of the availability, terms and conditions of professional goods and services is a vital source of information which helps consumers make informed and intelligent decisions in the marketplace. This attitude is based on the belief that the advertising of prices fosters a healthier competition. The Council seeks to permit the broadest possible dissemination of truthful and accurate information. Artificial barriers to such dissemination, such as bans on broadcast media ads, unreasonably narrow the definition of "routine legal services" and deprive consumers of information they need and have a right to know.

The Council contends that the first amendment protects all advertising by attorneys which is not unfair or deceptive; thus, attorneys should be allowed to advertise all information except that which is unfair or deceptive. The Council's brief noted that in Bates the Court extended the first amendment protections to commercial speech.

We rule simply that the flow of such information may not be withdrawn from protection merely because it propose(s) a mundane commercial transaction. . . . The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be keener than his concern for urgent political dialogue. Moreover, significant societal interests are served by such speech.

The Bates Court stated that commercial speech is protected but that false, deceptive or misleading advertising was subject to restraint.

The Council submits that the State should not assume that the public is not sophisticated enough to realize the inherent limitations of advertising and that the public is not better served by ignorance than by correct, albeit incomplete, information. In the alternative, the State should assume that the information sought to be disseminated is not in itself harmful, and that the people will perceive their own best interests only if they are well informed.

The Council supports the "unfair and deceptive" standard as the least restrictive alternative able to prevent deception and achieve consumer protection. Though the consumer cannot compare the prices advertised to the quality of services of the individual lawyer, the advertising of legal services and fees is not deceptive. It is not clear that clients now select lawyers on the basis of competence, or that they could do so without the information prohibited by the present restrictions on advertising. Therefore, the Council believes that non-deceptive advertising would at least increase the flow of information.

The Council views the MBA proposal as generally prohibitory and in contradiction of Bates: it prohibits advertising of any and all information other than that which it expressly permits. It thereby encroaches upon constitutionally protected territory by prohibiting advertising which is in no way unfair or deceptive. The Council's proposed amendment would allow advertising of all informa-
Lawyer advertising has never been viewed with approbation by attorneys of the Commonwealth.

ation which is not unfair or deceptive, and provide direction by defining "routine legal services" and listing, without limitations, examples of permissible and impermissible advertising. The most significant departure from the MBA's proposal is the Council's argument that the ban on electronic broadcast media advertising by lawyers can't be constitutionally sustained. The most important first amendment rights in the electronic broadcast media cases have been those of the public. The cases dealing with electronic media versus the print media involved the "fairness" doctrine. Broadcasters claimed a First Amendment right similar to newspaper publishers to broadcast as they see fit.

A close relationship exists between the right of the public to the free flow of information and ideas from the electronic broadcast media, and the public's right to the free flow of commercial speech. In the Council's view the rationale for permitting lawyer advertising and regulating broadcast media is the same as the argument for protecting and maintaining an informed public capable of conducting its own affairs. Given the profound effect of disseminating information in broadcast ads, the Council argues that the objectives sought by lifting prohibitions against lawyer advertising would mandate permitting such advertising on electronic broadcast media.

The brief amicus curiae of the Boston Bar Association (BBA) sets forth proposed Disciplinary Rules to govern attorney advertising, submits Ethical Considerations apart from those of the ABA, and proposes that the SJC appoint an advisory committee of both lawyers and laypersons to examine the Massachusetts experience with lawyer advertising and recommend to the court adoption of specific regulations to further implement the Disciplinary Rules. The advisory committee would be modelled upon the operation of the Advisory Committee on the Rules of Civil Procedure.

Lawyer advertising has never been viewed with approbation by the attorneys of the Commonwealth. Yet, the Boston Bar, as did the Consumers' Council, stressed the basic first amendment rights involved. The Boston Bar seeks a balance similar to the one sought by the Consumers' Council: not overly restrictive of the Constitutional guarantee of freedom of speech, while protective of those seeking legal services. The Boston Bar Association's proposal is general and directive rather than specific and prohibitory, to enable both the public and attorneys to read and understand the proposed rules. Each aspect of the more complex rules in the Massachusetts Bar Association's proposal and the Massachusetts Consumers' Council's proposal presents a policy decision of some significance. The Boston Bar Association suggests, "We have inadequate data to make such policy decisions and that a general rule permitting advertising but requiring its truthfulness and accuracy is preferable to the detail found in the other proposals, albeit such detail may well be required as we gain experience with various forms of advertising."

The proposal of the Boston Bar would permit a lawyer to advertise concerning availability and terms, including fees, of routine legal services, as expressly required by Bates. The rubric of "routine legal services" would be further considered by the proposed advisory committee. A lawyer could advertise the fee charged for the initial interview — an important consideration when a layperson is determining whether to seek legal services — and the availability of reasonably described legal services to be rendered for a total fixed fee. Here the Boston Bar extends the Bates rationale for limiting advertising to routine legal services, i.e. the belief that such services are largely fungible and can be performed equally well by any competent lawyer thus, the price differential becomes of prime importance to the consumer.

As a safeguard against "bait and switch" advertising, the Boston Bar proposed DR 2-101 (c), which requires any lawyer who proposes to undertake services for a total fixed fee shall not thereafter charge a client more than the advertised fee. The most significant distinction between the proposals of the Massachusetts Bar and the Boston Bar is that the Boston Bar's proposal has no blanket prohibition on lawyer advertising through radio and television. The draftsman for the Boston Bar Association stated, "[W]e thought it was too early to make a judgment that all electronic advertising was by its very nature misleading, or could never be sufficiently accurate and informative." A significant percentage of citizens use radio and television as their chief source of information about life and living. If it is a valid premise that radio and television advertising are not by their nature misleading, then the duty to serve the public will confirm the wisdom of a rule which permits truthful and accurate advertising of legal services to those who need them most.

The Civil Liberties Union of Massachusetts (CLUM) oppose the adoption of detailed regulations respecting advertising at this time, and support the approach recommended by the Boston Bar Association that the Court adopt a simple interim rule proscribing false, deceptive or misleading advertising, and defer the adoption of more detailed regulations pending consideration of the question of advertising by a court appointed advisory committee representing both consumers and providers of legal services.

The Civil Liberties Union noted that the proposal presented by the Massachusetts Bar Association fails to adequately protect rights guaranteed by the first amendment. Though the Massachusetts Bar proposes a blanket prohibition on lawyer advertising through radio and television, nothing in the case law supports totally banning lawyer advertising on the electronic media. Such a ban would deprive lawyers of access to perhaps the most potent means of communication.

The Civil Liberties Union maintains that wide scope should be given to permitted advertising, at least bringing the scope of permissible statements of lawyers equal to the scope of permitted advertising by insurance companies, prepaid legal service plans, pro bono organizations and other providers of legal services.

The Boston Patent Law Association submitted a memorandum to the SJC encouraging the use of existing consumer protection statutes to guide the regulation of lawyer advertising. Taking a more conservative stance than the Massachu-
The Civil Liberties Union noted that the proposals presented by the MBA fail to adequately protect rights guaranteed by the first amendment.
that he was following up on those ads that did not name a specific attorney at the law firm. He noted that an ad should include the name of a lawyer. Boston attorney Steven L. Kornstein, a sole practitioner, expressed what may be the pervasive view of attorneys beginning to advertise, "I think people should be able to shop around and look for the lawyer they want to represent them and if there is some advertising to help them do that, then we are performing a new public service that we weren't doing before — and that is good." 46

The pioneer television ad in Massachusetts ran the first week in December 1977. The thirty-second ad on the 6:00 p.m. news on WCVB-TV Channel 5 was placed by the legal clinic of Cawley, Schmidt and Sharrow, a multistate legal clinic which opened offices in Malden and Quincy. The ad on Channel 5 explained that the Supreme Court ruled that lawyers could advertise, and showed the entrance to one of the clinic's offices. The ad did not quote fees, but encouraged viewers to contact the clinic for this information. Ira Lisook, the managing counsel of the firm's Massachusetts' clinics, used a public relations expert to obtain free advertising in news columns of magazines, newspapers, television stations and radio stations in Boston. After a segment on WBZ-TV Channel 4's "Evening Magazine" he could not keep up with requests to do interviews with other radio stations and newspapers . . . and the clients started to roll in. According to Lisook, he "had to buy a suitcase to carry all my files." 47 Lisook suggests that, if you advertise, do not promote your prices but if you mention that the initial interview will be free you will be able to convert about 50% of the persons into paying customers. His clients are primarily middle class suburbanites, and about 80% of his clients have never seen a lawyer before. 48 Lisook said that he took it as a "direct affront to the concept of legal clinics" that provisions purporting to regulate legal clinics were "slipped in" to the Massachusetts Bar Association's lawyer advertising proposal. He distinguished between regulating the practice of law and regulating the conduct of a business. "There is a right to control the profession . . . but the business of practicing law, how lawyers may make money, can't be regulated." 49

As the legal profession becomes swept up in the wave of professional advertising, the concept of advertising may become increasingly accepted. Though we are beginning to see young practitioners and legal clinics experiment with advertising, the crucial question is whether the larger firms of the Massachusetts Bar will begin to advertise. Many of the large firms have established clientele and, thus, may not seek to publicize their services. Yet, it is these firms who have the necessary working capital to finance a massive campaign on the electronic broadcast media that would truly inform the consumer and legitimize the use of electronic broadcasting media. A Law Poll by Kane, Parsons and Associates, a New York public relations firm, which surveyed a random sample of lawyers and firms showed that only 3% have advertised since the Supreme Court decision in June, 1977. 50 Eighty-nine percent of those surveyed said they absolutely would not advertise.

Although the Supreme Judicial Court in Massachusetts is moving slowly, this has not been the case in all jurisdictions. As of July 15, 1978, 29 jurisdictions made some kind of changes to their Code provisions relating to lawyer advertising. Some permit print and newspaper advertising only, such as: Connecticut, Delaware, Idaho, Iowa, Louisiana, Missouri, New Mexico, Oklahoma, Rhode Island, Utah and Vermont; some include radio along with print media and newspapers, such as: Indiana, Nebraska and Wyoming; and some include television, with a variety of specific limitations on what or who can be shown or who and how the announcing can be done such as: Colorado, Georgia, Kentucky, New York, North Carolina, Ohio and Tennessee. Then there are extremes: Mississippi and Alabama allow newspaper advertising only, whereas, D.C., Maryland, Michigan and Minnesota merely prohibit false, misleading, deceptive or fraudulent advertising. And the Wisconsin and New Jersey Supreme Courts have suspended provisions which would unduly curtail or limit truthful advertising by lawyers. The District of Columbia's rules specifically deal with the question of solicitation.

Some State Codes have laundry lists of permitted information, some have laundry lists of prohibited information. Some are merely interim rules. Though a code may state that a specified form of media may be used, the limitations placed on that use may be so great as to make such advertising very difficult or costly. Conversely, a detailed list of what may be included can be worded in such a way that the only effective restriction is against the false, fraudulent, misleading or deceptive ads. Perhaps the most notable factor is the disparity between the jurisdictions. 51

Thus, the debate over attorney advertising continues, especially with regard to the broadcast media; but with the landmark decision in Bates, attorney advertising is here to stay.

Although Massachusetts attorneys have been slow to advertise, a surge in advertising has taken place in the 1979 Boston Yellow Pages.
Footnotes

4. Id. at 374.
5. American Bar Association, Revised Handbook on Prepaid Legal Services: Papers and Documents Assembled by the Special Committee on Prepaid Legal Services, 2 (1972).
9. Id. Powell, J., dissent at n. 12.
10. ABA Disciplinary Rule DR 2-101(B).
11. Model Code Section Ethical Consideration EC 2-8; Disciplinary Rule DR 2-101(B).
14. The proposed rules discussed herein represent distinct proposals for disciplinary rules and ethical considerations put forth by each brief and can be found on file with the Mass. Supreme Judicial Court.
17. MBA Brief, at 4.
18. Boston Bar Association Brief, at 14; Civil Liberties Union of Massachusetts Brief, at 5.
19. MBA proposed Disciplinary Rule DR 2-101(B) (12).
20. June 18, 1975 the Council appeared at the rule-making hearing of the Board of Registration in Optometry and challenged the constitutionality of a proposed rule imposing a blanket ban on advertising by optometrists. Consumers’ Council v. Board of Registration in Optometry, Suffolk Superior Court, Civil Action No. 10715. The Board repealed the ban prior to trial. The Council filed petitions for rulemaking with seven Boards of Registration which have adopted rules prohibiting advertising by architects, pharmacists, psychologists, public accountants, dentists, electrologists, embalmers and funeral directors. Each board has conducted or scheduled public hearings on changes in rules to permit advertising. The Council filed bill H. 5943 in the 1978 legislative session to repeal statutory bans purporting to prohibit advertising by barbers, podiatrists, chiropractors, dentists, electrologists, embalmers and funeral directors.
22. Studies have shown that prices for ophthalmic and pharmaceutical services are artificially inflated in markets where advertising is prohibited. Bates 433, U.S. at 377.
23. Massachusetts Consumers’ Council Brief, at 3.
24. 433 U.S. at 364.
25. Massachusetts Consumer’s Council proposed Disciplinary Rule DR 2-101(B) (12).
26. Id. DR 2-101(B).
27. Id. DR 2-101(A) (3).
28. Massachusetts Consumers’ Council Brief, at 12.
29. Id. at 14.
30. Id. at 16.
31. See e.g. Lowell Bar Association v. Loeb, 315 Mass. 176 (1944); In re Thibodeau, 295 Mass. 374 (1936); In re Cohen, 261 Mass. 484 (1928).
32. Boston Bar Association Brief, at 12.
33. Id. at 14.
34. 433 U.S. at 382.
35. 6 M.L.W. 183 (1978).
37. Boston Bar Association Brief, at 22.
38. See e.g., In re Madsen, 46 U.S.L.W. 2199 (Ill. Sup. Ct. 1977).
40. Boston Bar Association’s Brief, at 19.
41. Cf United States v. Smith, 555 F. 2d 249 (9th Cir. 1977).
42. 5 M.L.W. 641 (July 4, 1977).
43. 5 M.L.W. 641 (July 4, 1977).
44. 7 M.L.W. 484 (February 19, 1979).
45. Id. at 485.
46. Id. at 485.
48. Id.
49. Id.
50. Id.
51. 6 M.L.W. 219 (December 12, 1977).
52. Id.
53. 6 M.L.W. 825 (June 19, 1978).
Tort Liability for Psychic Injury: Overview and Update

This discussion of a recent exemplary decision by the Supreme Judicial Court of Massachusetts in the field of psychic injury will document an ancient theme of Anglo-American common-law jurisprudence. The main mission of the common law is to accommodate change within a framework of continuity and, in Professor Paul A. Freund's fine phrase, "to bring heresy and heritage into fruitful tension." In adapting the need for stability to the inevitability of change common-law judges have never been inhibited by a doctrine of disability at self correction. Stare decisis, a golden rather than an iron rule, has not meant stagnation or stick in the mud or that the common law is a closed system of rules, immutable unless changed by legislation. Since the formative period of the common law and the American colonial era, stare decisis has not foreclosed progress in the law via the correction of prior judicial mistakes and the recognition of new interests as they appeared.

In Massachusetts, as well, the quest for certainty has not been allowed to smother the quest for justice. In recent years a "reconstituted" court has reexamined without reluctance and revised without fear prior mistaken rules in the torts field when it became manifest that they denied justice; the Commonwealth has thereby been able to escape the backwater and to reestablish contact with mainstream tort law.

This notion — that error does not become invulnerable with age — brings to an end a prologue and introduces an entirely admirable reforming decision by the Massachusetts court in the litigious field of psychic injury. In Dziokonski v. Babinew, Mr. Justice Wilkins, speaking for a 6-1 majority of the Massachusetts court, repudiated the 81-year-old impact rule in the field of negligently inflicted shock without impact, rejected as well the mechanical zone-of-danger limitation, and then in a quantum leap of doctrine went beyond bystander-protection by upholding the complaint of a mother and father who did not actually witness the negligent running-down injury of their teenage daughter but suffered severe shock and consequent fatal injury when they thereafter came upon the scene of the accident or learned of its occurrence. It is in the spirit of Justice Wilkins' opinion that the common law Phoenixlike has always renewed its youth by testifying to the evanescence and transitoriness of demonstrable error.

Tort Liability for Psychic Injuries

On October 24, 1973, 15-year-old Norma Dziokonski suffered a fractured pelvis and multiple lacerations when she was struck by a car operated by one defendant as she was crossing the road. She had just alighted from a school bus in front of her house. The school bus was owned by a second defendant and driven by a third. All three defendants were charged with negligence, the bus owner for not having the bus painted yellow nor equipped with required warning lights and identification as a school bus and its driver for failing to warn the school children to pass in front of the bus and not at the rear.

The complaint filed by the administrator of Norma's mother alleged that the mother "lived in the immediate vicinity of the accident, went to the scene of the accident and witnessed her daughter lying injured on the ground." There was no allegation that the mother actually witnessed the traumatic injury to her daughter. It was alleged that she rushed from the house and saw Norma lying injured on the roadway and that the mother died from a heart attack while she was a passenger in the ambulance taking Norma to the hospital. The complaint alleged one count for wrongful death and one for conscious pain and suffering against each of the three defendants.

The complaint filed by the administrator of the estate of Norma's father alleged the above facts adding that he was the father of Norma and the husband of Mrs. Dziokonski. He "suffered an aggravated gastric ulcer, a coronary occlusion, physical and emotional shock, distress and anguish as a result of the injury to his daughter and the death of his wife and his death was caused.
thereby.” The complaint’s allegations concerning the father were far more reticent and far less definite than those of the mother as they did not state how, when or where he came to know of the injury to his daughter and the death of his wife. This complaint similarly alleged a count for wrongful death and one count for conscious pain and suffering against each of the three defendants.

The trial court granted defendants’ motions to dismiss for failure to state a claim on which relief could be granted, and the Supreme Judicial Court transferred plaintiff’s appeals on its own motion.

Rejection of Impact and Zone-of-Danger Rules

With unifocal precision Justice Wilkins formulated the dispositive issue raised by the appeals: a reexamination of the crucial issue of whether a defendant who negligently causes injuries from severe nervous shock should be liable for such harm in the absence of contemporaneous impact and in circumstances where plaintiffs were not within the zone of physical contact or peril at the time of the accident. These pivotal questions put both the impact and zone-of-danger limitations on the line. His answer for the 6-1 majority, reversing a long line of prior inconsistent cases, was a most convincing and well-reasoned affirmative.

The court first adopted the overwhelming weight of current authority which rejects the discredited impact rule as laid down 81 years ago in Spade v. Lynn & Boston R.R.,\(^5\) now adhered to by only a shrinking handful of states. Not long ago, of course, most courts would deny recovery for illness or injury resulting from negligently inflicted fright or shock without impact. The fatal flaw in the talismanic impact rule was that it would hold a defendant liable for negligently scratching your hand but not for scaring you to death. This irrational rule operated to deny recovery for perfectly foreseeable and serious consequences of admitted negligence. It was bad morals, bad psychiatry, and bad law, feeble in its rationale and inexcusably retrograde in result. Most states have now repudiated the frozen intellectual dogma of the impact rule where the defendant’s conduct was negligent by the usual tests and where plaintiff, though within the range of injurious physical contact, is injured via a psychic link in the chain of causation.\(^6\) There can indeed be a wounding of the mind without physical trauma — one has only to think of the numberless “shell shocked” war veterans who huddle in...
The fatal flaw in the talismanic impact rule was that it would hold a defendant liable for negligently scratching your hand but not for scaring you to death.

mental institutions, brushed by the wing of madness, but untouched by shot or shell.

Scrapping the impact rule would not end the Dziokonski court’s inquiry, however, as it was necessary to define the ambit of the new liability, i.e., whether to impose a zone-of-danger limitation or to advance beyond that restriction and allow bystander recovery. Indeed the ultimate issue in Dziokonski was whether to go beyond bystander-recovery itself by allowing parents who had not witnessed at first hand the harm or peril to their child to recover for their injuries consequent on their acute nervous shock when later learning of or coming upon the injured child and, if so, under what appropriate limitations.

Before turning to the zone-of-danger limitation, Justice Wilkins first administered the coup de grace to the impact rule and then read a funeral oration over its un lamented grave: “[W]e think the Spade rule should be abandoned. The threat of fraudulent claims cannot alone justify the denial of recovery in all cases. Whether a plaintiff’s injuries were a reasonably foreseeable consequence of the defendant’s negligence and whether the defendant caused these injuries are best left to determination in the normal manner by the trier of fact” (footnote omitted).7

Rejection of Zone-of-Danger Limitation
It is obvious that once the impact requirement is discarded, the universe of people who can plausibly claim to be injured emotionally by defendant’s misconduct is greatly enlarged — a whole new world of harm becomes visible. There are, speaking loosely, three categories of such potential victims. (1) Those who are personally endangered with a threat of physical impact from defendant’s negligence (though in the event, impact is barely missed). Such persons would qualify as plaintiffs under the zone-of-danger limitation. (2) Those who are present at the scene and witness as bystanders the infliction of injury on

some third person through defendant’s negligence. This involves bystander-recovery. (3) And finally those who merely come upon the injured third person after the accident or who later hear about the infliction of the harm.

Focusing upon those in class (2), Justice Wilkins underscored with bull’s-eye accuracy the infirmity in the zone-of-danger limitation. It cut off liability within the circle of foreseeability, inside the radius of risk, and arbitrarily refused to measure duty in terms of the scope of the foreseeable risk that negligent conduct entails. The zone-of-danger rule is too restrictive, circumscribed and lacks capaciousness: “The problem with the zone of danger rule, however, is that it is an inadequate measure of the reasonable foreseeability of the possibility of physical injury resulting from a parent’s anxiety arising from harm to his child. The reasonable foreseeability of such a physical injury to a parent does not turn on whether that parent himself was or was not a reasonable prospect for a contemporaneous injury because of the defendant’s negligent conduct. Although the
Justice Wilkins then traced the liberalization of the law as to liability for psychic injury achieved by the Dillon-D'Ambra decisions and their prolific and proliferating progeny in rejecting the arbitrary zone-of-danger limitation and allowing bystander-recovery. The scenario in this category of cases is a recurrent one. A mother, possibly in frail health, looks out of her window while her child is crossing the highway and sees the child killed by the negligence of defendant motorist. The shock to the mother from the harrowing event is so severe that she dies shortly thereafter from a heart attack or suffers a complete psychological breakdown. Originally the courts uniformly denied liability for the wrongfull death or physical illness of the mother. A Wisconsin case was typical of the judicial reluctance to allow recovery for a harm the defendant had clearly and negligently caused because of judicial pessimism as to the dangers of fraud, forgetfulness and the risks of imposture, policy reasons similar to those underlying the statute of frauds. The court began by accepting the doctrine of the Palsgraf case, that negligence is a relational concept, that it is not enough that defendant's conduct was negligent towards somebody else, that defendant's conduct must have been negligent with relation to the legally protected interests of plaintiff, that there is no such thing as "transferred negligence," and that plaintiff must show that his person or property was within the risk of defendant's conduct. Without conspicuous success, the court then tried to dress up its opinion that the result (heart attack to a mother in a vantage point of safety so far as the risk of physical impact is concerned) was bizarre, freakish, extraordinary.

Yet the notion that the injury to the eyewitness mother from severe nervous shock was bizarre and freakish will not easily down. Anyone crashing into another knows that his act may affect bystanders in various harmful ways and further that close relatives of the injured person are likely to suffer serious harm from viewing the accident or from hearing about it later. What the courts were doing was terminating defendant's liability within or inside the circle of risk on policy grounds favoring limitation of liability even though the result was one which might well have been anticipated. The denial of liability was based on sheer expediency tinctured by fears of fabricated or feigned claims and manufactured evidence. Justice Wilkins knows all this and more and Dziokonski, in accordance with the perspective of most modern courts, declares against embargoing an entire class of injuries or claims merely because some of them may be feigned or exaggerated. Moreover, there was neither evidence nor suggestion that the claims of Mr. and Mrs. Dziokonski were spurious or contrived. Massachusetts had only recently rejected the notion of a wholesale rejection of particular classes of cases because of the threat of fraud — an impermissible form of overkill. Any particular claim may be feigned or exaggerated. Should we therefore abolish the whole law of torts?

The Logic of Bystander-Recovery
If liability for negligent conduct is to be measured by the scope of reasonable foreseeability (risk to whom of what?), then measured by that standard, reasoned Justice Wilkins, "it is clear that it is reasonably foreseeable that, if one negligently operates a motor vehicle so as to injure a person, there will be one or more persons sufficiently attached emotionally to the injured person that he or they will be affected." Right as rain and sound as hickory. Mrs. Dziokonski was not Mrs. Palsgraf. Justice Wilkins' logic, which cannot be refuted, prefers realism to conceptualism. True, the category of persons adversely affected by the tortfeasor's conduct may be large. A gaggle of ladies from the PTA may debouch from a luncheon at Schrafft's in time to see defendant's brakeless runaway and wayward bus strike and kill a child leaving her body broken and gory in the noon-time roadway. Or a rock star's or movie idol's large crowd of fans may look on in horror while an assassin guns him down; or Orson Welles may announce an invasion of earth by Martians. Many courts, especially older ones, shrink from imposing a liability coinciding with the full ambit of foreseeability, fearing that liability would then greatly exceed culpability. A problem here is to avoid the risk of reasoning from polar principles and thus be ensnared by the notion that the greater and more numerous the harm, the less the liability — à la the mass disaster cases such as MER-29, Texas City Disaster Litigation, Ford Pinto rupturing gas tanks, Paris DC-10 and Tenerife crashes, and a nuclear "incident."

As of this writing there are at least a dozen cases which in accord with Dillon and Dziokonski now permit bystander-recovery. Justice Wilkins then cautions and counsels against the adoption of arbitrary and mechanical limitations which "unnecessarily produce incongruous and indefensible results." He states that in bystander-recovery cases there must be both a substantial physical injury and proof that the injury was caused by defendant's negligence. "Beyond this, the determination whether there should be liability for the injury sustained depends on a number of factors, such as where,
when and how the injury to the third person entered into the consciousness of the claimant, and what degree there was of familial or other relationship between the claimant and the third person."

Justice Wilkins then lays down the touchstone principle to determine liability in what we have called bystander and beyond-bystander recovery cases: "[W]e conclude that the allegations concerning a parent who sustains substantial physical harm as a result of severe mental distress over some peril or harm to his minor child caused by the defendant's negligence state a claim for which relief might be granted, where the parent either witnesses the accident or soon comes on the scene while the child is still there." On this premise, he had no difficulty in upholding the complaint concerning Mrs. Dziokonski who came on the accident scene while her daughter's body was still lying in the roadway.

Since the court did not know when, where or how Mr. Dziokonski came to know of the injury to his daughter and the death of his wife, it could not say, as a matter of law, that, within the allegations of the complaint concerning Mr. Dziokonski, there were no circumstances which could conceivably justify recovery. The application of the Court's premise would thus have to await the fuller development of the facts within the concreteness of a record.

To pragmatists who would define by consequences as well as by essences, we are confident that the instant decision will pass muster in the finest traditions of the common law. It teaches that stare decisis does not mean building a wall of fire around an unjust rule and that judges should not sit like the figure on a silver coin ever looking backward.

In a well-known Australian case, Chester v. Waverley Corporation, a mother, after a short agonizing search, came upon the body of her toddler floating lifeless in defendant's negligently exposed and unbarricaded street excavation. Notwithstanding the special equity and moral intensity of the mother's claim for disabling shock, she lost because she had not witnessed first hand the child's drowning death but had only come upon the scene while his body was still there. Dziokonski might well rescue, reverse and redeem that grievous result.

Those who have visited St. Peter's will recall the stunning sculpture of the Pieta positioned to the right as you enter the basilica. The shaped stone proclaims an immemorial truth: not all sorrowing mothers are accident fakers.

Footnotes

1. The entire corpus of tort law, its principles and rules, are essentially the product of the judges. Statutes have had very little to do with the growth of the subject. The dynamic element of the common law, its line of growth ("the urge of the acorn to become an oak") is attested by the fact that many torts have birthdays. The germ of the modern law imposing liability for interference with profitable relations and prospective advantage first emerged in Garret v. Taylor, 1621, 76 Eng. Rep. 485, (plaintiff was allowed recovery in an action on the case for the loss of his employees who had ceased working because of defendant's threats and vexatious suits against both employees and customers). In the famous case of Ashby v. White, (1703) 2 Ld. Raym. 938, 955, 92 Eng. Rep. 126, the common law first gave a remedy for interference with a political right, the right to vote, and the case became a landmark in the anthology of freedom. In 1707, Chief Justice Holt, the hero in Ashby v. White, again demonstrated his wisdom and laid the foundation for much of the future law of unfair competition. A shabby and spiteful man, Hickeringill by name, jealous of his neighbor's success in capturing wild fowl, shot off guns nearby to scare away the birds and spoil the neighbor's business. Although the mean-tempered defendant might lawfully have seduced the ducks by better decoys, whether for his own business or diversion, the court held his conduct actionable because done for a wrongful purpose. Here, early on, harm plus bad motive equal tort. Keeble v. Hickeringill, (1707) 11 East 574, 103 Eng. Rep. 1127. The modern tort of deceit began in 1789. In Pasley v. Freeman, 100 Eng. Rep. 450 (K.B. 1789), it was first held that an action for deceit was available to one other than a bargainer to a contract with the deceiver. It was held that one who fraudulently induced another to extend credit to a person known to be untrustworthy could be held liable to the victim thereby defrauded. In Tarleton v. McGawley, (1793) Peake N.P. 270, 170 Eng. Rep. 153, remedies for interference with prospective advantage ("business expectancies") were further strengthened by imposing liability on a defendant whose gun fire drove off African natives with whom plaintiff was about to trade. In 1841, the common law first decided to treat infant trespassers on a different basis from adult intruders. See Lynch v. Nurdin (1841) 1 Q.B. 29, 113 Eng. Rep. 1041, (perhaps foreshadowing the "attractive nuisance" doctrine, the court allowed recovery where a child was harmed from tampering with a negligently loaded cart and unattended horse on the highway, the court recognizing a duty to
children to secure the horse and cart which endangered children only because of the likelihood of their own intermediate. 1842 saw the birth of the "last clear chance" doctrine, an ameliorative device to circumvent a breach of duty without fault. In 1950 was a banner year in Family Law. In that year tort law, recovering damages on the ground that competition does not justify inducing a breach of contract, although neither force nor fraud was used. Lumley v. Gye, 2 E. & B. 216, 118 Eng. Rep. 749 (1853). In 1899, departing from all common-law precedents, the New York Court of Appeals first recognized the rights of third-party beneficiaries by holding that a third person for whose benefit a promise was given might maintain an action on it. Lawrence v. Fox 20 N.Y. 268 (1859). It was not until 1916 that American courts came to recognize the general rule, now commonplace, imposing liability on a manufacturer to a remote user without privity harmed by the producer's negligence. MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916). In a noteworthy volte-face, the overwhelming weight of modern authority in allowing recovery for prenatal injury and stillbirth has dramatically insisted that the law of torts cannot be fettered by earlier mistaken limitations. The dolorous prenatal immunity rule, a left-over relic of Victorian social injustice, yielded first in Bonbrett v. Kots, 65 F. Supp. 138 (D.D.C. 1946). The clear trend allowing recovery for prenatal injury and stillbirth is updated in 36 ATLA L.J. 245-54 (1976). In fewer recent cases and a venerable one American courts have upheld liability for preconception torts, those in which the foredoomed victims were not even conceived, were not even a gleam in their respective fathers' eyes, at the time of defendant's wrongful conduct. E.g., Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978). The cases are collected in 21 ATLA L. REP. 392-96 (Nov. 1978). The unassailable logic of the preconception tort cases simply holds that the improper canning of baby food today is negligence to a child born next week or next year who consumes it to his injury. 1950 was a banner year in Family Law annals. In that year tort law, recovering perspective, achieved a measure of equality between the sexes by allowing the wife, for the first time in an American court, a cause of action for harm to her constellation of conjugal rights (called consortium) through negligent injury to her husband. 

Hitaffer v. Argonne Co., 183 F.2d 811 (D.C. Cir. 1950). Hitaffer marked for extirpation the ancient end demeaning conception of the wife as a bundle of the husband's conjugal perquisites and helped to place her on a plane of legal parity with her husband. As of today some 35 states hold that if defendant negligently inflicts catastrophic injuries on the husband, transforming him from a heart into a husk, from a healthy companion into a physical and psychological wreck, and converting the wife from a loving mate into a lonely nurse, the wife will have a cause of action for negligent impairment of consortium. The most recent case signalling Jane Crow's disappearance from the official reports is Hopson et al. v. St. Mary's Hospital et al., ___ A.2d ___ (Conn., Jan. 29, 1979) (reversing a negative 1911 precedent and realigning Connecticut with the enlightened prevailing view allowing the wife a remedy for negligent impairment of consortium). Until 1960 it would be fair to say that in order for a consumer or user to recover for harm from a dangerously defective product in an action against the producer, he would have to show privity of contract or negligence. In other words, there was no strict products liability remedy, and it would be a defense for the remote manufacturer to plead, "I carefully killed, maidened or blinded you." Since the 1960's in the most dramatic and spectacular breakthrough in the long history of tort law, the strict products liability rule has swept the country — like a prairie fire. The vital core of policy undergirding the regime of strict products liability law may be paraphrased: "Brakeless cars are not best even if carefully made." The two benchmark decisions, both important developments in the same direction, are: Henningen v. Bloomfield Motors, Inc., 161 A.2d 69 (N.J. 1960) (automobile manufacturer and dealer strictly liable to wife of retail purchaser for injuries caused by defendants' nonnegligent breach of implied warranty of merchantability notwithstanding the absence of negligence and privity of contract and despite the presence of an exculpatory clause which the court invalidates as violative of sound public policy of consumer protection) and Greenman v. Yuba Power Products, 377 P.2d 897 (Cal. 1963) (manufacturer of defectively designed and produced power tool strictly liable to remote user without privity of contract or negligence). With a slight exercise of imagination, the foregoing list of innovating and reforming decisions could be indefinitely extended. In 1969 Professor Robert E. Keeton documented a comprehensive roster, a true honor roll of states, which had accomplished law reform by means of overruling decisions in the decade 1958-1967. The roster comprised 37 categories of decisions and truly confirms a sunburst of creative continuity in the law of torts. See KEETON, VENTURING TO DO JUSTICE (1969: Harvard U. Press, Cambridge, Mass.). The Keeton study together with the 35 states listed above indicate how the common law "works itself pure through rules drawn from the fountain of justice." This is the outlook and mission enjoined on all courts by the beloved Cardozo when he urged, "Let us gather up the driftwood and leave the waters pure." In maintaining the fruitful tension between heritage and heresy mentioned at the outset of this discussion, it is important to reflect that while tradition is a fine thing, it means "keeping the flame and not just gathering up the ashes."

2. The recent history of Massachusetts decisional law demonstrates that stare decisis does not mandate the perpetuation of error or the sanctification of ancient fallacy. The trend is accelerating to overrule even long-settled lines of decision where it has become clear that they denied justice and frustrated reasonable expectations. See, e.g., Evangelio v. Metropolitan Bottling Co., 158 N.E. 2d 342 (Mass. 1959) (Massachusetts adopts majority rule holding that inference of negligence may be drawn in exploding bottle cases where plaintiff's proof shows that the bottle was not improperly handled by himself or intermediate handlers; prior inconsistent authority was overruled; court admitted it was applying substance of res ipsa loquitur in exploding bottle cases); Bates v. Southgate, 308 Mass. 170, 31 N.E. 2d 551 (1941) (where agent deceived a third person, court overruled prior decisions by permitting rescission in action against principal); Carter v. Yardley & Co., 319 Mass. 92, 64 N.E. 2d 693 (1946) (confessing previous error, court adopts true rule with rescission of contract's products liability and approves Quack doctrine); Kabatchnick v. Hanover-Elm Building Corp., 103 N.E. 2d 692 (Mass. 1952) (court overruled a century of prior inconsistent precedent and allowed an action of deceit based on a misrepresentation by the owner that he had received an offer for the leased premises in a specified amount); Keyes v. Construction Serv. Inc., 165 N.E. 2d 912 (Mass. 1960), 25 NACCA L.J. 159-160 (1960) (reversing prior inconsistent cases allows recovery for prenatal injury where infant is born alive); Moore v. Greyhound Lines, Inc., 331 N.E. 2d 916 (Mass. 1975), 36 ATLA L.J. 249-51 (1976) (overruling live-birth doctrine adopted 3 years before and allowing recovery for stillbirth of a live viable fetus); Brune v. Belinkoff, 235 N.E. 2d 793 (Mass. 1968), 32 ATLA L.J. 791-794 (1968) (reversing prior contrary line of cases court abolishes "locality" rule in medical malpractice.
cases and enlarges physician’s duty of care); Collyer v. Carney Hosp., 254 N.E. 2d 407 (Mass. 1969), 13 ATLA NEWS L. 28 (Feb. 1970) (prospectively abolishes charitable immunity rule); George v. Jordan Marsh Co., 268 N.E. 2d 915 (Mass. 1971), 14 ATLA NEWS L. 315 (Sept. 1971) (debtors’ remedy against harassment by creditor and right of action recognized for intentionally inflicted extreme mental suffering); Agis v. Howard Johnson Co., 355 N.E. 2d 315 (Mass. 1976), 19 ATLA NEWS L. 385-86, 424-26 (Nov. 1976) (Massachusetts extends rule in George v. Jordan Marsh, supra, to include intentional infliction of extreme mental distress even though unattended by physical injury, illness or consequences; cause of action allowed waitress who was fired when restaurant manager, suspecting theft, informed all restaurant’s waitresses that until identity of culprit was disclosed, he would fire them all alphabetically and began his firing with plaintiff, Mrs. Agis, whose name beginning with “A” led to her summary discharge); Gaudette v. Webb, 284 N.E. 2d 222 (Mass. 1972), 15 ATLA NEWS L. 402 (Nov. 1972) (common-law remedy for wrongful death recognized; defendant’s tort was letter-perfect); Mounsey v. Ellard, 297 N.E. 2d 43 (Mass. 1973) (obliterates any distinction between duty owed to invitees and licensees in occupier liability cases, imposing a unitary duty of care toward both classes of entrants); Priddgen v. Boston Housing Authority, 308 N.E. 2d 467 (Mass. 1974), 17 ATLA NEWS L. 162-63 (May 1974) (reversing prior contrary decisions, holds that occupier is under duty of reasonable care to aid known helpless, trapped trespasser); Gildea v. Ellershaw, 298 N.E. 2d 847 (Mass. 1973) (confinement of liability of public officers for negligence); Morash & Sons, Inc. v. Commonwealth, 296 N.E. 2d 461 (Mass. 1973) (denial of sovereign immunity of Commonwealth for maintaining of private nuisance); Whitney v. City of Worcester, et al., 366 N.E. 2d 1210 (Mass. 1977) (announcing intention to abrogate governmental immunity doctrine retroactively as to all injuries occurring since May 13, 1973, unless definitive legislation as to governmental liability is enacted by the end of January 1978); cf. Note, Governmental Tort Immunity in Massachusetts: The Present Need for Change and Prospects for the Future, 10 Suffolk L. Rev. 521 (1976); for a jaundiced, not to say dyspeptic, view of the prospective-retroactive overruling technique employed in Whitney, see Kramer, Prospective-Retroactive Overruling: Remanding Cases Pending Legislative Determination of Law, 58 B.U.L. Rev. 818 (Nov. 1978); Sorensen v. Sorensen, 339 N.E. 2d 707 (Mass. 1975), 36 ATLA L. J. 234-37 (1976) (overruling prior contrary cases, abrogates parental immunity doctrine and allows unemancipated minor child to maintain suit against parent for negligent auto tort to extent of parent’s auto liability insurance coverage); Lewis v. Lewis, 351 N.E. 2d 826 (Mass. 1976) (overruling prior contrary cases and abolishing interspousal immunity in auto negligence cases); Pevoski v. Pevoski, 358 N.E. 2d 416 (Mass. 1976) (new rule in Lewis v. Lewis, supra, permitting husband-wife tort suits, applied retroactively to pending cases not disposed of by settlement, judgment or running of statute of limitations; in a modern conflict-of-laws functional approach, assigning more importance to purpose than place, to teleology as geography, the court held that Massachusetts, as the matrimonial domicile of the spouses, controlled the capacity of one spouse to sue the other for a negligent auto tort which occurred in New York which also allowed such suits); Haydon v. Coca Cola Bottling Co. of New England, 378 N.E. 2d 442 (Mass. 1978) (interspousal immunity no bar to third-party action for contribution against injured plaintiff’s spouse); Diaz v. Eli Lilly & Co., 302 N.E. 2d 555 (Mass. 1973) (in a splendid reforming opinion by Justice Kaplan the Massachusetts court reversed a 62-year-old negative precedent which had been reembraced only two years before and recognized a wife’s right to recover for negligent impairment of consortium with her husband); Boston Hous. Author. v. Hemingway, 363 Mass. 184, 293 N.E. 2d 831 (1973) (making inroads on caveat lessee and holding that in a rental of any premises for dwelling purposes, under a written or oral lease, for a specified time or at will, there is an implied warranty that premises are fit for human occupancy and landlord’s breach of such implied warranty may be invoked by tenant as defense in former’s action for eviction and rent); cf. Love, Landlord’s Liability for Defective Premises: Caveat Lessee, Negligence, or Strict Liability?, [1975] Wis L. Rev. 19; McDonough v. Whalen, 365 Mass. 506, 313 N.E. 2d 435 (1974) (court overrules the completed-and-accepted rule as a limitation on the liability of building contractors and in an action by purchasers of a home against contractors who had negligently designed and installed a septic tank, the court reversed a 1922 contrary case and allowed recovery for physical harm to plaintiff’s property from sewage overflowing the land since its occurrence after completion and acceptance of the work by the original owner); Poirier v. Plymouth, 372 N.E. 2d 212 (Mass. 1978) (abolishes “hidden danger” rule, a masked form of assumption of risk except that it placed the burden of proof to establish latency of dangerous condition on plaintiff, in actions against landowners by employees of independent contractors); Crowell v. McCaffrey, ___ N.E. 2d ___ (Mass., March 6, 1979) (far-reaching decision extending foregoing and cognate decisions stemming from Hemingway case, supra, to landlord’s liability for personal injuries which were not involved in Hemingway; where plaintiff, tenant of a third-floor apartment was harmed when railing of the third-floor porch gave way when he leaned against it, Justice Braucher, reversing directed verdicts for the landlord, held that there was a submissible case for the jury on the theory that the defendant was negligent in maintaining an area under his control and, alternatively, that on a permissible finding that the porch was part of the rented premises, there was a breach of the landlord’s implied warranty of compliance with minimum standards prescribed in the State’s Building and Saitary Codes; if a rule is what it does, this one will manifestly strengthen consumer protection in the rental market of those metropolitan deserts known as cities; Back v. Wickes Corp., 378 N.E. 2d 964 (Mass. 1978) (landmark decision in which Massachusetts adopted “second collision” theory as a facade of liability for collision-enhanced injuries resulting from faulty auto design, declared that the U.C.C. provisions as adopted in G.L. 106, §2-318 make the Massachusetts law of implied warranty without privity “congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts §402A (1965),” and affirmed that product defect is to be measured by foreseeable uses as well as intended uses within the expectable environment of use); Uloth v. City Tank Corp., 384 N.E. 2d 1188 (Mass. 1978) (in affirming recovery for user’s loss of foot based upon negligent design of a garbage truck refuse body, the court lays down that an obvious wrong does not make a right, rejects the patent-latent distinction as foreshadowing a finding of design defect where the product’s dangers are open and obvious, and with high plausibility holds that design error may give rise to an unacceptable level of danger even though the warnings given are adequate and the dangers are obvious). Uloth is the best opinion we have ever read demolishing the notion that, as a matter of law, an obvious danger can never be an unreasonably dangerous one. The above representative array of reforming decisions manifests the belief of Massachusetts judges that the judicial prerogative is not exceeded when courts reexamine and correct prior judicial mistakes by presiding at inquests over their own dead doctrines. The law belongs in usufruct of the living.

4. Any legal profile of tort liability for psychic injuries, i.e., of the legal protection accorded by law to the interest in peace of
mind, requires treating the subject under at least five heads:

1. Cases involving the intentional infliction of extreme mental suffering, a sort of psychic aggression against the plaintiff’s peace of mind commonly labeled nowadays the tort of “Outrage.” The classic example, of course, is the seminal case of Wilkinson v. Downton, [1897] 2 Q.B. 57. Defendant, a practical joker, knowing that plaintiff-wife was in frail health, deliberately and falsely told her that her husband had been smashed up in an accident. The severe shock to her nervous system caused serious and lasting consequences which at one time threatened her reason. This assault against her peace of mind greatly transgressed the bounds of decent joking in circumstances likely to lead to injurious physical consequences. Defendant was properly held liable for plaintiff’s physical illness resulting from her nervous shock intentionally inflicted without impact. The modern cases at pell-mell pace recognize this tort of “Outrage” and do not require a showing that plaintiff suffered physical consequences but allow recovery for extreme outrage unattended by physical illness. The theory comes in very handy where plaintiff cannot show all of the elements of a technical assault as required to qualify as plaintiff in an action for a trespass to the person, as illustrated in the ancient and classic case of I de S et ux. v. W de S, Y.B. 22 Edw. III, f. 99, pl. 60 (1348) (tavern keeper’s wife successfully dodged hatchet cast at her by an irate customer).

2. Cases documenting the demise of the discredited “impact” rule in situations where plaintiff has suffered physical harm from negligently inflicted fright or shock without physical contact. The decedent “impact” rule, now happily fallen into desuetude and consigned to the dust bins of history, reflected a “fear of a flurry of fabricated suits.” This arbitrary rule foreclosed all recovery for physical harm caused by negligently inflicted fright in the absence of contemporaneous impact. As we have elsewhere said, under this rule defendant would be liable for negligently scratching you but not for frightening you to death. In the situation at hand, defendant’s conduct has been negligent by all the usual rules as to duty, breach and harm caused, has actually endangered the plaintiff’s bodily safety and actually caused a bodily harm, not as a result of a direct physical impact, but as an effect of the attendant nervous shock and acute psychic injury. The overwhelming weight of authority, now joined by Massachusetts in the Dziokonski case, currently allows recovery in this type of case. The plaintiff is complaining not merely of transitory fright without substantial physical harm, but of a real bodily injury (heart attack, stroke, miscarriage, nervous collapse and institutionalization, etc.), an invasion of an interest zealously protected by the law. The defendant has negligently endangered plaintiff’s bodily safety by conduct which might have caused an injurious physical impact. Providentially, the innocent plaintiff escaped the impact but not the injurious consequences of the fright without contact. The unbidden plaintiff may still be hospitalized by the terror of a close call, a narrow escape from the Hound of the Baskervilles, the Abominable Snowman or defendant’s negligently unbraked runaway truck. Hence, the only question is whether, in the present state of medical science, with all the resources of

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the adversary system (surveillance movies, criminal liability for perjury, contempt sanctions, discovery, cross-examination, expert testimony) it is expedient in view of the risk of feigned or exaggerated claims to allow plaintiff to trace the causal connection between defendant's misconduct through a psychic link in the chain of causation — a linkup on which plaintiff has the burden of proof, i.e., risk of nonpersuasion. See Magruder, Mental and Emotional Disturbance in the Law of Torts, 49 HARV. L. REV. 1033, 1035-36 (1936) (classic article); PROSSER, TORTS (4th ed. 1971) 330-31; Lambert, Tort Liability for Psychic Injury, 41 B.U.L. REV. 584 (1961).

Of course, the impact rule hardly discouraged the dishonest plaintiff, fraudfeasor or faked claim artist who knows how to swear up to a headnote. But it surely road-blocked and defeated the honest plaintiff who would not lie and whose genuine injuries were caused by defendant's provable negligence without impact.

The harsh idiosyncrasies of the impact requirement may be illustrated in three harrowing cases, now happily all overruled: Mitchell v. Rochester R.R., 45 N.E. 354 (N.Y. 1896) (while plaintiff, an expectant mother, was waiting to board one of defendant's horse-drawn cars in a designated crosswalk, defendant's negligently managed horses came so close to plaintiff that she stood between their rearing heads when they were stopped and became unconscious from fright, suffering a miscarriage and resulting illness; the New York Court of Appeals, zestfully embracing the exposed non sequitur that since negligently inflicted fright without resulting physical harm was not actionable, there could be no recovery for physical injuries resulting from such fright, denied plaintiff a remedy). One year later the Supreme Judicial Court of Massachusetts decided Spade v. Lynn & Boston R.R., 47 N.E. 88 (Mass. 1897) (where plaintiff, a passenger in defendant's train, suffered serious physical disorders without impact from the negligent manner in which defendant's conductor removed an obstreperous drunk, held, there may be no recovery for physical injuries caused by negligently inflicted fright or mental anguish without impact). A third unappetizing decision is Bosley v. Andrews, 142 A. 2d 263 (Pa. 1958), in which defendant's trespassing bull pursued plaintiff onto her land and the terrified plaintiff had a consequent heart attack for which recovery was denied because of the absence of impact. This regressive decision evoked a blistering dissent from the late Justice Michael A. Musmanno who said that he would dissent from this atrocious decision until the cows came home.

(3) Zone-of-danger cases, i.e., cases in which plaintiff is within the circle of risk from physical contact, is not touched but suffers physical harm from negligently inflicted emotional disturbance without impact. These cases are sometimes referred to as fear-for-safety-of-self cases. The plaintiff is personally endangered, is thus within the zone of danger (not a mere bystander observing peril or harm to a third person from a vantage point of safety), but is not touched by defendant's car, instrumentality or other object or force negligently set in motion by defendant. With the widespread overruling of the battered impact rule, the clear weight of modern authority makes recovery available to plaintiffs who are within the zone-of-danger and suffer severe shock from a hair-raising escape. In these cases defendant's negligence is a breach of an orthodox duty of care owing to plaintiff and the prevailing rule allows juries to find such breach to be the proximate and responsible cause of the harm to plaintiff traced out via a psychic link (fear for safety of self) in the chain of causation. The following representative sampling of cases illustrates recovery under the zone-of-danger rule: Colla v. Mandella, 85 N.W. 2d 345 (Wis. 1957), 64 A.L.R. 2d 95 (1957), 21 NACCA, L. J. 53-59 (1958) (where defendant negligently left his unattended truck on an incline in an alley and runaway truck crashed into side of house in which plaintiff, a cardiac patient, was sleeping, precipitating a fatal heart attack, recovery allowed for death from negligently inflicted fright without impact); Falzone v. Bush, 214 A. 2d 12 (N.J. 1965) (where wife was frightened and made ill when nearly struck by defendant's out-of-control car, New Jersey overrules its 65-year-old impact rule and allows physically endangered wife to recover for harm from negligently inflicted fright without contact); Battala v. State, 176 N.E. 2d 729 (N.Y. 1961) (recovery afforded 9-year-old girl who suffered illness from hysterical fright when ski lift attendant negligently failed to lock safety belt permitting her to be carried down mountain on unsecured chair lift); Strazza v. McKittrick, 156 A. 2d 149 (Conn. 1959) (recovery where truck struck back of plaintiff's house while she was in nearby room); cf. Dold v. Outrigger Hotel, 501 P. 2d 368 (Hawaii 1972) (where defendant hotel belligerently dishonors a hotel reservation and plaintiff, far away from home has great trouble in finding another room, defendant is liable for resulting "emotional harm," a result surely appealing to careworn wayfarers); Niederman v. Brodsky, 261 A. 2d 84 (Pa. 1970) (father suffers heart attack when nearly struck by defendant's car and Justice Musmanno's cows come home).

(4) Cases involving bystanders not within zone of physical danger. This category raises the question of bystander recovery for mental distress suffered by victims themselves outside the zone of physical danger or radii of physical contact. Such bystanders may well suffer physical injury or disability from witnessing harm to or peril of some near and dear family member such as a spouse or child or fiancé or close friend, a next-door neighbor or a fellow worker. The classic common-law problem, on which there has been formidable and voluminous commentary, involves a mother who witnesses from a position of safety (front room, balcony, porch) the vehicle of defendant strike and kill her small child. The precise question is whether there should be liability for negligently causing, without any impact, physical harm via emotional means to a bystander who was outside or beyond the zone of physical contact. Until the landmark decision in Dillon v. Legg, 441 P. 2d 912 (Cal. 1968), the American rule had steadfastly denied recovery in such cases. It clung to the rule in the most harrowing of circumstances, as in Resavage v. Davies, 86 A. 2d 879 (Md. 1952), where the mother standing on the porch of her home saw defendant's car jump the curb and fatally strike her two teenage daughters while they were waiting for a bus and, in the court's words, "petrified with horror of the sickening scene unfolded before her and torn with anxiety, ran to the children who were languishing in pools of blood and in a dying condition."

The drama of the Dillon case is deepened by the fact that only six years earlier in Amaya v. Home Ice, Fuel & Supply Co., 379 P. 2d 513 (Cal. 1963), the California Supreme Court, confronting the identical issue, held in a 4-3 decision, accompanied by a full and impressive set of opinions not to extend liability to cases where the patient-bystander-spectator was not himself physically endangered by defendant's conduct. (In the intervening six years there was a shift in the judicial personnel of the court).

Justice Tobriner's opinion for the Dillon majority is a valuable armory of counter-
arguments against those who would embargo and ban all bystander recovery because: (1) unlimited liability for negligence here is unthinkable and the prudent stopping point is the zone of danger rule; (2) because of the risk of fraud in some cases, we should not take the first step, and there will be no place to stop. There are echoes here of Professor Comford's classic exposition for standing pat, the principle of the opening wedge and the principle of the dangerous precedent. See, CORNFORD, MICROSCOGRAPHIA ACADEMIA.

The Principle of the Wedge is that you should not act justly now for fear of raising expectations that you may act still more justly in the future expectations which you are afraid you will not have the courage to satisfy...

The Principle of the Dangerous Precedent is that you should not now do an admittedly right action for fear you, or your equally timid successors, should not have the courage to do right in some future case, which ex hypothesi, is essentially different, but superficially resembles the present one. Every public action which is not customary, either is wrong, or if it is right, is a dangerous precedent. It follows that nothing should ever be done for the first time. Quoted in PAUL A. FREUND, ON LAW AND JUSTICE (1968) 55.

In his jurisprudential masterwork, Justice Tobriner, rejecting these gloomy and pessimistic views against judicial recognition of bystander recovery, laid down three guidelines as conditions for such recovery:

(1) Whether plaintiff-bystander was located near the scene of the accident or a distance away from it. (2) Whether the bystander's shock resulted from a direct emotional impact on plaintiff from "sensory and contemporary observance" of the accident, as contrasted with learning of it from others after its occurrence. (3) Whether plaintiff, bystander and victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.

A leading Rhode Island case gives full and ungrudging support to the Dillon doctrine. In D'Ambra v. United States, 354 F. Supp. 810 (D.R.I. 1973), anticipating Rhode Island law, the federal court allowed recovery to a mother who suffered emotional trauma from witnessing a negligently operated U.S. mail truck strike and kill her 4-year-old son. In this diversity action, Chief Judge Pettine with prophetic discernment made an Erie-educated guess that the Rhode Island Supreme Court would favor bystander recovery when squarely faced with the issue. The D'Ambras were awarded $10,000 plus medical expenses for the wife's resulting psychoneurosis and the husband's consequential damages. On defendant's appeal to the First Circuit, on certification from that court, the Rhode Island Supreme Court upheld and approved bystander recovery and thereby lent its strong support to the Dillon doctrine. D'Ambra v. United States, 338 A. 2d 524 (R.I. 1976). On return to the First Circuit, that court affirmed the $10,000 award for Mrs. D'Ambra's injured feelings: 518 A. 2d 275 (1st Cir. 1975). For an excellent note on D'Ambra, see Buehler, Recovery for Negligent Infliction of Mental Distress Extended to Bystander Not in Zone of Danger, 10 SUFFOLK U. L. REV. 811 (Spring 1976).

Dillon and its sequels, coming to fine fruition in Dziokonski, lead case under review, spark the speculation that insight may out-run foresight as the law presses forward in the right direction before reasons for this can be articulated in formal doctrine. This, too, may constitute creative continuity in the law. At any rate it is clear that as of this writing at least a dozen jurisdictions have approved and applauded Dillon-D'Ambra. See cases cited in fn. 13, infra (5) Beyond-bystander cases.

Cases in category (4) supra document the trend to support bystander-recovery for psychic injury, i.e., cases where the bystander-plaintiff is outside the zone of danger or area of physical contact but witnesses at first hand the peril or injury to a third person, usually a child, spouse or near relative. Most of these are post-Dillon cases decided since 1968. The last category of cases - beyond bystander recovery - permits liability where the plaintiff does not actually witness the accident, in some cases because not physically present at the scene, but nevertheless suffers illness from the emotional shock engendered by it. These cases might be called "distress shock" cases and move the boundary of liability forward or outward to include the plaintiff who was not an eyewitness but whose emotional trauma is triggered by coming to the scene of the accident thereafter or by later hearing about it (telephone, letter, newspaper, broadcast, etc.). Our last basket of cases supports recovery in "absent plaintiff" cases and holds that plaintiffs may state a cause of action for phychic injuries despite their absence from the situs of defendant's tort and wrongful activity.

One of the leading cases allowing recovery to "absent plaintiffs" is the celebrated Buffalo Creek Valley Flood case, Prince v. Pittston, 63 F.R.D. 28 (S.D.W. Va. 1974), in which defendant's negligent and reckless construction and maintenance of a slag dam resulted in its collapse, unloosing 130 million gallons of sludge and water into a 17-mile hollow. When the dam collapsed after 3 days of heavy rain, a 50-foot wave of sludge and debris roared through the valley, ravaged the tiny towns, destroying houses, stores and churches, leaving 125 dead, over 1,000 injured and 4,000 homeless.

While the claims of the Buffalo Creek Valley residents who had actually suffered traumatic personal injury, death or property damage were routine and conventional tort claims, the striking feature of the litigation centered on the distinctive claims of the 33 plaintiffs who might be termed "the absent plaintiffs." All 33 were absent from the valley, the situs and location of defendant's tortious activity, at the time of the flood: some were out of state, two were in a nearby jail on misdemeanor charges, and seven were in the valley at the time the dam failed but were termed "absent" by defendant because they had fled before the flood waters actually reached their homes.

Defendant sought to throw out the claims of these 33 plaintiffs on the ground that they were absent non-eyewitness plaintiffs, in the sense that they were not exposed to any threat of physical harm at the time of the flood and had witnessed none to anyone else. Compressed to essence, defendant contended that, even conceding plaintiffs' allegations of recklessness, it was entitled to summary judgment because the law does not allow absent, non-eyewitness plaintiffs compensation for harm resulting from the subsequent apprehension of peril to third persons where plaintiffs did not witness first hand the original tragedy, were outside the zone of physical danger or contact and had suffered no contemporaneous impact.

After denial of the coal mining operator's motion for summary judgment and 10 days before the trial was scheduled to begin, the parties announced a settlement allocating $330,000 to the 33 absent plaintiffs. The U.S. District Court, required to review the out-of-court settlement because of the minority of many of the absent plaintiffs, deemed the settlement just and fair. See Prince v. Pittston, 63 F.R.D. 28 (S.D.W. Va. 1974). For two perceptive accounts of the Buffalo Creek Flood and

The zone of danger rule is too restrictive, circumscribed and lacks capaciousness...
genesis of the Prince litigation, one an excellent law review article and the other an authoritative book by the vigorous, tenacious and idealistic young lawyer who successfully conducted this complicated public-interest lawsuit, see McCormally, Mental Distress — Summary Judgment Improper Where Plaintiffs Allege Severe Mental Distress Despite Their Absence from Location of Tortious Activity, 63 GEORGETOWN L.J. 1179-94 (May, 1975); STERN, THE BUFFALO CREEK DISASTER, (Random House, 1976).

The bottom line in this important litigation is that 33 absent plaintiffs had their mental distress — loss of community, a sort of survivors’ syndrome, and thus goes beyond the parameters of the zone-of-danger or bystander rules, inevitably raising the question of whether recovery should be extended to the mother who is not present at the scene but five minutes later comes upon the bruised and bloody body of her child or simply learns over the telephone that her child has been killed 5 minutes before or answers the doorbell and is handed the bruised, bloody and deceased body of her small child. Should the law in obeisance to mechanical and arbitrary rules of thumb insist on the mother’s “visual perception” of peril or harm to her child?


6. PROSSER, TORTS (4th ed. 1971) 332; an authoritative book by the vigorous, tenacious law review article and the other...


15. Dziokonski v. Babineau, 380 N.E. 2d at 1302. Cautionary comments are indeed in order: liability under Dillon does not extend indefinitely outward. For instance in Justus v. Atchison, 139 Cal. Rptr. 97, 565 P. 2d 122 (Cal. 1977), a father who had watched the birth of a baby who died during the course of delivery sued for physical injury resulting from emotional distress suffered from observing the stillbirth. The court held that although the father had witnessed the event of birth, the shock did not occur until he was informed that the baby was dead even though he may have sensed trouble during the allegedly negligent delivery. The shock was not from what he observed but from what he was told. Since the husband did not know what he was seeing when he saw it, the court held that he did not observe the injury to the degree necessary to qualify as a Dillon-plaintiff. It is to be hoped that possession of a medical degree is not prerequisite to qualifying as a plaintiff in a Dillon-based claim. In Kelly v. Kokua Sales & Supply, Ltd., 332 P. 2d 673 (Haw. 1975), plaintiff-father in San Francisco suffered a fatal heart attack when told by telephone of the death of his daughter and granddaughter in an auto accident caused by defendant’s negligence in Hawaii. Although the court accepted Dillon, it denied plaintiff’s claim, over a strong dissent by the Chief Justice, because he was not located “a reasonable distance from the scene.” Dillon-D’Ambra-Dziokonski and their progeny open a new horizon in recovery for psychic injury. Current case law indicates, however, that the new vistas carry with them boundaries and base-lines. The new doctrines set limits as well as horizons.

16. 380 N.E. 2d at 1302.

17. 62 Commw. L.R. 1 (High Court of Australia, 1939).
Due to the infirmities of age, many elderly persons in our society are incapable, in varying degrees, of being self-sufficient. An important segment of this group could, however, continue living alone at home with minimal help from outside services. It should be realized that although most elderly persons are able to function without any intervention by family and state, national estimates suggest that as many as 10% to 15% of this population require some type of protective services intervention.

A system of services, protective and supportive, at the community level provides one means of helping elderly persons who are not quite capable of complete self-care. An elderly person may be in need of protective services if such person is unable to perform or to maintain physical and mental health. Consequently, protective services are designed to assist elderly persons unable to manage their personal or financial affairs. Such services are intended to protect the senior citizen from himself and unscrupulous third parties. Protective services include, but are not limited to: home health care, medical assistance, meals, transportation, legal assistance, social casework, counselling and legal alternatives ranging from power of attorney to actual commitment.

This article proposes that the law should both protect those in society who are unable to take care of themselves and at the same time safeguard their constitutional rights. Legislation must serve as the basis for conferring authority and for empowering alternatives which are least restrictive when it is necessary to exercise control over the affairs of the incapacitated elderly. Simultaneously, due regard must be given to their individual dignity, right of decision and the constraints of due process. In drafting Protective Services Legislation, elected officials must find the most equitable blend of restrictions and rights.

**Non-Institutional Protective Services: Surrogate Services**

Surrogate services involve the transfer of the client's decision making power to another person, a guardian or conservator, through legal means. This form of protective services may sometimes be essential.

One form of surrogate protective services imposed by Court order is commonly referred to as guardianship. To have a guardian appointed, the court must determine that an elderly person is no longer able to function as a self-reliant individual. The purpose of guardianship is to protect the person of an individual when he is unable to care for himself, and to safeguard his assets when he is incapable of managing his affairs.

In contrast, a conservator is appointed by court order to manage the estate of one who is not capable of managing it himself. The conservator’s powers are restricted in that they extend over property of his ward, but do not include control over the ward’s personal life. His main obligation is to manage assets in the ward’s best interest. The conservatorship usually functions in a more detached and impersonal way than does a guardianship.

Guardianship encompasses a broader range of responsibilities because a guardian has control over the person as well as the property of the ward. Therefore, the decision to petition for a guardian has social and psychological as well as economic ramifications. The finding of incompetency by a court leaves the disabled person virtually incapable of performing any act with legal results.

Once a guardian has been appointed, the consequences are generally drastic and permanent. The ward is stripped of any legal power; he may not charge a purchase, sign a contract, deed a property, open a bank account, decide where he wants to live or even give consent for medical treatment. Such functions are handled by the court-appointed guardian who is usually selected without the ward’s consent.

Recognizing the serious impact that appointment of a guardian has on an individual’s life and liberty, a discussion of present guardianship proceedings is necessary. Many states have archaic guardianship laws; they contain criteria
for appointing a guardian which emphasize a medical model of mental illness but they are applied to persons simply suffering from the functional disorders associated with old age.

As a prerequisite for the appointment of a guardian, the disabled person must be declared incompetent. A typical statute defines an incompetent as one who by reason of mental illness, drunkenness, drug addiction or old age is incapable of caring for himself, managing his business affairs, providing for his family, or is liable to dissipate his property or to become the victim of designing persons. Thus, the court must find: (1) that a person is mentally ill, elderly, an alcoholic or a drug addict and (2) as a result of this condition, he is unable to care for himself or manage his property.

The due process procedures for appointing guardians are cryptic. Notice of a petition for guardianship is sometimes waived altogether, the person may
Legislation must serve as the basis for conferring authority and for empowering alternatives which are least restrictive when it is necessary to exercise control over the affairs of the incapacitated elderly.

not be present at a hearing and representation by counsel is rare. In some cases there may be no one willing or available to serve as a guardian, resulting in the elderly person being committed to a state mental hospital solely because of a lack of options.8

Today, there are twenty states which make no provision for the appointment of a lawyer or guardian ad litem and most of the remaining states allow the courts a great deal of discretion in appointing a guardian ad litem.9 A Syracuse University study reported by Alexander and Lewin showed that in only 16.4% of the cases studied was a guardian ad litem appointed to represent the interests of the alleged incompetent.8

In the National Senior Citizens Law Center Study it was found that in only .1% of the cases was the proposed ward represented by appointed counsel or guardian ad litem.9 It should also be recognized that due to relaxed standards and apathetic attitudes, courts frequently fail to separate the conflicting interests involved in such a proceeding. The attorney hired by the petitioners is often said to represent the interests of the proposed ward, when in fact their interests may be diametrically opposed.10

The sixth amendment to the United States Constitution provides that in all criminal prosecutions the accused shall have the right to be represented by appointed counsel.11 The Supreme Court has extended the right to counsel to civil matters which are similar in their incidents and effects to guardianship proceedings.12 The abuses of the past should no longer be tolerated; the same due process standards granted in criminal cases and certain civil cases must be provided in guardianship proceedings.

The case of Barry v. Hall involved an ex parte commitment of an individual alleged to have been of unsound mind. The court held that when a civil commitment hearing is involved, "a mere ex parte proceeding has no proper place in a court of justice. It is a nullity and void as affecting those not parties to it."13

State statutes should be reformed so that the only valid question to be answered by a court is whether a proposed ward is able to care for his person and/or manage his property. Fundamental due process protections against arbitrary and unjustified deprivations of liberty should be provided. State legislatures should provide detailed guidelines so that courts do not arbitrarily deprive persons of their rights.

It is believed that an elderly person subject to a guardianship or a commitment proceeding suffers just as real a deprivation of liberty as the juvenile. For this reason the In Re Gault14 rationale should be extended to commitment and guardianship proceedings.

In Herford v. Parker,15 the court held that due process requirements, particularly the right to counsel, should be observed in proceedings to authorize the involuntary confinement of the mentally deficient for treatment and training. The rights to notice, hearing and counsel were considered essential in proceedings for indefinite commitment of sexually dangerous persons in Commonwealth v. Gomes.16 Whenever a person's right of self-determination is terminated his fundamental rights of due process must be protected. This is true even if that person is over 65 years of age.

Least Restrictive Forms of Protective Services: Preventative and Supportive Services

The preventative and supportive services are the usual social services such as home care, meals, physical and mental clinics, informative and referral legal advice. If these services are provided in an effective and timely manner, surrogate services may never be needed.

Effective legislation is needed to better provide social welfare services and to offer legal protection for this nation's 20 million persons aged 65 or over.17 State statutes must provide less restrictive alternatives which are designed to protect the person and property of the noninstitutionalized person and enable him to continue living in the community in spite of some disability. Surrogate services should only be provided when absolutely necessary and only after a court has made a searching inquiry as demanded by minimum principles of due process and equal protection.

There is a growing recognition by state legislators that the social agency is the key element in providing preventative and supportive protective services to this country's elderly. It provides the casework, continuity and financial resources needed for such an undertaking. State Protective Services laws have been enacted in various forms in eleven states. Over thirty-five states have drafted or plan to draft protective service legislation.18

The North Carolina Law19 on Adult Protective Services provides essential services to persons who are aged, infirm or otherwise incapable of taking care of themselves. This Statute authorizes Social Service agencies to investigate reports of abuse, neglect or exploitation and to provide necessary services without regard to the income of the recipient.

There are five basic guidelines empha-
sized in the North Carolina Statute: (1) The client participates in making any
decision as to the action which should be
taken to meet his needs; (2) The client is
helped to remain in the community; (3)
Surrogate action is allowed if the disa-
bled adult is in need of protective ser-

tices and lacks capacity to consent and
has no relative to act in his behalf; (4) If
surrogate action is taken, legal rights are
restored as soon as possible; (5) Action
should always be the least restrictive
alternative available consistent with the
individual’s needs.

The Arkansas Act20 is similar to the
North Carolina law. This statute provides
for specific procedural safeguards. In a
legal proceeding where a person is
declared incapacitated, he must be repre-
sented by an attorney, receive notice and
have the right to a jury trial. This statute
allows the disabled adult the same rights
as other citizens while at the same time
protects the individual from abuse,
neglect and exploitation.

An outstanding measure which would
empower the State of Rhode Island to
provide protective services for an elderly
person found to be abandoned, abused,
exploited or neglected was introduced
this year in both branches of the General
Assembly by Senator James S.
D’Ambra.21 The thrust of this measure
would be to assist those elderly who are
not capable of helping themselves and
who are the victims of neglect and abuse.
This bill authorizes the State Department
of Elderly Affairs (DEA) to step into a
situation where there is evidence that a
person 60 years of age or older is the vic-
tim of abandonment, abuse, exploitation
or neglect and to utilize public and pri-

tate resources to bring about a remedy.
Protective Services under the Rhode
Island Act include but are not limited to
social casework, medical, psychiatric
and/or psychological evaluation and
treatment, home care, day care, legal
assistance, social services, maintenance of
adequate shelter and protection from
maltreatment, physical abuse and depri-
vation of necessities.

In a case where a victim does not have
the capacity to decide whether to accept
the temporary “protective services”, the
DEA Director could act only with a court
order obtainable on a showing that the
person needs the protection but lacks the
mental competence required for consent.

The Rhode Island bill provides that
once a guardianship application for pro-
tective services is filed, the court must
order notice of date, time and place of
hearing to the elderly person himself and
to all persons required to be named in
the petition. Such notice must be given at
least 14 days prior to the hearing date in
non-emergency cases. The elderly person
has the right to counsel at the hearing
and it is the burden of the petitioner to
show by clear and convincing evidence
that the person is in need of protective
services.

Also, included in the Rhode Island
measure is an emergency provision
which would allow the DEA to give ser-

tices when removing an elderly person
from surroundings which pose a substan-
tial risk to the person’s life. With court
approval the DEA could shelter a victim
under this emergency provision until a
judicial determination of need for protec-
tive services is made.

People who provide care for or deliver
medical services to the elderly would be
required to report to DEA any situation
which provides reasonable grounds to
suspect an elderly person is being victim-
ized. Failure to report could subject a
person to a fine of up to $500. If the per-
son reporting has acted in good faith, he
is immune from civil or criminal liability
because of such report or testimony.

The Rhode Island Act provides for
State or Federal funds to be available to
make payments for protective services
only if the elderly person is unable to pay
for such services.

The New Jersey Statute22 and Connect-

ticut Act23 are also excellent examples of
effective legislation which make protec-
tive services available for the elderly
while safeguarding their rights and
resources.

It is firmly believed that the state legis-
lature must take the initiative needed to
assure both protection and services to the
incapacitated elderly by providing thor-
ough guidelines such as those established
in the acts previously discussed. Legisla-
tors must recognize the problems that
today’s elderly confront and must be

... the state legislature must take
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and services to the incapacitated elderly by
providing thorough guidelines. . .

willing to provide solutions through leg-
islation. More state legislatures must
begin that which some have already
accomplished. It is necessary to recognize
the fact that choices can no longer be
arbitrarily and solely decided by a court;
alternatives, solutions and guidelines
must be provided by state law.

Suggested Guidelines For Reform:
The state has traditionally justified its
intervention in the lives of elder citizens
by pointing to its police power and role
as parens patriae.24 The state’s parens patriae
powers have traditionally been exercised
in an atmosphere of informality. Relaxed
procedures were said to be justified by
the fact that the proceedings were non-
adversary; the sole preoccupation of the
court was the individual’s best interests.25
Proceedings labeled parens patriae deprive
individuals of fundamental rights without
the procedural requirements which
would assure a fundamentally fair
hearing.

It is the contention of this article that
when institutional and non-institutional
adult protective services are provided, the
parens patriae doctrine should be deemed
inapplicable. To provide minimum due
process and equal protection under the
law, whenever an elderly person’s liberty
is jeopardized an adversary process is
necessary. To ensure this, several mea-
sures are required.

First, notice reasonably calculated
under all circumstances to apprise the
proposed ward of the nature of the
charges should be given in order to
afford him a real opportunity to present
his objections.

In Lessard v. Schmidt, a federal court
dealt with the question of constitution-
ally adequate notice for one accused of
being of unsound mind when a depriva-
tion of liberty is at issue. The court held:
Notice of date, time and place is not
satisfactory. The patient should be
informed of the basis for his deten-
tion, his right to jury trial, the stan-
ard upon which he may be detained,
the names of examining physicians and all other persons who may testify in favor of his detention, and the substance of their proposed testimony. 26

A second measure to protect the elderly person’s liberty is to require that a fair hearing be provided in a meaningful manner; the presence of the alleged incompetent is necessary. Although most jurisdictions require that the alleged incompetent be present for the hearing, 45 states and the District of Columbia allow the court to dispense with that requirement if the best interests of the alleged incompetent would be served thereby. As a result, the alleged incompetent is seldom present for the hearing which determines his competency. The absence of the proposed ward is consistent with the fact that most hearings turn on medical conclusions instead of factual determinations about functional ability. 27

Third, a jury of laymen applying prevailing community standards is usually indispensable to assure a fair hearing. Most jurisdictions recognize the right to jury trial on the issue of competency either in case law or by statute. However, this right is illusory, and in actual practice jury trials very rarely occur. There is a great need for a jury trial in incompetency proceedings because the trier of fact is called upon to decide what behavior constitutes incapacity to care for one’s self or one’s property. 28

As a fourth measure, proof beyond a reasonable doubt should be the standard adhered to in these proceedings. It should be realized that guardian proceedings involve individual interests and rights no less fundamental than those involved in juvenile and civil commitment proceedings. The threat of involuntary confinement, the loss of civil rights, the indeterminate nature of the adjudication, the uncertain and subjective content of the incompetency label and the enormous consequences of an error in fact finding, all compel the conclusion that the only appropriate standard of proof in such a proceeding is proof beyond a reasonable doubt. 29

Finally, the alleged incompetent should be represented by appointed counsel or a guardian ad litem. 30 Although all jurisdictions permit an attorney to be present at a guardianship proceeding, few notify the alleged incompetent of his right to retain one at his own expense prior to a hearing. Because the elderly person himself is rarely present at the hearing, in practice he is almost never represented by counsel or a guardian ad litem. 31

In the case of In Re Gault 32 the Court held that in a proceeding where the issue is whether a child will be found to be delinquent and subject to loss of his liberty, it is comparable in seriousness to a felony prosecution. The Court made almost all criminal procedural due process safeguards applicable to juvenile proceedings. The Gault decision emphasized that the admonition to function in a ‘parental’ relationship is not an invitation to procedural arbitrariness.

Similarly, it can be argued that when the liberty of an elderly person is threatened, the doctrine of parens patriae is no justification for deprivation of minimum due process. A full adversary hearing should be mandated whenever the liberty of any individual is at stake.

In addition to the full adversary hearing, the following guidelines should be emphasized when implementing protective services legislation: 33

1. The basis for the elderly’s inability to function should be the person’s inability to make or communicate rational decisions, not mere physical incapacity.
2. The elderly person should be allowed to retain as much power over his life as is consistent with his functional capacities.
3. The loss of rights should be limited specifically by order of the court.
4. Unless a guardianship is renewed by the court, it should terminate automatically. The burden of justifying the termination of a guardianship should not be placed on the disabled person.
5. Procedures for authorizing intervention should be explicitly stated by state statute.

Conclusion

Protective Services programs raise the issue of paternalism versus individual liberty. A controlled and limited exercise of the state’s parens patriae power is necessary to make personal liberty a reality.
It is necessary for state legislatures to develop specific guidelines and mandates, so that sound methods can be evolved for protecting the elderly person’s legal rights and physical and mental well-being. Such measures will safeguard the agency involved, staff workers and other concerned individuals.

State law must play an active role in providing the least restrictive alternatives of care, treatment and other supportive services designed to prolong or restore functional independence to the disabled individual.

The Doctrine of Shelto v. Tucker is applicable:

Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.34

Footnotes

3. UNITED COMMUNITY SERVICES OF METROPOLITAN BOSTON, PROTECTING THE AGED, 12-14 (June, 1968).
6. Id. at 603.
7. A guardian ad litem is a guardian appointed to prosecute or defend a suit on behalf of a party incapacitated by infancy or otherwise. AMERICAN BAR FOUNDATION, THE MENTALLY DISABLED AND THE LAW, 280-88 (Table 8.3) (Rev. ed. 1971).
10. Horstman, supra note 8 at 244-45.
11. This provision applies to the states through the fourteenth amendment: Gideon v. Wainwright, 372 U.S. 335 (1963).
13. 98 F.2d 222, 226 (D.C. Cir. 1938).
15. 396 F.2d 393 (10th Cir. 1968).
18. Mail Survey conducted by Department of Elder Affairs, Boston, Massachusetts, Fall, 1978.
22. New Jersey Senate Bill No. 1199 (June, 1978).
24. Latin term defined as the father of the country constituted in law by the state, protection of all citizens or subjects unable to protect themselves.
25. Horstman, supra note 8 at 221.
27. Horstman, supra note 8 at 241-50.
28. Id. at 251.
29. Id. at 255.
32. 387 U.S. 1 (1967).
A Right of Action For Private Parties Under Title VI

This article addresses an issue left open in University of California Regents v. Bakke, namely, whether an individual, denied an opportunity to enjoy the benefits of a federally funded program because of race, has a right to prosecute an action under Title VI. The article examines the language and legislative history of Title VI and discusses and applies relevant legal tests to the issue. Although Title VI is composed of six sections, the primary focus will be on Sections 601 and 602.

The Language and Legislative History of Title VI

Title VI prohibits racial and ethnic discrimination in all programs, save a few, receiving federal assistance. This basic principle is set out in Section 601, 42 U.S.C. § 2000d:

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

The language of Section 601 is broad in scope. Congress's primary intent was to eliminate discriminatory practices and devices which had denied federally funded program benefits to racial minorities. With the passage of Title VI, Congress was heard to say that it would no longer condone discriminatory practices in programs financed by "the hard earned dollars of all Americans.

Section 601 imposes an affirmative duty upon the recipient of federal funds to refrain from discrimination and creates an absolute right in the would-be program participant to be free of discrimination. The duty arises the moment a public, private or public-private program enters into a contract with a federal agency. Not only does Section 601 impose a duty on the recipient to refrain from any and all discriminatory activity directly related to the purposes for which the funds are received, but it prohibits discriminatory activity indirectly related to the purposes for which the funds are received as well.

In most instances, a recipient signs a contract with the federal government intending to provide services to unknown third parties. This gives rise to a third-party beneficiary contract. Third-party beneficiary contract law holds in general that where a promisor (recipient) breaches his promise (discriminates against a program participant), the third-party beneficiary (program recipient) has a right of action against the promisor.

This unlimited substantive right of a program participant has the following contractual bases. First, the recipient has made a valid contract; and, as in the case of other contracts, a social interest is promoted by its efficient enforcement. Second, it was the express intent of the federal government that the program participant should receive the beneficial performance; it is generally felt that the intent of one who has paid for the promise should be effectuated. Third, the intended program participant relies upon the recipient's promise not to discriminate and would be disappointed by a failure of the recipient to keep this promise. Fourth, the purposes of the law are best served by making legal remedies available to the one who has a direct interest in the program; in this case that person is the intended participant and not the federal government.

Thus, in keeping with general third-party beneficiary theory, a would-be program participant, denied participation in a federally funded program because of race, should have a right to enforce the antidiscrimination provision of Title VI.

Section 602 of Title VI provides a mechanism through which the antidiscrimination principle set out in Section 601 can be enforced. It authorizes federal agencies to promulgate antidiscrimination guidelines, to await voluntary compliance and, if necessary, to terminate funding to recalcitrant program recipients. This is known as the "pinpoint" provision of Title VI.

But where an agency seeks to enforce Section 601 by terminating funds, it must first promulgate guidelines or regulations which have been approved by the President; and it must hold a hearing to determine whether the program is in
compliance with the regulations. Upon a showing of non-compliance, the agency must notify the recipient of its failure to comply; and satisfy itself that compliance cannot be secured by voluntary means. Findings of non-compliance must be submitted to the Congressional committees having jurisdiction over the program; but no action may be taken by the agency until thirty days after submission of the report. Once funds are terminated, the recipient has a right to seek judicial review of the findings. Thus, as a practical matter, termination of funding is a long and arduous process which is used in a last ditch effort to end discrimination.

Clearly Title VI creates not only a substantive contractual right, but also an enforcement procedure for federal agencies to follow. However, it is unclear whether Section 602 precludes a private litigant from prosecuting an action under Title VI.

**Legislative History**

The Senatorial debates, although not conclusive on the issue, do provide insight into where procedural restrictions are to be placed. It was Senator Humphrey’s confusing statements which led other Senators to address the issue of whether Section 602 limits the substantive and/or procedural rights of an individual. The Senator from Minnesota stated:

It might have been more accurate for me to say that it [Section 602] qualifies the means of enforcement of section 601, to those agencies covered under Title VI in the sense that a procedure is set out for the effectuation of section 601 to those governmental activities covered. In other words, section 602 . . . [does] not in any way limit the substantive law of section 601, but set[s] forth a procedure for the enforcement of the law for those activities. Thus Senator Humphrey believed Section 602 did not limit that part of Section 601 which provides the right of an individual to be free from discrimination in federally funded programs. Yet, it is unclear whether the procedure set out in Section 602 is the only procedural means of enforcing Section 601.

When Senator Stennis of Mississippi sought further clarification from Senator Humphrey, he questioned in a leading fashion: “I clearly understood the Senator from Minnesota to say that Section 602 was a limitation on Section 601.” Senator Humphrey cryptically responded: “A limitation on the procedure to be considered for the effectuation of the law of the land.” From this colloquy, one could conclude that Section 602 is the only procedural means available for enforcing Section 601.

Fearing this misinterpretation, Senator Case of New Jersey quickly gained the floor to qualify Senator Humphrey’s remarks:

I wish to make clear that the words and provisions of section 601 and the substantive rights established and stated in that section are not limited by the limiting words in Section 602. Section 602 says that when a department or agency of the Government in dealing with the kinds of programs which are referred to in Section 602 attempts to prevent the discrimination, the department must follow this procedure.

According to Senator Case, only federal agencies seeking enforcement of Title VI need follow the procedures set out in Section 602. Individual plaintiffs can utilize any available judicial means to enforce Title VI. Senator Case foresaw a time when an individual would bring suit to redress discrimination under Title VI. He wanted to ensure that “so far as the substantive rights of individuals, as stated in Section 601, [were] concerned, they are stated as absolute, without limitation.” Senator Case did not want his “embracement of this bill to be construed as indicating that [he] believed that the substantive rights of an individual, as they may exist under the Constitution or as they may be stated in section 601, [were] limited in any degree whatever.”

Two things stand out from Senator Case’s comments: First, Section 602 does not limit the substantive rights of the individual; and second, Section 602 places a procedural limitation, not on the individual, but on a federal agency seeking enforcement of Section 601. These propositions were supported by other Senators.

Senator Humphrey emphatically agreed with Senator Case’s contention that Section 602 was not a limitation on an individual’s right to bring an action under Section 601. He stated:

I thoroughly agree with the Senator insofar as an individual is concerned. As a citizen of the United States, he has his full constitutional rights. He has a right to go into court and institute suit . . . There would be no limitation on the individual. The limitation would be on the qualification of Federal agencies.

Senator Keating also agreed with Senator Case. He felt Section 601 should be interpreted as providing an individual with a right of action. The Senator from New York stated:

I agree with him [Senator Case] thoroughly. If the bill does not mean what he indicated it means, it ought to mean so. Under Section 603 a state, political subdivision of a state, or an agency of either, which is denied funds because discrimination is taking place, is given the right of action in court. But there is no correlative right in the citizen. If funds are granted to discriminatory projects by public officials, the citizen who is denied the benefits of the project has no correlative right to bring a suit in court and he should have . . . [I]t seems to me that if we are going to give court protection to the municipality or the state involved, the citizen should also have the same right to have court review of [discriminatory] actions.

Senator Keating, like other Senators, was deeply concerned over the fact that Title VI did not expressly provide a private right of action. There is something inherently unfair about a bill which, on the one hand, protects a fund recipient from the wrongful termination of funds, but, on the other hand, denies a private citizen a right of redress against the prescribed act. In voicing this concern, Senator Keating addressed the issue in two ways: He argued first that there is an express private right of action under Section 601. Alternatively, he argued that if there is not an express private right, one should be implied.

**Implying a Private Cause of Action**

No case has found an express right of action in Section 601. Nevertheless, this right has been inferred. As a general rule, courts recognize implied rights of action in favor of plaintiffs injured by violations of a statute, unless such rights are expressly withheld by Congress or there is a clear legislative implication to withhold the right (ubi jus, ibi remedium).

The first case to apply the doctrine of implication was *Texas & Pacific Railway Co. v. Rigsby.* In that case the plaintiff, an
employee of the defendant, was injured when a defective handhold gave way while he was climbing a railroad car. Plaintiff alleged a cause of action under the Federal Safety Appliance Act. This Act required all ladders on railroad cars to be equipped with secure handholds and provided criminal penalties in cases brought by the government. Although the statute did not contain an express provision for private actions, the Supreme Court, examining the statute’s goal, found that its purpose was to promote the safety of employees and travelers, and held that:

disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied. 31 (Emphasis in original).

The decision in Rigsby provided for later courts the “especial benefit” test which is used as a “basis for the inference that Congress intended for the statute to affect the rights of the plaintiff.”32 This test was soon followed by the “effectuation of congressional purpose” test enunciated in J.I. Case Co. v. Borak. 33

In Borak, the plaintiff, a stockholder of the defendant, brought an action under the Security Exchange Act of 1934 (SEA) alleging he had been deprived of his preemptive rights by reason of a merger resulting from false and misleading proxy statements in violation of the SEA. Although the Act makes no provision for private actions, the Court held that a private cause of action should be implied. The Court reasoned that the purpose of the statute was to protect investors like the plaintiff, and that a private cause of action was necessary to effectuate the congressional purpose. 34

Rigsby and Borak exemplify the principle of ubi jus ibi remedium (where there is a right there is a remedy) and are the cornerstones of affirmative implication. However, in recent years the Court has applied the contra principle of expressio unius est exclusio alterius (If a remedy is not expressly provided, one will not be implied).

In National Railroad Passenger Corp. v. National Association of Railroad Passengers 35 (Amtrack), plaintiffs sought to enjoin Amtrack’s termination of certain intercity lines. The district court dismissed the action holding that the plaintiffs lacked standing; the Court of Appeals reversed. The issue facing the Supreme Court was whether a private cause of action could be implied in favor of passengers under the Rail Passenger Service Act of 1970 (Amtrack Act). 36 The statute creates Amtrack as a private-for-profit-corporation to operate and develop a modern intercity rail passenger system with federal financial assistance as well as private capital. 37 The corporation was permitted to take over the responsibility of providing needed passenger service and to abandon unprofitable routes in accordance with statutorily prescribed procedures. 38 The termination of passenger service was held to be the primary purpose of the Act. The Act also grants dis-
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Title VI prohibits racial and ethnic discrimination in all programs, save a few, receiving federal assistance.
There is ample evidence in the legislative history to show that Title VI was primarily enacted to protect racial minorities.

Section 601 of Title VI provides that "no person" shall be excluded from participation in any program receiving federal funds on the basis of race. There is ample evidence in the legislative history to show that Title VI was primarily enacted to protect racial minorities suffering from discrimination at the hands of fund recipients. Although Title VI creates a federal right of action for racial minorities, it is questionable whether this right extends to nonminorities.

Like Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981 and the Equal Protection Clause of the Fourteenth Amendment, Title VI is "framed in universal terms without regard to any differences of race, of color, or of nationality". The legislative history is replete with statements that the purpose of Title VI is to end discrimination in federal programs. The Bakke Court ruled that "Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause..." Consequently, a white plaintiff is afforded a statutory right of action upon alleging that he is a potential beneficiary of the program and, but for the inherently suspect racial classification established by the recipient, he would have participated. The plaintiff will be granted relief where the suspect classification cannot withstand strict scrutiny. A program strictly scrutinized must show "that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary... to the accomplishment of its purpose or the safeguarding of its interest." Absent a compelling program interest to justify the classification or in the alternative where there is a compelling program interest but a less burdensome means of reaching the legitimate end is available, the classification will be struck down.

In Bakke, the plaintiff alleged (1) that Davis received substantial financial assistance from H.E.W.; (2) that he was a potential beneficiary of the program; and (3) that Davis' minority admissions program was based solely on race. In support of its minority admissions program, defendant argued that the program served the purpose of:

(i) reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession;
(ii) countering the effects of societal discrimination;
(iii) increasing the number of physicians who will practice in communities currently underserved; and
(iv) obtaining the educational benefits that flow from an ethnically diverse student body.

In rejecting the first three contentions, the Court stated that "the state has a legitimate and substantial interest in ameliorating, or eliminating... the disabling effect of identified discrimination." However, there was no evidence that defendant had discriminated against minorities in the past. The goal of remediating the effects of societal discrimination in general was too amorphous to justify a compelling program interest. Consequently, the plaintiff was granted relief.

In support of his contention that Title VI precludes a private right of action, Justice White argued that because termination of funds is the only remedy provided for in Title VI and because an individual can not terminate program funds without violating the procedures set forth in Section 602, an individual is implicitly denied a remedy under Title VI. However, there was no evidence that defendant had discriminated against minorities in the past. The goal of remediating the effects of societal discrimination in general was too amorphous to justify a compelling program interest. Consequently, the plaintiff was granted relief.

In support of his contention that Title VI precludes a private right of action, Justice White argued that because termination of funds is the only remedy provided for in Title VI and because an individual can not terminate program funds without violating the procedures set forth in Section 602, an individual is implicitly denied a remedy under Title VI. However, it is unlikely that a plaintiff would seek termination of funds. It is more likely that he would seek injunctive relief and/or damages. Such an action is not inconsistent with a federal statute authorizing termination of funds. Section 602 of Title VI not only provides for the ter-
mination of funds, it also provides for the use of any other legally authorized means to end discrimination. A decree of injunctive relief will surely end discrimination. Furthermore, it is axiomatic that where a federal statute creates a right, there is a remedy. Although Title VI does not explicitly provide a remedy for specific individuals, it does create in the individual a statutory right to be free from discrimination in programs receiving federal funds. Once it is determined that this right has been infringed, an equitable remedy may be fashioned to redress the infringement. Since Bakke has been shown to be within the special class of persons protected by the statute, he may call upon the Court to use its equity powers to fashion a remedy.

The focus of the Civil Rights Act is on termination of discrimination in facilities serving the public, in school, in employment and in programs receiving federal funds. It makes little difference if an individual brings an action to end discrimination in a program receiving federal funds or if a federal agency brings the action, the discriminatory practice must come to an end. As a practical matter, where an individual brings an action for injunctive relief, one can be assured that discrimination will end. However, where a federal agency seeks to terminate funds, as a method of ending discrimination, one is only assured that federal funds will not be used to discriminate. If the program does not depend solely or substantially on the funds it receives from the federal government, then the discriminatory practice may continue. Thus, by providing a private right of action under Title VI, the underlying purpose of the Civil Rights Act is assured.

Ending discrimination in federally funded programs has never been relegated to state law. It has been suggested that this prong is irrelevant when applied to Title VI.

Conclusion

The purpose of this paper was to examine the language and legislative history of the title, and to discuss and apply relevant legal tests to the question of whether a private right of action exists under Title VI. In carrying out this purpose, it was found that the language of Section 601 creates in the individual a right to be free from discrimination in programs receiving federal funds. It simultaneously creates a duty on the part of fund recipients to refrain from discrimination. It is unclear from the face of Title VI, especially in light of Section 602, whether an individual has a right to enforce his third-party beneficiary rights arising out of the contract between the federal government and the fund recipient. However, it has been suggested that the procedures set forth in Section 602 merely bar federal administrators seeking to terminate funds, but do not restrict an individual from enforcing his right to be free from discrimination. This proposition is supported by language from the congressional debates. Finally, an application of the Cort test demonstrates that an individual has a cause of action under Title VI.

Footnotes

1. The respondent in University of California Regents v. Bakke, 46 U.S.L.W. 4896, 98 S.Ct. 2733 (1978), alleged petitioners' minority admissions program was violative of his rights under the Fourteenth Amendment of the U.S. Constitution, a provision of the California Constitution, and Title VI of the Civil Rights Act of 1964. The Superior Court of California held petitioners could not take race into consideration in making admissions decisions; to the extent that the admissions program did so, it was held to be violative of the federal constitution and statutory law. However, the trial court did not grant respondent relief because he had failed to show a causal relationship between the special admissions program and his rejection from medical school. Id., at 4899. Both parties appealed the decision. The issues in the case being important ones, the Supreme Court of California transferred the case directly from the trial court. Id. Reversing in part and affirming in part the trial courts ruling, the Supreme Court of California held that respondent need not show a causal relationship between the violation and the injury suffered; and that petitioners admissions program was violative of the federal constitution. Id. Petitioners appealed to the Supreme Court and certiorari was granted. After listening to arguments on the constitutionality of petitioners' special admissions program, the Court requested the parties to return to their respective offices to prepare briefs focused on the question of Title VI's applicability to the issues in the case. As a general rule the Supreme Court will decide constitutional questions only when necessary. Massachusetts v. Wescott, 431 U.S. 322 (1977). Upon return to arguments one of the issues debated by the parties was whether respondent had a private right of action under Title VI. The Court held it unnecessary to address this issue because the parties neither briefed nor argued it in the lower courts.


3. The only definition of "program" is in the new regulations. In 28 C.F.R. §42.401(e) the following definition is given: "Program refers to programs and activities receiving federal financial assistance of the type subject to Title VI."

4. Federal programs, such as the Social Security Administration, Veterans Administration and Civil Service Administration which provide direct services or benefits to the ultimate recipient, are exempt from Title VI.

5. The Congressional debates are replete with statements that Title VI was enacted for the express benefit of racial minorities. See, e.g. 110 Cong. Rec. 1518 (1964) remarks of Rep. Celler), id., at 70-64-7065 (remarks of Sen. Ribicoff), id., at

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... No rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement; or (2) by any other means authorized by law: Provided however, That no such action shall be taken until the department or agency concerned has advised the appropriate person . . . of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating . . . assistance . . . the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program . . . a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

[Emphasis in original.]

13. The termination of funds is not an automatic sanction; it follows only after a reasonable time has been allowed for voluntary compliance with federal regulations. Mandel v. H.E.W., 411 F. Supp. 542 (D. Md. 1976). Where it is clear that voluntary compliance is not forthcoming, Title VI imposes an affirmative duty on government agencies to commence enforcement proceedings. See, Adams v. Richardson, 356 F. Supp. 92, 94 (D.D.C. 1973).

14. See generally, Friedman, supra note 3.

15. Under the new rules, 28 C.F.R. §42.308, the agencies submit their reports to the Attorney General for approval rather than to the President as required by 42 U.S.C. §2000d-1. Where an agency has failed to promulgate guidelines, it is precluded from terminating funds. See, Adams v. Richardson, 480 F.2d 1199 (D.C. Cir. 1973).


18. 110 CONG. REC. 5254 (1964).

19. Were it found that termination of funds is the only means of enforcing Section 601, an individual could not bring an action under Title VI. Accord, Bakke, supra note 1, 492 U.S. 435-4927 (Justice White dissenting).


22. 110 CONG. REC. 5256 (remarks of Sen. Case).

23. According to Senate Case: "Section 602 states what a Federal officer must do. It is only when the Federal agencies covered by Title VI act, they must act under the prescribed procedure." Ibid. Also see, Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377, 383 (D.D.C. 1976) (Section 602 is "directed towards the efforts of federal agencies in enforcing compliance with Title VI" and is not a limitation on the rights of the individual to seek compliance.)

24. See, 110 CONG. REC. 5255 (remarks of Sen. Case): "...sometime there may be a possibility that an individual would bring suit"" also see, remarks of Senator Johnson, id., at 6052.


26. Id., at 5256.

27. Id., at 5256 (remarks of Sen. Humphrey).


29. Lau v. Nichols, 441 U.S. 563 (1974); Serna v. Por-
Death Penalty Stricken in Rhode Island

The Supreme Court of Rhode Island has ruled that the state mandatory death penalty statute is unconstitutional. In State v. Cline (R.I. Feb. 19, 1979) and State v. Anthony (R.I. Feb. 19, 1979) the court held that the death penalty provision of R.I. Gen. Laws §11-23-2 violates the eighth amendment prohibition of cruel and unusual punishment.

Both Robert Cline and William H. Anthony were convicted in the superior court of first-degree murder. Cline was an escapee from the Adult Correctional Institution when he killed Frank A. Pirri. When convicted, the death sentence was imposed as required by section 11-23-2 of the Rhode Island Gen. Laws. Anthony was convicted of the murder of a fellow inmate at the Adult Correctional Institution. The trial judge deferred imposing a sentence pending answers to certified questions sent by him to the Supreme Court. Several of these questions concerned the mandatory death penalty provision.

Because the eighth amendment prohibition of cruel and unusual punishment applies to the states through the due process clause of the fourteenth amendment, Robinson v. California, 370 U.S. 660 (1972), the Rhode Island court looked to the United States Supreme Court decisions regarding the constitutionality of death penalty statutes. In Furman v. Georgia, 408 U.S. 238 (1972), the Court for the first time addressed the issue whether capital punishment violates the eighth amendment. In Furman three petitioners had been sentenced to death under a Georgia statute that gave the trial jury full discretion in the imposition of the death penalty. The Court found the imposition of the death sentence under that statute to be unconstitutional. A plurality of justices stated that although capital punishment is not per se unconstitutional, its imposition in a wholly discretionary manner violates the eighth amendment. Such sentencing, absent any legislative guidelines, afforded "no meaningful basis for distinguishing the few cases in which it [was] imposed from the many cases in which it [was] not." 408 U.S. 238, at 313.

The several opinions written in Furman, however, created confusion among state legislatures concerning what amount of discretion, if any, could constitutionally be left in the hands of the sentencer under a death penalty statute. The Supreme Court, in Woodson, et al v. North Carolina, 428 U.S. 280 (1976), clarified the Furman decision. The North Carolina statute in question required that the death penalty be imposed on all persons convicted of first-degree murder. The Court ruled that the complete lack of discretion in imposing the sentence rendered the statute unconstitutional. The Court stated that:

[t]he fundamental respect for humanity underlying the eighth amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death. 428 U.S. 280, at 304.

The requirement in Woodson of individualized consideration of both the particular defendant and crime was recently restated by a plurality of the Court in Lockett v. Ohio, ___U.S.___, 98 S. Ct. 2954 (1978). In Lockett, the Court stated that "the eighth and fourteenth amendments require that the sentencing authority, be it judge or jury, be allowed to consider as a mitigating factor 'any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for the sentence less than death.'" R.I. Feb. 19, 1979, at 5, quoting Lockett v. Ohio, ___U.S.___, 98 S. Ct. at 2965.

In 1973, the Rhode Island General Assembly amended the death penalty provision of section 11-23-2, to read:

Every person who shall commit murder while committed to confinement in the adult correctional institutions or the state reformatory for women shall be punished by death. The punishment of death shall be inflicted by the administration of a lethal gas.

The Rhode Island Supreme Court, in Cline and Anthony, found the Rhode Island statute to contain the identical fault that existed in the statute declared unconstitutional in Woodson. (Op. at 5). There is no provision for the judge imposing sentence to consider mitigating factors and, for that reason, is constitutionally infirm.

The court refused to construe the statute as constitutional, despite a request by the state to do so. The language of the mandatory death penalty provision was too "clear and concise" to be open to a constitutional interpretation. Additionally, the court felt that this task should come "within the exclusive purview of the legislative branch." (Op. at 6). (In this regard, the court noted a new state bill, currently under consideration in the House Committee on Judiciary, entitled An Act Relating to Capital Punishment, [H.R. 79-H 5360], which would "provide for the imposition of the death penalty in certain circumstances and establishes a procedure for the review of such sentencing." (Op. at 6, quoting the Legislative Council).

Accordingly, the Supreme Court vacated the death sentence imposed on Robert Cline and his case was remanded to the superior court with a direction to impose upon him a life sentence. The response of the court to the certified questions presented by the trial judge in Anthony, which related to section 11-23-2 R.I. Gen. Laws, was that the death penalty provision of that statute constituted cruel and unusual punishment and, was thus violative of the eighth amendment.

Virtually every society has utilized the death penalty as punishment for certain crimes. Today, the sentiment prevails that capital punishment is the ultimate deterrent to certain conduct. Public opinion polls conducted across the country indicate a majority of the public support restoration of the death penalty. (Forst, The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's, 61 Minn. L. Rev. 743, 744 (1977)). This public feeling persists despite an apparent lack of evidence that capital punishment, or the threat thereof, serves as a deterrent to certain conduct. In fact, some statistical studies have determined that the death penalty does not deter murder. (Forst, The Deterrent Effect of Capital Punishment: A Cross-State
Perhaps the theory of repudiation can be advanced as a justification for capital punishment. But revenge is certainly not a motive on which a truly civilized society should pride itself.

Nonetheless, the perpetrator of a heinous crime must be punished and, for the present, capital punishment has been selected in many states as the appropriate means of punishing such offenders. The Supreme Court of Rhode Island, under the guidelines set forth by the United States Supreme Court, has lessened the harshness of the death penalty statute by requiring that the imposer of the sentence give individualized consideration to the circumstances surrounding both the crime and the offender.

Until the day when society rejects capital punishment, or the United States Supreme Court no longer feels compelled to defer to the legislative process on the matter, the death penalty must be imposed as rationally and as fairly as possible. The Rhode Island Supreme Court decisions in *Cline and Anthony* will guarantee that essential measure of rationality in any future Rhode Island death penalty statute.

John J. McQuade, Jr.

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The Peremptory Challenge Limitation

Following the lead of the Supreme Court of California, the Supreme Judicial Court of Massachusetts in *Commonwealth v. Soares*, 1979 Mass. Adv. Sh. 593 held that the exercise of peremptory challenges to exclude members of discrete or cognizable groups solely on the basis of presumed to derive from a prospective juror's membership in the group violates art. 12 of the Massachusetts Declaration of Rights.

In *People v. Wheeler*, 583 P. 2d 748 (Cal. 1978), the California supreme court considered the appeals of James Michael Wheeler and Robert Willis, black men, from judgments convicting them of murdering a white man in the course of a robbery. The issue before the court was whether the use of peremptory challenges by the prosecutor to strike each and every black prospective venireman at the trial of these defendants contravened the impartial jury guarantee under art. 16 of the California Constitution.

At the trial of Wheeler and Willis a number of black prospective jurors were called and, during *voir dire*, interviewed by the trial judge, the prosecutor, and defense counsel. Upon completion of *voir dire*, the court found that each black juror summoned stood indifferent. Thereafter, the prosecutor used some of the peremptory challenges available to him to strike every black prospective venireman. Defense counsel twice objected to the use of peremptory challenges by the prosecutor to exclude blacks from the venire and moved for a mistrial. The motions were denied by the trial judge. A panel of 12 regular jurors and 2 alternates was then sworn. All of its members were white.

Similarly, in *Commonwealth v. Soares*, supra, the Supreme Judicial Court of Massachusetts considered the appeals of three black men convicted of murdering a white man. At trial, sixteen black persons were called as prospective jurors. Three were removed from the panel for cause by the trial judge. Twelve of the remaining thirteen were removed from the panel after the prosecutor challenged them. Defense counsel, on several occasions, objected to this practice and moved for a mistrial. These motions were denied. A jury, including one black member, was subsequently empanelled and sworn.

It is well-settled that an essential prerequisite to an impartial jury is that it be drawn from "a representative cross-section of the community" *Taylor v. Louisiana*, 419 U.S. 522, 528 (1975), *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972), *Ballard v. United States*, 329 U.S. 187, 193-94 (1946), *Smith v. Texas*, 311 U.S. 128, 130 (1940) and this requirement is an essential component of the sixth amendment right to a jury trial. *Taylor v. Louisiana*, supra at 530. This right is applicable to the states through the

The laws of California and Massachusetts provide that counsel may exercise a designated number of peremptory challenges against jurors called for service at trial. Cal. Pen. Code §§1055-1089, Mass. Gen. Laws ch. 234 §29. A peremptory challenge permits counsel to object to a prospective juror without stating the reasons for the objection. Upon objection the court must exclude the challenged juror from the panel. Cal. Pen. Code §1069, Mass. Gen. Laws ch. 234 §29. Recognizing that the right to exercise a peremptory challenge is statutory in nature, the *Wheeler* and *Soares* courts, in reversing the murder convictions, concluded that this privilege is subordinate to the constitutional right to a petit jury which, as nearly as possible given practical restraints, approximates a representative cross-section of the community. Accordingly, the courts concluded that trial counsel may employ the peremptory challenge to exclude prospective jurors based on an individual's specific bias, but may not exercise this privilege to eliminate a prospective venireman based solely on the candidate's group membership.

Turning to the next level of inquiry, the courts discussed the problem of implementation. The tribunals agreed that, up to the time of opposing counsel's objection, a presumption exists that peremptory challenges are being exercised in a constitutionally permissible fashion. Upon timely objection counsel must demonstrate that his adversary is using peremptory challenges to exclude members of a cognizable class from the jury and evince to the court a likelihood that they were challenged solely because of their membership in that class. The trial judge must then determine whether the presumption of validity has been rebutted by the evidence and arguments proffered by objecting counsel. If the judge determines that the presumption should be set aside, the burden shifts to the other party to show that he challenged candidates because of specific bias and not solely because of their membership in a particular class. If the other party fails to meet this burden the panel of jurors must be dismissed.

The *Wheeler* and *Soares* cases mark the end of an era which permitted and indeed encouraged the use of peremptory challenges to excuse an individual from jury service solely because of his association with a certain class. In the case of black criminal defendants the traditional rule permits unencumbered use of peremptory challenges and encourages proliferation of a common scenario: the fate of a black criminal defendant being determined by an all, or predominantly, white jury. Because blacks remain a racial minority in this country, a lawyer might, with relative ease, eliminate blacks from jury service in those jurisdictions which offer counsel wide latitude in the use of peremptory challenges. Recognizing that courtrooms should not serve as the forums for the promulgation of highly fallacious and racial stereotypes, the California and Massachusetts courts have wisely placed minimal restraints on the use of peremptory challenges.

Oliver C. Mitchell, Jr.
The Associates


"There were maybe twenty young associate lawyers spread around the big library, working through lunch. Some of them sat at the teak tables, scribbling citations on long yellow legal pads. Others snatched reporters from the book-cases, searching for the perfect case, the perfect holding. In a dark corner, a solitary associate in a black suit working with the tax digests pulled at his hair as if a legal problem had unhinged him.

"Then they froze. For an instant, the associate lawyers looked like manikins — the view from the windows a diorama in the Museum of Natural History. A frozen picture called 'law firm — nineteen hundred and seventy-seven.' ...

"Cosmo Bass came into my field of vision. The associates in the library had seen him first, felt his presence. Bass was over eighty, but easily outdistancing the two senior associates who trailed behind him. He was not wearing the required suit jacket, but then he made the rules. His face was gray granite, his red suspenders surged with his chest — he could wear suspenders, they were like the lines of climbers on a white mountain, looked nailed to his snowy shirt with pitons. His hair was silvery and I thought: My God, his face is a ski slope.

"One of the senior associates placed a volume of Federal cases on the table in front of him. Then both of the associates stepped back. Bass snapped through the pages of the book, looking for a case. The associates stared at each other.

"Christ, I thought, there are two associates and one of them is wrong. There's been an argument about the meaning of a case and Cosmo Bass will certainly murder someone.

"Bass slammed the book shut. He strutted out of the library, the associates racing to keep up with him."

This vignette illustrates only one of the many potent forces surging in the prestigious Wall Street firm of Bass and Marshall. John J. Osborn, Jr., author of The Paper Chase, shifts focus in his newest work to law associates, presenting a world of incessant pressure, boundless energy, and cultivated insanity.

"The champion of the book is Samuel Weston, a new associate at Bass and Marshall. He is the son of a Kansas City farmer turned agri-businessman and a Harvard Law graduate who finds himself in the Brooks Brothers set among those who have exchanged their individuality for gamesmanship and salaries starting at $27,000 a year. Our hero relates such episodes as being snatched from the office corridor at 10 p.m. by three frenzied senior associates. Instead of departing after a long day, he is impressed into assembling appellate briefs for the Court of Appeals for the District of Columbia. This work is completed at eight o'clock the next morning.

"Weston meets and befriends Craig Littlefield, another associate and a Yale Law graduate, whose notions about the most effective methods of churning legal memoranda are unconventional — to say the least. Tired of what he deems plodding methods of legal research, Littlefield composes memoranda for the partners based upon inspirations from Cicero, Plato, and St. Augustine. He disguises this eclectic approach by fabricating such citations as Cicero v. Union Carbide. Basically, he theorizes that if he returns to fundamental principles, the final answer will be correct and will correspond with whatever another associate would conclude by laboriously reading the cases. He reasons that only two bases for error exist: either his analysis of fundamental principles is wrong or the current law is wrong. If the latter is the case he will have become a participant in changing the law. To this approach Littlefield adds generous amounts of amphetamines and LSD.

"Predictably, this is not the sort of endeavor that commands esteem in a large and respected law firm, but Littlefield has a plan. It is for the reader to imagine who is summarily dismissed from the firm only to be admitted to the Yale Law faculty when he substitutes actual case citations for Cicero in his metaphysical briefs. Who else but Littlefield could uncomplicate the Internal Revenue Code by brilliant applications of the great philosophers?"

On a deeper level, Littlefield's unorthodox research methods illuminate The Associates pervasive theme of the juxtaposition of natural law with legal positivism. Natural law consists of those immutable principles that govern human relationships as expounded by such thinkers as Cicero and Plato. In law school exams this approach might provide an analytical framework for problem-solving. Unfortunately, Littlefield learns the hard way that a brilliant thesis is valueless in the wrong setting.

"Weston, on the other hand, quickly realizes that the school of legal positivism dominates the law firm environment, i.e., the law is whatever the judge says it is. "You are, as they say at the large firms, cannon-fodder." Consequently, Weston becomes ammunition, prepared to shoot down the opposition with a plethora of case citations accumulated from exhaustive legal research.

"But the law is not the only subject that proves exhaustive as we follow the ups and downs of Weston's dauntless love for blonde, blue-eyed Camilla Newman, another Bass and Marshall associate. She, in turn, is seeing Robert Lawrence, a married senior associate ripe for partnership. It isn't too difficult to imagine Ms. Newman's fate when Lawrence actually reaches the coveted top position. But never fear, this love story has a very happy ending.

"On the surface this work depicts a tender romance and the hectic pace of an established law firm.

"Beneath this facade lies a fascinating excursion into the law of contracts.

"On whatever level the reader chooses to approach this book, he should find The Associates to be a combination of hilarious and bittersweet episodes that is very satisfying indeed.

E.J. Pallotta, Jr.
The Public Burning


World history is replete with political and judicial blunders which would be better forgotten than remembered. Certainly the great land of opportunity — our America the beautiful — has some ugly blemishes which can be attributed to all three branches of the government. One of the darkest periods of our political history was the early 1950's. It was then that the exercise of the First Amendment freedom of speech was subject to rigorous review by the United States government through judicial channels. "McCarthyism" was surging. The Korean War was taking its toll of Americans. The country had barely had an opportunity to enjoy its liberty from the Second World War when one of its former allies, the Soviet Union, became the subject of such a monumental fear as to create a nationwide panic. The United States became overly-protective of its defense mechanisms and technological advances. Consequently, grave mistakes were made in the name of justice and the preservation of democracy.

Perhaps the Rosenberg trial was borne of political repression and national paranoia. Robert Coover’s novel, The Public Burning, is not another analysis of the Rosenberg trial, but an effort to condemn the United States. Coover is not particularly interested in repeating the facts surrounding the case, although he does intertwine fact with fiction. The novel is simply an attempt to enrage one’s sense of humanity.

Richard M. Nixon, the then Vice President of United States, is the narrator. The book is full of soliloquies in which Nixon covers topics ranging from his golf game to the expedition of the Rosenberg execution. Coover has the propensity to be excessively fictitious to the point of being fanciful. These fanciful episodes lend little to the factual development of the Rosenberg trial and distract the reader from his growing emotion toward the victim.

Coover allows the judicial system to be subjected to international ridicule and domestic impudence. He equates the judiciary with the world of entertainment. Lawyers and judges pose as playwrights, composing the death scene ultimately performed by Julius and Ethel Rosenberg. Not only does Coover depict the Rosenberg execution as a theatrical performance, he expounds upon the entertainment theme by noting the use of the Rosenbergs’ plight in dramatic productions and comedy night club acts. Coover describes the execution scene by the Marx Brothers as his favorite. "Harpo (Ethel) sitting in the electric chair and writing desperate letters to Groucho (Julius) which Chico (the executioner) reads aloud in his Jewish-Italian Accent." Chico: "It’s a incredible dat I should sit in a cell inna Sing Sing awaitin my own legal murder after da twelf’ yearsa da kinda principled, constative, wholesome livin’ dat we did!"

The final scene of the skit finds Harpo electrocuting himself with two loose wires on the electric chair plugged into his ears. Coover probably had a number of reasons for including this skit in his novel, such as: To demonstrate how a serious matter such as death can be the subject of laughter; how many Americans capitalized on the Rosenberg’s fate; And to instill the question “was the execution legal murder?”

The reader is often led to believe that many have second thoughts and doubts as to the guilt of the Rosenbergs; however, the producers of this play have expended so much time and energy that the execution must be staged. The narrator expresses his wishes to dispense with that issue. I will grant a stay effective until . . . the penal provisions of the Atomic Energy Act can be determined by the District Court and Court of Appeals.”

To the pro-Rosenberg population this was sufficient to enshrine Douglas as the Rosenbergs’ would-be Saviour. However, the exaltation was short lived as Chief Justice Vinson announced the decision of the majority of the justices to vacate the stay.

The procedure of the Supreme Court bench setting aside a single justice’s stay of execution was questionable. Justice Black said the action was “unprecedented” and that there was no statutory mandate permitting such actions. Coover discloses the government’s approval of vacating the stay. Without it there was a near certainty that if the Atomic Energy Act were held applicable by the Court the indictment would not stand. The Rosenbergs would be free and the government would have the burden of procuring a new indictment.

The final scenario in Coover’s production is set in New York City moments before the execution. The entire city is the “theatre” with Times Square serving as the stage. The electric chair is the center of attraction, surrounded by box seats reserved for privileged guests — those without whom this performance could never have happened — members of the judicial, executive and legislative branches of government. Other spectators include performers, athletes, musicians, children and perhaps even “real” criminals. Curtain time is 8:00 P.M. The show lasted all of sixteen minutes. At 8:06 P.M. Julius Rosenberg is pronounced dead. Coover’s account of Ethel’s execution provides the crowd with a sliver of sensationalism.

After the prescribed number of electric jolts, Ethel is still alive. The executioner instantly quashes the crowd’s excitement by giving her additional jolts. Ethel Rosenberg is pronounced dead at 8:16 P.M.

The novel is disturbing and provoking. The reader is incensed from beginning to end. Anyone who chooses to read it will undoubtedly question the function of the judicial system in times of political repression.

Yolanda R. Mitchell
Justice Hugo Black And
The First Amendment

Edited by Dennis, Gillmor, and Grey,

Supreme Court Justice Hugo L. Black was
a fierce champion of the first amend-
ment. In his thirty-four year tenure on
the Court, Justice Black never waivered
from his resolute conviction that the first
amendment mandate that “Congress
shall make no law...” was an absolute,
and that any Congressional act which
abridged the freedom of speech or press
violated the Constitution.

An intensely private man, “Justice
Black hoped to be evaluated on the basis
of his legal work and not his personal
dimensions. He believed that the Court
and its justices should speak once in their
formal determinations and then remain
silent. As he lay dying, he instructed his
son to burn the notes he had taken dur-
during Court conferences to avoid the sec-
ond-guessing by historians and journal-
ists which he thought might distort the
clarity of his written opinions.” That
such a renowned jurist would, despite his
own wishes, escape analysis was highly
unlikely — and in Justice Hugo Black And
The First Amendment we find a collection of
essays by communications law scholars
intended to examine Black’s interface
with the first amendment, especially as
applied to freedom of the press.

Most of the twelve selections in the
book elaborate and focus on Justice
Black’s absolutist approach in specific
areas of first amendment application.
These areas include libel, obscenity, con-
tempt, access to the press, journalist’s
privilege, and privacy. The cumulative
lesson of these essays is that Black,
although contributing mightily to the
defense of freedom of speech and press,
should not be thought of as a doctrinaire
liberal since his absolutist position may
have depreciated individual values no
less precious than freedom of expression.
For example, Donald M. Gillmor, in
“Black and the Problem of Privacy”,
notes that to Black “... privacy qualified
as one of those ‘mysterious and uncertain
natural law concepts,’ broad, abstract,
and ambiguous, which he had identified
in Griswold as lacking respectable constitu-
tional antecedents. Nor was invasion of
privacy synonymous with eavesdropping,
a practice as old as human society in
Black’s view and still today useful in the
detection and prosecution of crime.”

These analyses give one a better
understanding of how Black approached
various first amendment issues. They
occasionally cite apparent inconsistencies
between his early absolutist position and
his later opinions. Many critics believe
that Justice Black’s absolutist stands
weakened at the end of his tenure, such
as when he found that wearing black
armbands in a high school protest of the
Vietnam War was unprotected conduct.
However, Professors Dennis, Lavick, and
Gerald in “Expression and Conduct in
the Opinions of Justice Black” defend
Black’s opinions as consistent, noting that
inconsistencies seem to arise only if one
disregards the distinction he made
between action and expression. In examin-
ing opinions written by Black in key
first amendment cases, the authors con-
clude that “Justice Black was consistent
both in drawing the distinction between
pure speech and speech-plus, and in
applying standards of time, place, and
circumstances to conduct.”

Two selections in the book add a per-
sonal dimension to Hugo Black. In one,
Edmond N. Cohn presents and discusses
excerpt from a rare public interview he
was granted with the Justice. One feels
the deep conviction and commitment
Black had for his absolutist position: “I
believe the words do mean what they say.

In the other selection, “Do You Swear
to Tell the Truth, the Whole Truth, and
Nothing but the Truth, Justice Black?”
John Medelman gives us a “feel-tone” of
the man behind the opinions. Medelman
touches upon Hugo Black’s early days
spent as a county prosecutor, dramatizing
accidents and murders before provincial
juries. It was here that Black developed
the captivating manner of speech which
later carried him to victory in the Ala-
abama senatorial race. finally, we find him
on the Supreme Court; a man viewed by
his spouse, family, and law clerks as
amusing, compassionate, and over-
whelmingly energetic.

The book is a fine collection of essays
on Justice Black’s staunch defense of
what he saw as the uncompromising lan-
guage of the first amendment. For one
interested in first amendment issues, and
a distinguished jurist’s approach to them,
these selections are both informative and
worthwhile.

John Q. Kelly
Heritage Project Begun

The Heritage Committee of Suffolk University has been appointed by the President and funded by the Board of Trustees to recover and preserve an accurate record of the roots from which this institution and its various divisions have grown.

Much of Suffolk's "history" is still relatively close in time, as historians measure it, and the University now possesses a unique opportunity — one which could be irremediably lost by delay — to retrieve much of that history from primary sources. Toward this end, the Committee is undertaking the Heritage Project, which encompasses documentary evaluation, archival research, and the circulation of questionnaires, in addition to numerous interviews with faculty members, administrators, and students, to be conducted as part of an oral history program.

Over the next three years, 1979-1981, a series of eight pamphlets and a book on Suffolk's history and heritage will be published by the University for all members of the University community and the general public. The prospectus includes pamphlets on the Law School, the Business School, the founder, the neighborhood, the social character of the institution, and the chief shapers of the University.

Those with information or materials they would like to share should contact Professor of History David L. Robbins, the Chairman of the Heritage Committee.

Faculty Notes

Professor Lisle Baker appeared recently on the public television program, The Advocates, arguing against the proposition that Congress should deregulate the interstate trucking industry. Professor Alvan Brody is preparing an article outlining the legal rights of nonsmokers in the lodging and food service industry. Professor Charles Kindregan and Robert Ward are serving as the coaches of the Beacon Hill Tigers Little League Baseball Team this season. Professor John Sherman has recently published Estate Planning By Guardians and Conservators in 63 Mass. L. Rev. and lectured in November at the Institute for Modern Photography on the tax implications of collecting in general and collecting photographs in particular. Professor Louise Weinberg will be a Visiting Professor this summer at the University of Texas Law School.

Suffolk University Law Library does not have volume 4 of The Advocate. If any alumnus has issues of this volume he or she wishes to donate to the library, please send them to:
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attn: Jane Morris

Alumni Class Notes

1953
Elliott M. Goodman, JD, is a senior member of Goodman and Goguen P.C., a Natick law firm.

1959
Lawrence W. Brennan, JD, was recently elected second vice president of the Middlesex County Bar Association.

1960
James L. Lalime, BS '58, JD, is in the private practice of law in East Amherst, New York.

1967
Michael Gatta, JD, has joined the staff of commercial/industrial real estate brokers at Peter Elliot and Company, Inc. in Dedham.

1968
Theodore J. Aleixo Jr., JD, a state representative, is head of the Joint Legislative Committee on Heath Care for the 1979-80 session. Mark I. Benson, JD, is a partner with the law firm of Levy, Winer, Hodos and Benson, P.C. in Greenfield. Frederick W. Colman, JD, is an attorney advisor in the real estate division at Waltham Headquarters for the U.S. Army Corps of Engineers.

1970
Joseph W. Kane, JD, has joined the staff of the Boston Housing Authority as general counsel.

1973
John W. Capone, JD, has been appointed commissioner to the Employee Management Relations Board for the State of Nevada.

1974
Robert H. Gaughen Jr., JD, is in the private practice of law in Weymouth. Kevin C. Glavin, JD, was recently sworn in as a special assistant attorney general for the State of Rhode Island.

1975
Gary Boyle, JD, was recently appointed by Gov. Galen in New Hampshire to membership on the Commission on Crime and Delinquency. Robert W. Gardner Jr., JD, currently practices law in Ayer and Merrimack, New Hampshire. Elizabeth Koskoff, JD, is a member of the firm of Koskoff, Koskoff and Bieder in Bridgeport, Connecticut.

1976
Marianne B. Bowler, JD, was appointed assistant U.S. Attorney for the District of Massachusetts. Patricia Donoghue, JD, is an attorney at law in Saugus.

1977
William J. Crowley, JD, has become associated with the law firm of Reed, McCarthy & Joseph I. Mulligan, JD '68 in Boston. Joseph A. DiGiovanni Jr., JD, has joined the New England regional office of the American Insurance Association as associate counsel. Donald D. Goodnow, JD, presently is associated with the law firm of Kennedy and Berkson in New Hampshire.
1978

Robert E. Barrett, JD, is currently working at Data General Corporation in Westboro. Leonard Bello, JD, has recently opened a law office in New Bedford. Annette C. Benedetto, JD, is currently practicing law with the Department of the Attorney General in Boston. Kiley P. Black, JD, has been promoted to assistant treasurer at the Marlborough Savings Bank. Lawrence F. Boyle, JD, is the clerk to Supreme Court Justice John Doris in Providence, Rhode Island. Richard P. Breed III, JD, is presently employed by State Street Bank and Trust Company in Boston. Craig M. Brown, JD, is practicing law with the firm of Parker, Coulter, Daley and White in Boston. Theresa A. Buffum, JD, has been assigned to active duty for training in the Marine Corps officer candidate program. Ms. Buffum will report to Quantico, Virginia. James F. Clarke Jr., JD, is employed by the Cabot Corporation in Boston. Carmine Cornelio, JD, is associated with Atty. W. Paul Needham, JD '76 in Boston. Mary E. Dean, JD, is working in the Chief Counsel's Office of the Internal Revenue Service in Washington, D.C. Fernand J. Dupere, JD, has been named general counsel for the National Association of Government Employees and International Brotherhood of Police Officers in Western Massachusetts. Alan S. Einhorn, JD, is presently working for the Hon. John Doris at the Supreme Court of Rhode Island in Providence. David J. Elliott, JD, is working at the Connecticut Supreme Court. Kathleen A. Foley, JD, practices with the firm of Richmond, Roser, Crossan and Resnek in Boston. Philip J. Foley, JD, is associated with the law firm of Bower and Gardner in New York City. Jamie V. Gregg, JD, is working for the Hon. Dudley Bonsal at the U.S. Courthouse, New York, New York. James H. Hahn, JD, is currently with the firm of Tillinghast, Collins and Graham in Providence, Rhode Island. Edwin Hawkridge, JD, is presently working at the Trial Court of Suffolk County in Boston. John F. McGrail, JD, is currently practicing law with the firm of McGuire and McGuire in Worcester. Susan Mellen, JD, is working at the Supreme Judicial Court in Boston. Michael P. Padden, JD, is employed in the Criminal Defense Division of the Legal Aid Society in New York. David P. Railsback, JD, is working in the office of the Hon. Alfred Joslin in Providence, Rhode Island. Lisa N. Singer, JD, is presently employed at the Rhode Island Supreme Court in Providence. Linton W. Turner Sr., JD, is currently the law secretary to the Hon. VanSciver in Mount Holly, New Jersey. Alex Weir, JD, is presently employed in the enforcement division of the Securities and Exchange Commission in Washington, D.C.

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