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### The Advocate, Law School 75th Anniversary Edition, 1906-1981

Suffolk University Law School

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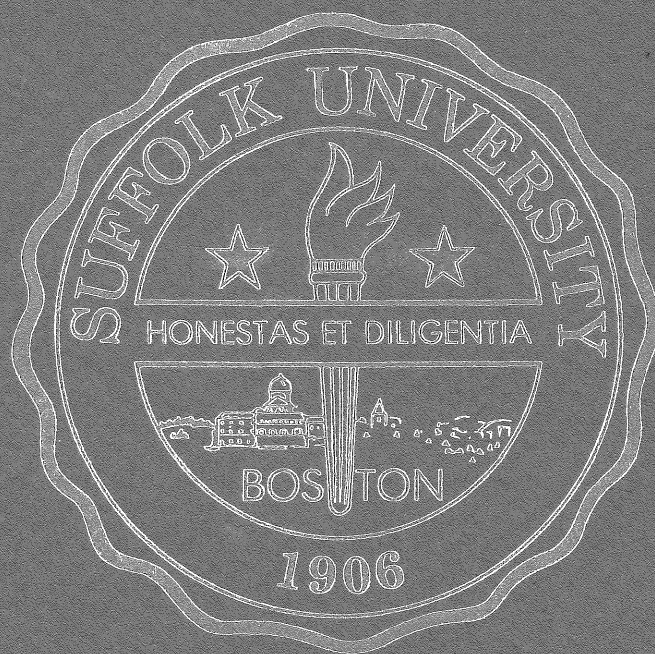
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the Advocate

SUFFOLK UNIVERSITY



The Law School

1906 - 1981



# theAdvocate

75th Anniversary Edition

The Suffolk University Law School Journal

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The ADVOCATE is a publication of Suffolk University Law School. Our current circulation is 11,000. The ADVOCATE is published three times a year: orientation, fall and spring issues. The orientation issue is distributed to law students only. This special issue celebrates the University's seventy-fifth anniversary.

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

All articles and editorials reflect the personal views of the authors and are not necessarily the views of the administration or faculty of Suffolk University Law School.

Guest editorials by students and faculty are welcomed by The ADVOCATE, which recognizes its obligation to publish opposing points of view. Persons desiring to submit manuscripts, to be put on the mailing list or to communicate with the staff please address all letters to: The ADVOCATE, Box 122, Suffolk University Law School, 41 Temple Street, Boston, MA 02114.

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# LETTERS . . .

## United States Court of Appeals For the First Circuit

CHAMBERS OF  
FRANK M. COFFIN  
CHIEF JUDGE

156 FEDERAL STREET  
PORTLAND, MAINE 04112

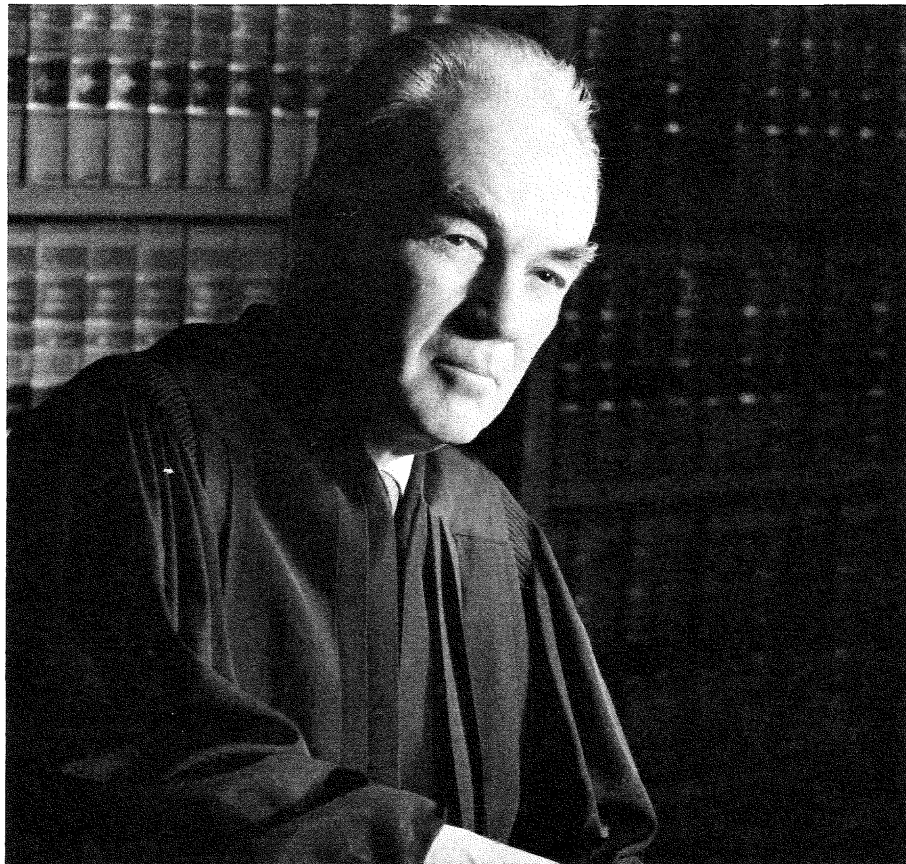
December 15, 1980

Dear Advocate:

I write most willingly to add my congratulations for the achievements of the past three quarters of a century and my best wishes for the realization of aspirations for the next three quarters of a century to those of Suffolk Law School's large and growing legions of supporters.

In a day when we may take educational opportunity for all as a cardinal underpinning of the current social order, it comes as a dash of cold water to realize what a novel idea it was to attempt to open such a learned profession as the law to those who had to work at jobs during the daytime, whose gourmet experiences were confined to the dinner pail, and whose future clientele was to be drawn from the streets, docks, skyscrapers, row houses and tenements of a teeming, ethnically diverse seaboard metropolis.

As a Maine native, born and brought up within six miles of the little town of Sabattus, where Gleason Archer received his high school education, I have been moved by the stories of the young Dean Archer and his kindly patron George Frost, a benevolent partnership whose benign and lengthening shadow is now being celebrated. The idea of giving the elite discipline of the law to all who care enough about their contribution to their times to work hard and humbly for it is just as valid today as it was in 1906. That Suffolk is better equipped than ever to perform this leavening upward mission is obvious to any who have had the opportunity to observe her faculty, her student body,



and her alumni — the living monuments of an institution devoted to the service of mankind.

With its roots so solidly planted and richly nourished, there is no doubt

that growth, service, and continuing harvest will follow richly as Suffolk Law School nears and then passes its first centennial.

Sincerely,

*Frank M. Coffin*

SUPREME JUDICIAL COURT  
BOSTON, MASSACHUSETTS 02108

EDWARD F. HENNESEY  
CHIEF JUSTICE

December 24, 1980

Dear Advocate:

It has been a great seventy-five years, but what of the future? One of the challenges to all universities lies in education for citizenship. The lawyer's education, in particular, should be not only for citizenship but for leadership. The lawyer, more so than any other professional, is likely to hold government office, or advise government or labor or corporations, or sit as a judge. What has sufficed in the past will not be sufficient in the testing years ahead. As preparation for this leadership role, I suggest a strong education in the humanities, as well as in the basic principles of those disciplines which most directly relate to the community's problems: economics, history, government and science.

The intellectual gap between our trained specialists and other educated persons is wide. The chasm between our scientists, and our non-scientists, for example, is so marked that the two groups seem like two separate cultures. One of the obvious dangers, of course, is that the social and political policies offered by the pundits of print and the television tube may be accepted without sufficient critical examination.

Some teaching from other disciplines can and has been done in the law schools. However, it does not seem likely that the law schools, with their crowded curricula, can do much in this direction. Among many pressures on the law school is that for increased practical training in such areas as oral advocacy and legal writing. Rightly so, for in these most litigious of times, the new lawyer must be able to compete. I suggest then that one solution lies in more broadly based *pre-law* qualifications. Your university has substantial undergraduate core requirements toward a broad education but your law school, like all law schools, draws its students from many sources. Many undergraduate degrees may represent narrow educations either because of unstructured requirements, or because of the widespread trend toward undergraduate specialization,

for immediate competitiveness in the job market. As a result, a 3.6 undergraduate average and a 700 L.S.A.T. are presently achievable by a student who is unacquainted with Harry Truman, the gross national product, or the relationship between the oceans and the air we breathe.

Certainly, too, the knowledge of our future leaders should come not only from Jefferson and Cousteau, but from More and Schweitzer as well. Admittedly moral and ethical training does not reside exclusively or even principally in the university, but life and the law have become so complex that education and

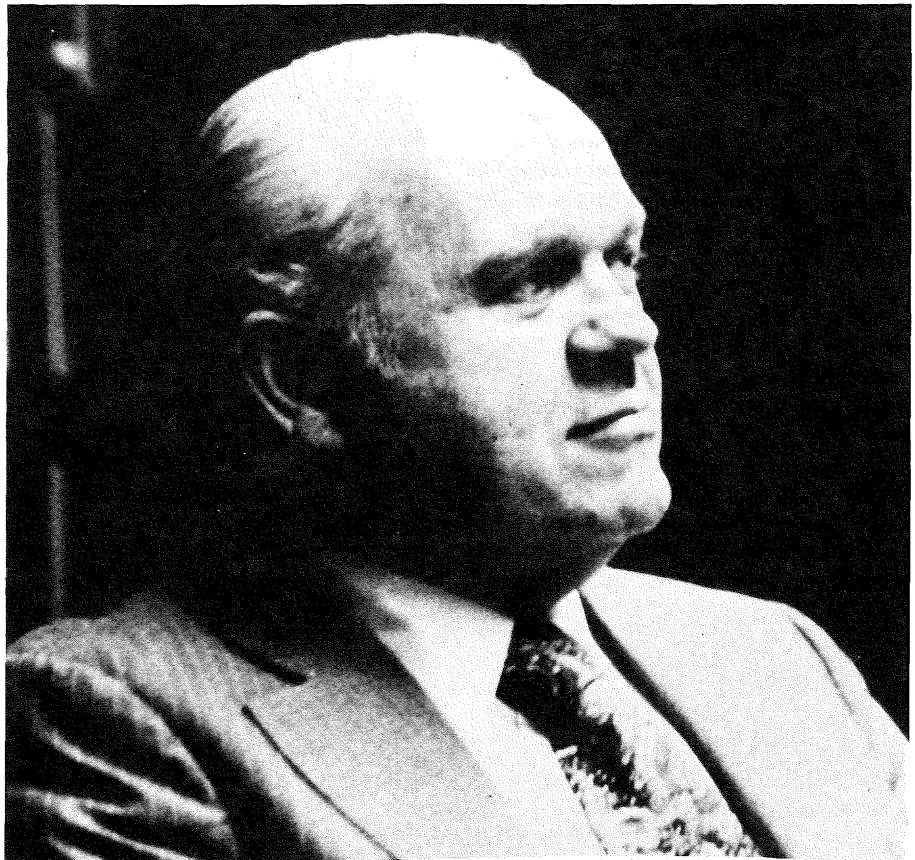
sophistication may be required even to recognize the moral and ethical issues.

Education for leadership, as I see it, is one of your challenges for the years to come. It entails extraordinary difficulty, but it also presents a great opportunity to influence issues of national survival as well as justice itself, not only in the courts but in every other arena where justice is at stake.

May I say to a distinguished law school: May the next seventy-five years be as productive and fruitful as the past seventy-five.

Sincerely,

*E. F. Hennessey*  
Chief Justice





# The Advocate Colloquium: An Exchange of Ideas and Opinions

*On August 27, 1980, the ADVOCATE conducted a colloquium as part of its tribute to the Suffolk University Law School's 75<sup>th</sup> Anniversary. Those taking part included: Ed Pallotta, Jr., Editor-in-chief of the ADVOCATE; Maribeth Page Hedgpeth, Associate Editor of the ADVOCATE; Faye Birnbaum, Associate Editor of the ADVOCATE and a July 1980 Suffolk graduate, now an attorney in Boston; Professor Charles P. Kindregan, faculty advisor to the ADVOCATE and Bill Amidon, Alumni Relations, Suffolk University; Joe Ippolito, former Editor-in-Chief of the ADVOCATE, presently with the Attorney General's office in Rhode Island; Michael Festa, a Suffolk graduate, presently an assistant district attorney for Middlesex County; Marcia McGair, a Suffolk graduate, presently serving as a Magistrate's clerk in Federal District Court, District of Rhode Island.*

The discussion generated at this conference generally dealt with legal education in the 75 years past and a projection of legal education in the future. Specifically, the members focused on Suffolk's role in legal education, past and future, and the challenges presented to law schools and law students alike in the face of an ever changing legal community. The following is a summary of the issues discussed, questions presented, and contributions made at the ADVOCATE Colloquium.

One of the most pervasive issues throughout the discussion was that of the practicality of the traditional legal education in a community where an attorney's ability to perform in the courtroom, in the lawyer-client relationship, and in the office, is increasingly being scrutinized. Generally, the students and alumni who participated voiced the opinion that they would not have changed their course curriculum in light of their experience in the marketplace. Particular note was made that Suffolk's extended required course program had proven very beneficial, providing familiarity with a broad spectrum of law.

Responding to the inquiry as to the possibility of changing the law school curriculum from an academic one to more

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**“Professor Kindregan stressed the need to find a balance between the academic and practical aspects of law . . . .”**

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of a practical one, Professor Kindregan noted that he found very little enthusiasm among legal educators to do so. He added that as recently as ten years ago law school was an academic exercise, and that educators did not necessarily take into account that they were training lawyers. Professor Kindregan stressed the need to find a balance between the academic and practical aspects of law, warning that the legal community should not forego one for the other.

Professor Kindregan next posed a question to the other participants, asking if, in their opinion the law school trains appellate lawyers better than it trains office practitioners and trial attorneys. This query was generated as a result of Profes-

sor Kindregan having heard this comment often times from alumni. Michael Festa responded that although he felt that there was a great deal of emphasis placed on appellate experience, including activities such as Moot Court and Clark Competition, there is a very practical advantage to those experiences. The advantage he spoke of is that the experience makes the individual more comfortable speaking, whether it be to a jury or a judge, and it teaches the individual to communicate with clarity.

A logical progression in this discussion brought the participants to speak of precisely what makes a good trial lawyer. Ed Pallotta, Jr. began by asking Professor Kindregan his opinion of trial lawyer

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**“. . . there are too many characteristics which comprise a good trial attorney which are beyond the reach of the curriculum.”**

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competence. Professor Kindregan responded by saying that in his opinion the trial bar is not as incompetent as they have been made out to be, and emphasized that it is impossible for the law schools to train and certify good trial attorneys.

The group as a whole agreed that there are too many characteristics which comprise a good trial attorney which are beyond the reach of a curriculum. In short, the group concluded that law schools cannot guarantee the competence of a trial lawyer, but it can give students the academic background necessary to become one.

There remains the question as to what, if any vehicle, can provide an individual with the special qualifications that may become necessary in order to try cases, if the era of a specialized trial bar becomes a reality.

The group spoke next of continuing legal education and the role it may come to have in retraining, refreshing and reinspiring attorneys. Bill Amidon noted that law schools are just now beginning to look at this as a market and as a service to the legal community. Once again, the group sentiment was that perhaps it is too much to ask of law schools that they become involved in their graduates post-professional training.

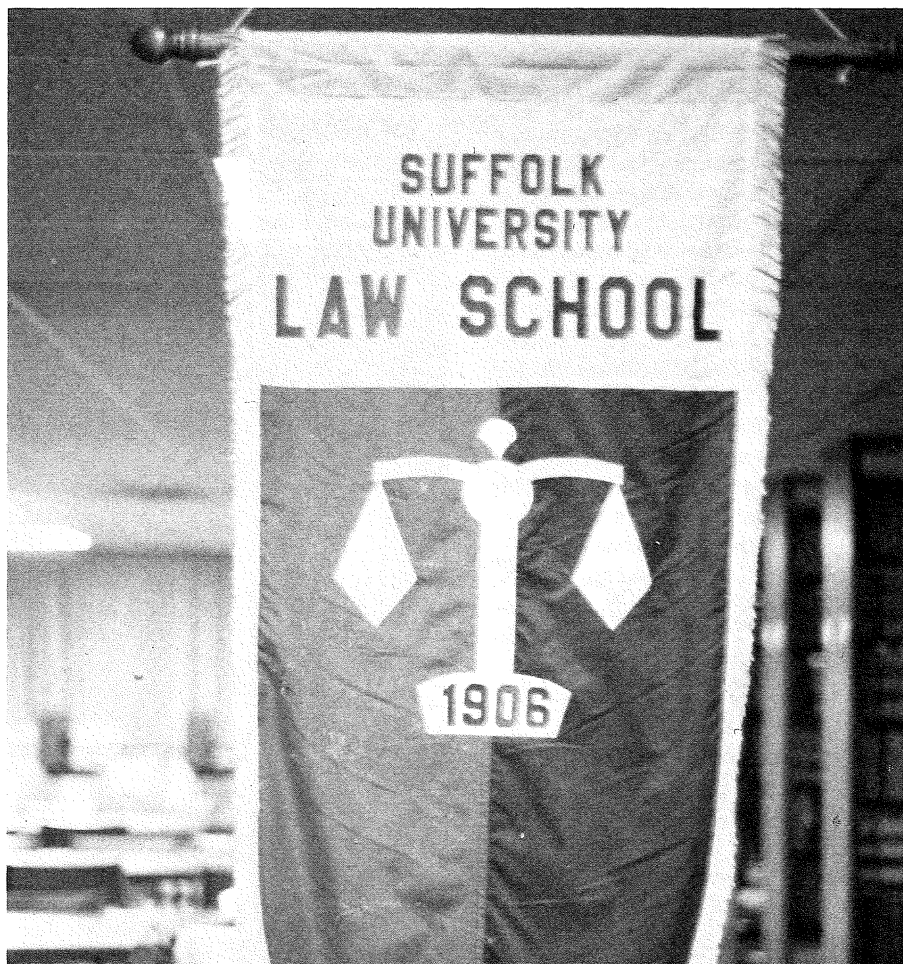
The discussion went on to focus more specifically on Suffolk Law School, its attributes and its shortcomings alike. The group first spoke of Suffolk's unique and varied student population due in large part to having both day and evening division law schools. Professor Kindregan remarked that teaching in the evening division can be a sheer joy because of the contributions the students make. Ed Pallotta, Jr. and Maribeth Page Hedgpath, both evening division students, agreed that the varied work and life experiences that their classmates shared helped to enhance the classroom learning experience, which is something that most law schools miss out on. Generally, the students and alumni felt that the most difficult aspect of their law school educations was trying to draw together endless theory and realizing that it will all ultimately be drawn upon in practice. Joe Ippolito remarked that until an individual gets out into the marketplace it is likely that all the theory will seem divergent, and noted that fortunately this is not a terminal condition.

Next, the social and economic history of Suffolk was touched upon. The group learned that years ago the law schools in Boston had no Blacks, no Jews, no

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**“Suffolk was really the first to open up legal education to the disadvantaged . . . .”**

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Irish and no Italians in their population. Suffolk was really the first to open up legal education to the disadvantaged, with its founder doing things that outraged the Bar. For instance, rather than paying tuition the students bought tickets that admitted them to individual classes. The question that came to mind during this discussion but remained unanswered, was whether Suffolk still fills the role of providing a legal education to the disadvantaged, or in the alternative, should it be filling that role?

The colloquium provided an opportunity for members of the Suffolk Law community to gain perspective on the institution's role in legal education, in the past, present and future. The members came away having learned a little from one another's experience at Suffolk and having contributed a great deal to a meaningful exchange of ideas and opinions. The group wishes to thank the ADVOCATE for inviting them to participate and wishes Suffolk a successful 75<sup>th</sup> Anniversary.

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**“. . . teaching in the evening division can be a sheer joy because of the contributions the students make.”**

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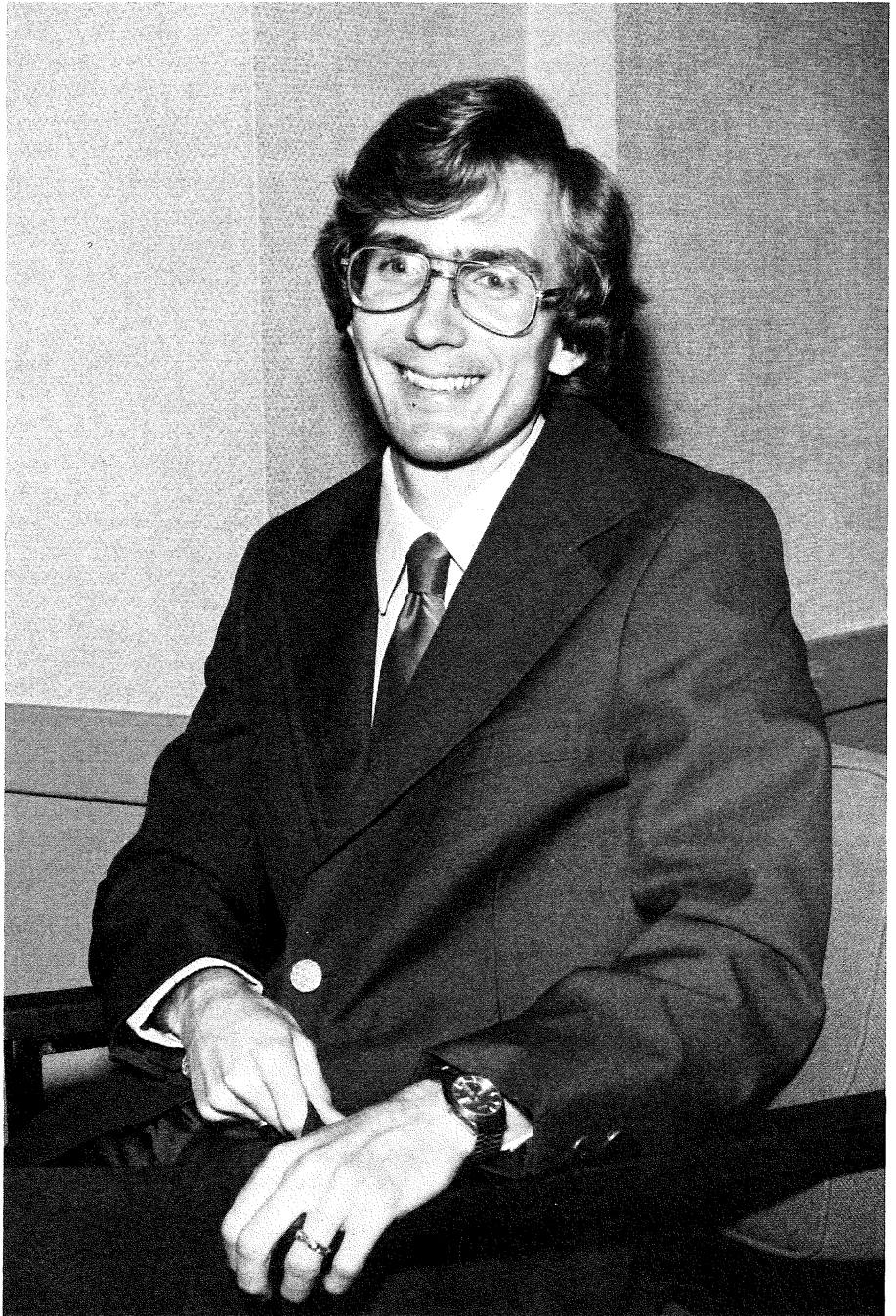
# Opportunity's Haven: The Ambiguous Heritage of Suffolk University Law School.

Suffolk University Law School celebrates during 1981 its seventy-fifth year of educational service to Boston and its people. There are today over 9000 living graduates. Operational costs have risen from sixteen thousand dollars in 1914 to over six million;<sup>1</sup> and tuition, alas, from forty-five dollars in 1906 to nearly four thousand in 1981. Despite the institution's obvious appeal, however, the precise character of its service has proved — and remains — a matter of lively controversy within the Suffolk Law School community.

In early planning for the seventy-fifth anniversary year, the motto "seventy-five years of excellence" was proposed. A critical capital funds drive — the Campaign for Excellence — was under way, and the motto seemed an appropriate method of linking the two occasions. This seemingly innocuous suggestion, however, provoked unexpected dissent. "Excellence," some charged, smacked of elitism and snobbery, which had no place in the Suffolk tradition. More appropriate, their argument ran, would be the motto "seventy-five years of opportunity." Again, dissent erupted. "Opportunity," to many, carried overtones of mediocrity and low standards. Each phrase accounted accurately for an aspect of the school's appeal; neither, however, could attract Suffolk community consensus as an expression of the institution's historic mission.

Provision of excellence and provision of opportunity clearly represent different kinds of service; there is a natural tension between them. At Suffolk University, however, polarization between advocates of the two approaches exceeds the academic norm. The institution has, in fact, long manifested a personality split which pits the ambitions of excellence-oriented Jekylls against the fears of opportunity-loving Hydes. At seventy-five, Suffolk University Law School remains a battleground of the historical forces that have shaped it, and of the constituencies produced by them.

What follows is a discussion of those forces, and how they have helped to make Suffolk University Law School what it is today.



*David L. Robbins is Associate Professor of History at Suffolk University and Chairman of the Heritage Committee. He has authored several Heritage Series publications.*

## I. The Age of Opportunity

Suffolk Law School was born in 1906 into a different America. Unquestioned, unrestricted immigration had been the central fact of American life for forty years. Twenty million people — a number equal to the entire American population in 1850 — had arrived from Europe since the Civil War; half of these had entered the country since 1890. Boston's population in 1906 was 36% foreign-born; the country's, 14%. In 1870, the figures had been 25% and 9%, respectively.

By 1906, many Americans were being forced to confront the implications. Thousands of new immigrants arrived each day. Even more disturbing, an American-born second generation increased every year in numbers and maturity, demanding full rights of participation in the society to which their mothers and fathers had come in search of opportunity.

Traditional elites circled the wagons against them. High school, then college, degrees took on unprecedented importance. Professional associations were founded, and strove to require graduate degrees for access to professions. Poorer immigrant groups were thereby excluded.

This emphasis on degrees, however, also created intense pressure for expanded educational facilities and opportunities. Institutions of higher learning were few, exclusive, and costly. New schools, therefore, began service. Many catered to poorer "native" Americans who sought degrees that would distinguish them from their immigrant competitors. Some, even more disreputable in the eyes of traditional elites, also aimed at the immigrants. Only through education, their founders argued, could the new arrivals be "Americanized," and thus controlled; a few educators even saw their institutions as instruments of economic self-help for immigrant groups.

High school graduations quadrupled between 1870 and 1906; the number of college degree recipients trebled. In the emerging field of professional education, figures were more dramatic still. This daunting growth in graduates, and in new schools from which they came, spread alarm among the professional associations that had been set up by traditional elites. The new (often evening) schools were denounced for their educational shoddiness. Their proprietors were portrayed as academic snake-oil salesmen, greedy men purveying a worthless commodity to gullible immigrants. Worse yet, charged the associations, these entrepreneurs

then turned loose the victims of their imposture on an unsuspecting community; thus the public interest, not immigrants only, suffered. As safeguards for educational "excellence," the professional associations began to develop accreditation "standards." It became an open secret that "quality" was a code word for exclusivity.

mas; and only one law professor in three taught full-time.

Agitation for "standards" came from the law schools of powerful private universities; many of these universities had strong links to traditional elites. At Harvard Law School, Dean Christopher Columbus Langdell (1870–95) introduced changes intended to make legal education

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## **“It became an open secret that ‘quality’ was a code word for exclusivity.”**

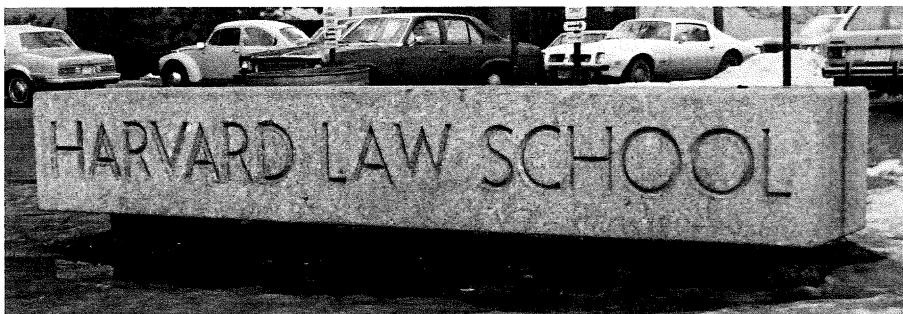
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The legal profession was no stranger to these developments. In 1870, there were 28 law schools in the country, with a total of 1600 students. Only one-quarter of those admitted to the bar were law school graduates. By 1906, ten times more law students were attending five times more schools. One-third of all law students attended 45 evening institutions, all founded since 1870. Two of three bar admissions came from law schools by 1906; bar membership, however, had risen 35% during the decade, and the number of lawyers with immigrant backgrounds had increased at twice that rate.

The American Bar Association was founded in 1878; fourteen years later, the Association created the Section of Legal Education and Admission to the Bar. In 1900, with aid and encouragement from the Section of Legal Education, the Association of American Law Schools was established as a professional association of university law school teachers. Its 35 member schools contained less than half the country's law students. Neither the ABA nor the AALS had formally articulated accreditation standards by 1906, but concern was growing. Some schools retained only two-year legal programs; less than one-third required high school diplo-

more "thorough," but which also made it more time-consuming and more costly. The old "black-letter" (lecture and memorization) approach was replaced by the "case" method, which required expensive casebooks and extensive time outside class for reading and reflection. A new three-year program added an extra year's tuition, while a nucleus of required courses increased rigor. All Harvard law professors were ordered to teach full-time, with support forthcoming from increased tuition. Finally, a college (not just a high school) degree was demanded for admission — a most exclusive policy, indeed, when less than five percent of Americans even attended college.

The Harvard approach represented a radical departure, and an implied denunciation of legal educations given at lower costs to working people by other law schools. It was little emulated before 1906. As immigration peaked in the next ten years, however, the case method was adopted by a majority of university law schools, and the rest of the Harvard package was accepted in principle by them as a model for "quality" legal education. Shortly thereafter, the professional associations followed suit.

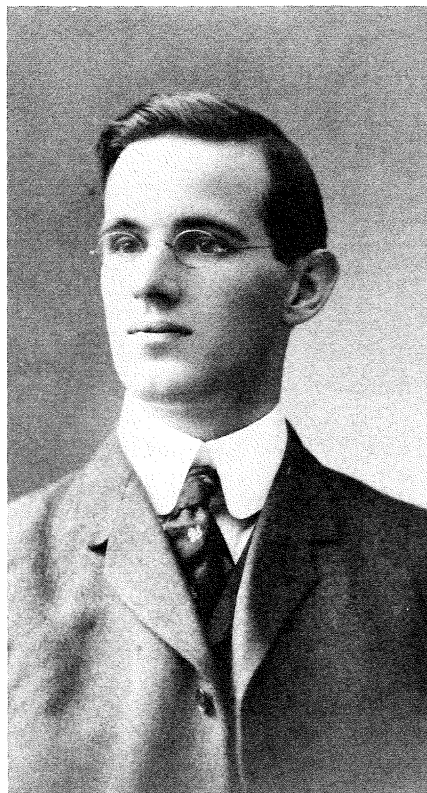




It was into this legal environment — and into this battle over “standards” of legal education — that Suffolk Law School was born. Harvard Law School, established in 1819, was for years the only law school in the Boston area. But, in 1872, as demand grew for law degrees — and during the turmoil caused by Harvard’s adoption of the case method — Boston University Law School was founded. It was located on Beacon Hill, in the heart of the city’s legal district. Both law schools flourished. Then, in 1898, the Boston YMCA proposed to found an evening law school (later Northeastern). The idea found support among Harvard’s faculty and overseers. Some among them backed the attempt to introduce immigrants to the principles and practice of the American legal system (understood in the proper Christian spirit). Others recalled 1872, and reflected that a YMCA law school, located in downtown Boston, would surely attract students away from Harvard’s upstart rival. Support from Harvard helped win from the General Court, in 1904, degree-granting powers for the YMCA school; it was the first evening law school thus distinguished in Massachusetts.

Gleason L. Archer entered Boston University Law School in the very year that the YMCA charter was issued, having attended Boston University’s College of Liberal Arts since 1902. Archer was of Yankee stock, but came from the rural poverty of the Maine frontier. He managed two years of college through part-time work and self-denial, and was allowed to attend law school only by an act of providential philanthropy by George Frost, a Boston manufacturer. Archer’s natural sympathy for the ambitious poor boy (he was a great lover of Horatio Alger’s tales), and his desire to emulate Frost’s generosity in making legal education available to those who could not obtain it by conventional means, propelled him to center stage in the maneuvering of Boston’s legal titans.

In the fall of 1906, young Archer, fresh out of B.U. Law School, founded “Archer’s Evening Law School” in his first-floor flat at 6 Alpine Street, Roxbury. Over the next three years, he associated with him an enthusiastic staff of part-time instructors — almost all of whom were recent B.U. Law graduates; they included Arthur McLean, Webster Chandler, Frederick Downes, Chesley York, and Thomas Gibb.<sup>2</sup> Archer and his associates also attracted a loyal, and growing, student body. Early graduates included Roland Brown, Bernard Killion, F. Leslie Viccaro,



Thomas Vreeland Jones, and Harry Burroughs, with one of the first, George Douglas, joining the faculty in 1910.

By the spring of 1909, the Suffolk School of Law (as it was called from 1907 on) had already twice been forced to

seek larger quarters — relocating first to Archer’s third-floor law offices at 53 Tremont Street, Boston, in September, 1907, and then, in March, 1909, to the fifth floor of the Tremont Temple. Enrollment ballooned from a complement of nine, at Archer’s initial lecture on September 19, 1906, to over a hundred (plus nine faculty members) only three years later. The confident founder began styling himself “Dean” in 1908, and in June of that year designed what is still the official law school seal. When, later that month, Suffolk’s first student<sup>3</sup> passed the bar exam (after only two years of training), the resultant clamor seemed to promise a bright future for the school; it also, however, waked the lolling giant in Cambridge.

Suffolk School of Law had enjoyed cordial relations with, and the virtual patronage of, the B.U. Law faculty since 1906. This seemed appropriate, for Archer’s evening school would, if successful, draw students away primarily from the YMCA Law School; support by B.U. Law School for Suffolk was fair turnabout for Harvard’s recent solicitude over the YMCA school’s development.

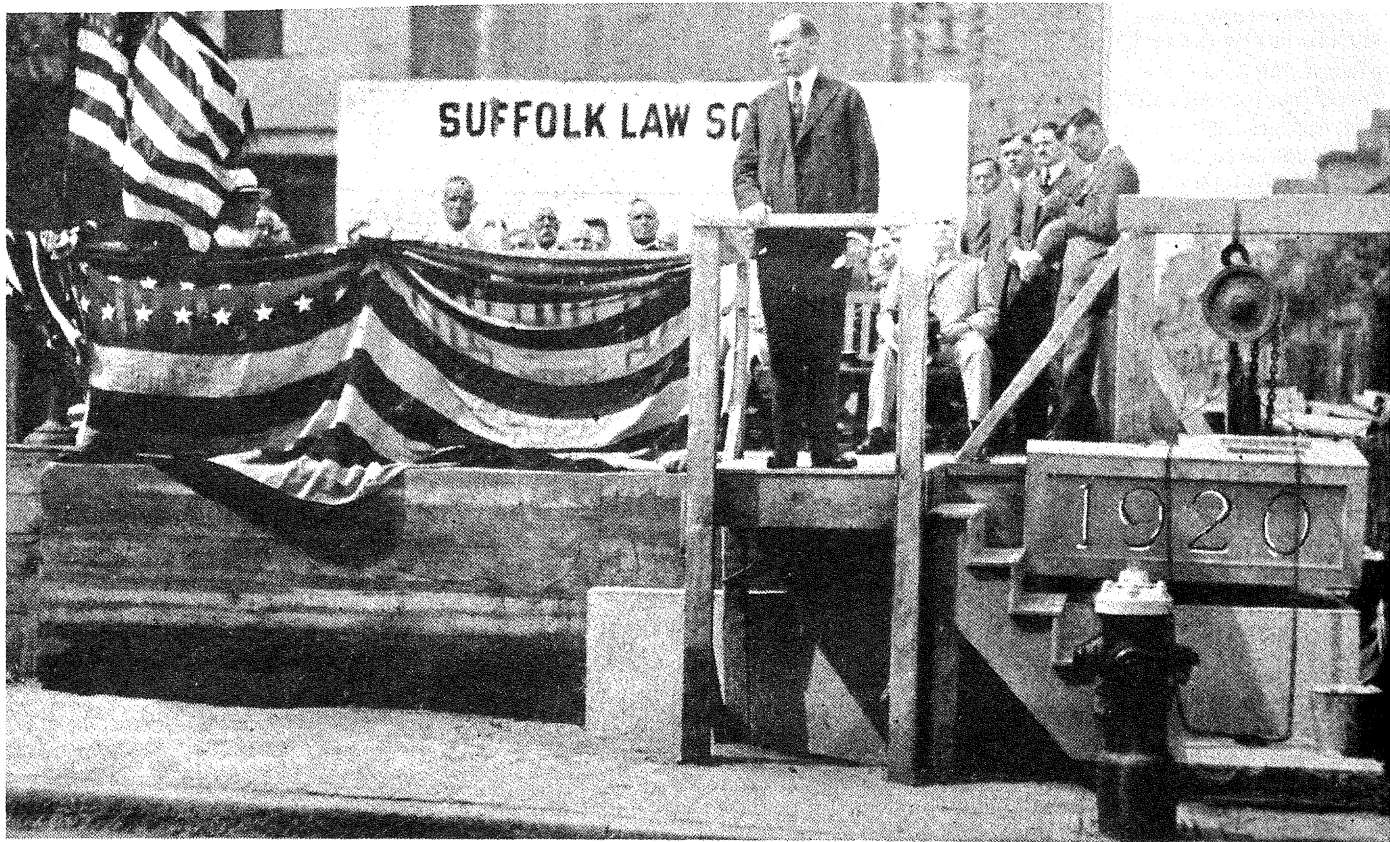
Things changed rapidly in 1909, however. Boston University’s pious Methodist trustees had it brought forcefully to their attention (some said by Harvard potentates) that survival of the Young Men’s Christian Association evening law school was being threatened by the growth of Archer’s institution. The B.U. trustees forthwith prohibited a dumbfounded law faculty from further association with the Suffolk School of Law. When Archer and his Board of Trustees petitioned the legislature in 1911 for degree-granting powers (precisely as the YMCA school had done in 1904), they found progress of their proposed legislation impeded by the combined influence of the three other schools.

This resistance sparked the fiercest educational struggle in the General Court’s history. Archer perceived the opposition

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**“When later that month, Suffolk’s first student passed the bar exam (after only two years of training), the resultant clamor seemed to promise a bright future for the school; it also, however, waked the lolling giant in Cambridge.”**

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**LAYING OF THE CORNERSTONE, AUGUST 4, 1920**  
**Hon. Calvin Coolidge in his first public address after being notified of his nomination for the office of Vice-President.**

as a conspiracy by Boston's university law schools, and their puppet, to deny educational opportunity to poorer Americans, native and immigrant. He denounced the conspirators as part of an "Educational Octopus," an arrogant "educational trust" endeavoring to suppress free competition and equality of opportunity. He also warned of the dire political and social consequences that would follow if such behavior were tolerated.

Since Suffolk's opposition seemed to center around Massachusetts Republicans, Archer carried his cause to Democratic leaders. Irish almost to a man, they were no strangers to the fight against exclusiveness and privilege. Suffolk's Chairman of the Board, Thomas J. Boynton, was a local Democratic chairman. Through his influence, General Charles Bartlett, James Vahey, and Joseph O'Connell became Trustees. Their mediation brought Martin Lomasney and Mayor James Michael Curley into the fight. After a three-year legislative battle, Archer and his

allies finally won; Suffolk Law School (as the new charter designated the institution) received degree-granting powers on March 20, 1914.

Spectacular growth followed over the next twenty years. In the August after degree-granting powers were approved, Dean Archer purchased the old Lee-Higginson mansion at 45 Mount Vernon Street. Archer's action brought Suffolk Law School to Beacon Hill, which has remained its home ever since; for the first time, the law school's academic space was neither rented nor shared.

The new building, and availability of the LLB, provided a fillip to attendance. The magnitude of the boom that followed, however, suggest other factors, as well. Suffolk Law School, like evening schools in many cities around the country, was fulfilling an important need in American society; it served many who hungered for education and its benefits, but who could not overcome the monetary, time, and/or prejudicial barriers erected by

traditional academic centers. Evening classes allowed students to retain jobs. The school was open only three nights a week; each course met only once weekly. Working men were thus given an opportunity to stay abreast of course material. A part-time faculty, and a minimal administrative staff, kept salary costs down and tuition low, while a free employment bureau (set up in 1915) helped students to find the jobs necessary for continued attendance. Gleason Archer aimed to make his law school financially accessible to any ambitious working man, of any age or background.

He was also determined that prior deficiencies in educational background should not exclude potential lawyers, as they did from so many traditional institutions. Throughout Suffolk Law School's period of explosive growth, Dean Archer pursued a policy of open admissions. There were no entrance requirements; every man was offered an opportunity to study law. Those who lacked the high

school education required to take the Massachusetts bar exam could obtain it by attending Suffolk's Summer Preparatory Department (established in 1910) during each summer of their law school career.<sup>4</sup> Clearly, problems could arise from this order of educational achievement, and there was, understandably, a high attrition rate among Archer's students. Only about 30% of those entering went on to graduate; but many impecunious young men who might otherwise have been denied access to the legal profession found their way into that 30%. In pursuit of that goal, they flocked to Suffolk Law School.

The growth of Archer's school also owed something to the Dean's formidable skills as a promoter; he had a knack for finding the limelight. Scholarships were rarely granted to students; tuition was the sole source from which expenditures could be covered. However, when scholarships were given, Archer made the most of them. Some went to compensate students for handling duties (such as running the Library) that could not be absorbed by the tiny staff of full-time administrators. Others, though, were used by the Dean to generate publicity for the school. Two scholarships, for example, were awarded in 1909 to the winners of a popular vote conducted on official ballots printed in the *Boston Traveler* during a two-month period; the excitement increased both *Traveler* sales and Suffolk applications. One of the recipients was immigrant newsboy Harry Borofsky (afterward Burroughs), who went on to become a well-known philanthropist, and a benefactor of the school.

Archer even made advertising capital of the rare instances of exclusion from his law school. At the closing exercises on May 18, 1908, Dean Archer announced that although women (none of whom had yet been admitted to the school) might be the intellectual equals of men, he would not have any of them in his classrooms because of the flirtation that would inevitably arise. Several newspapers picked up the story, which outraged Boston feminists and women's suffragists. A battle in the letters columns of the local press ensued, which dragged (as Archer knew it would) the then-obscure name of Suffolk repeatedly into the popular consciousness. Attendance increased, and, not incidentally, the way was paved for foundation (later in 1908) of Portia Law School — open only to female students, and run by Archer's law partner, Arthur W.

McLean. Many years later, Portia (by then coeducational) was to become the New England School of Law. Archer, for his part, remained true to his "convictions" through three decades. Women were formally barred from Suffolk Law School before 1937; and from 1925 until that date, the Dean's catalogue prominently billed Suffolk Law as "A Man's School."

Suffolk Law School's attendance mushroomed from 135 in 1914 to a maximum of over 2600 in 1927. Typically, half the students were Irish in background — of immigrant stock, but second or (more commonly) third generation Americans. Another quarter was composed of more recent immigrants, mainly East European Jews and Italians; some of these students were newly arrived in this country, but the second generation predominated. Poor Yankees (from English or Scottish stock, long resident in New England) constituted the final quarter. There was black representation in Archer's law school from early in its history; the first confirmed black graduate<sup>5</sup> received his degree in 1915. In general, blacks at Suffolk totaled approximately 2% of the student body, a percentage equal to the black proportion of Boston's population. Such black percentage equivalence was very rare at institutions of higher learning during this period.

Boston proper was home for more Suffolk Law School students than any other community; contiguous cities like Roxbury, Dorchester, Somerville, Cambridge, and South Boston provided the next largest delegations. Then came cities on the north shore or north of Boston — Lynn, Lowell, Lawrence — which were linked to the Hub by an effective rail network. South shore communities were generally under-represented, at least partially due to deficiencies in public transportation. Archer's law school served a primarily urban-based, lower middle or working class constituency — hard-working individuals seeking to realize the American dream.

Although many of the ambitious workmen who attended Suffolk went on to exemplary legal careers, many others never intended to do so. They came to Archer's school not to become legal professionals, but to acquaint themselves with certain areas of law for a career in business. Such men often remained students only until they had satisfied their needs, or curiosity, and then dropped out — thereby swelling the attrition rate to

a misleading level. Those who did remain contributed further to the bewildering multiplicity of goals and educational backgrounds that characterized Gleason Archer's "haven of opportunity."<sup>6</sup>

Because of the school's location, and its provision of opportunities for West End residents, West End ward boss Martin Lomasney evinced, until his death in 1933, a paternal solicitude for the institution's well-being. In a ward run by Irish politicians, who depended on a population of Jewish and Italian immigrants for election, Suffolk Law School constituted an almost universal source of hope. The school's sociology mirrored that of the ward, and West End Democratic leaders worked diligently to protect such an institution from outside "quality control" which might destroy it or alter its symbiosis with the West End community. The large Irish representation at Suffolk (and consequent Irish domination of class elections) also guaranteed the continuing loyalty of Lomasney's Irish colleagues in the Democratic leadership at the city and state level. In 1929, there were 29 Suffolk alumni in the Massachusetts legislature. F. Leslie Viccaro became, during the same year, the first Suffolk graduate appointed to the bench. Three years later, Frank J. Donahue retired as Democratic State Chairman and received an appointment to the Superior Court of the Commonwealth; he was the first alumnus to serve in either capacity. Mayor Curley and his fellow Democrats took care of Archer's school as it took care of them and their constituents.

There were so many new students for Suffolk Law School to accommodate, however, that certain adjustments became necessary. An Annex added to 45 Mount Vernon Street in 1915 quickly became overcrowded, so in 1920 construction began on the building at 20 Derne Street that today is called the Archer Building. Within a year, that structure was opened to classes, and 45 Mount Vernon Street was sold to Portia Law School. The Mount Vernon Street building remained in Portia's hands for fifty years; it was reacquired by Suffolk University in 1972, when the New England School of Law (formerly Portia) moved to Newbury Street.

By 1923, even the Derne Street building was proving inadequate. It was extended northward that fall, along Temple Street; the Annex, housing four 400-seat lecture halls, was opened in March, 1924. The

introduction of daytime class sessions<sup>7</sup> (like their evening counterparts, part-time and three days a week) the following September sufficiently spread the steadily increasing student load that the expanded facilities proved adequate for over a decade.

Physical facilities were not the only resource taxed by the rising tide of enrollments. The law school faculty increased from nine to thirty-four between 1909 and 1930, but the 377% growth was dwarfed by a 2300% student increase over the same period. In the face of such numbers, moot court exercises were abandoned in 1914, and replaced with a lecture course on "Practice and Pleading."<sup>8</sup>

The Socratic "case" method had never been viewed by Dean Archer as suitable unmodified for the instruction of part-time students. He was convinced that the time and energy constraints imposed by jobs would not permit them to "reinvent the wheel" in each legal area as the case method required; for his students, Archer believed the most efficient instructional method was the old "black-letter" approach, based on lectures and texts which reduced law to a set of simple rules.<sup>9</sup> If he had thoughts about selectively incorporating Socratic elements, they were rendered moot by the dramatic increase in class sizes after 1914. Thus, as the case method was becoming ubiquitous in university law schools during the 1920s, black-letter law was entrenching itself at Suffolk Law School.

Classes had grown so large and unruly by 1921 that Archer was forced to take remedial measures. His numerous "rookie" teachers had trouble maintaining order, so class monitors were engaged from the Boston University School of Theology. These "fighting parsons" reported serious offenders directly to the Dean. To monitor the monitors, an intercom system was installed that allowed Archer, while seated in his office, to "visit" any lecture hall.

Archer's full-time administrative staff increased from one (himself) in 1910 to six by 1930. The efficient, close-knit band of Irish Catholics under the Yankee Dean was headed by Archer's indispensable secretary and girl Friday Catherine C. "Kay" Caraher; it also included Caraher's sister Margaret "Peg" Gillespie and the legendary Dorothy McNamara. The number of student scholarships for administrative assistance was steadily increased,

and more and more Archer family members were put to work. What allowed the administration to avoid chaos, however, was not its increasing numbers, which were constantly in danger of being overwhelmed by the surge of new enrollments; it was a unique system developed jointly by Dean Archer and Kay Caraher. Under the system, class admission "tickets" were issued to each student upon payment of his quarterly (or, sometimes, weekly) tuition. These coupons would then be signed by the user and presented to a monitor when entering a class. The "tickets" were returned by the monitors to the administrative offices, where tuition payment and class attendance could then be computed simultaneously.

The retention of effective personal attention to students under these circumstances posed a very difficult problem for Dean Archer. His solution was the invention of the "Suffolk method." In 1915, the Department of Problems and Quizzes (later the Research and Review Department) was created, and Dean Archer's brother Hiram was appointed its head. The Department's function was to prepare, correct, and grade all written exercises used to supplement the lectures at Suffolk Law School. These exercises were of three kinds: homework problems, upon which written legal opinions were required; monthly tests in all subjects; and examinations in all subjects at the end of each semester. Each exercise was carefully graded by the Research and Review Department, not only for content, but — since difficulties with written (and, occasionally, spoken) English were not uncommon at Suffolk — for grammar and spelling as well. The problems, tests, and final examinations were then returned to students, along with an official answer for comparison purposes. This approach gave every student regular drill in both writing and legal analysis.

Director Hiram Archer worked full-time at his job; in this sense, he was the first full-timer on the instructional staff at the law school. His part-time assistants multiplied as enrollment grew; by 1927, their function had been taken by three new full-timers. One of these was Kenneth Williams, cousin to the Archers and, save Kay Caraher, Gleason Archer's most trusted assistant. In 1929, Williams was also appointed Resident Counsellor to first-year students, in which capacity his major function was to provide intensive



assistance to those whose written work was seriously deficient.

The exertions of the Research and Review Department, combined with regular in-class review, expository pedagogy, and Gleason Archer's black-letter legal texts, constituted the "Suffolk method." Through it, Suffolk Law School sought to acculturate its non-traditional clientele to the world of legal thought and practice. Since bar examinations emphasized the memorization of black-letter law at the expense of inductive reasoning, the "method" allowed a larger number (if not a higher percentage) of students from Suffolk to pass the Massachusetts bar exam in the 1920's than from any other Boston-area school.



As prosperity came to Suffolk Law School, optimistic attempts were made to add activities typical of more traditional institutions. Some flourished briefly at first, but even these soon died or became dormant. At a workingman's school, few had extra time to donate; and non-involvement during student days built neither durable student institutions nor a strong sense of alumni identification. An Alumni Association was founded in 1913, then again in 1920, 1925, and 1927. The 1927 effort even included purchase by Dean Archer of an Alumni Clubhouse at 73 Hancock Street, appointment of Archer's close friend and associate Alden Cleveland as Alumni Secretary, and publication of the *Suffolk Alumni News*. By the mid-1930s, however, the *Alumni News* had vanished; and in 1939 the Alumni Clubhouse (where Alden Cleveland had been resident caretaker since 1927) was vacated.

Other organizational efforts also succumbed to similar forces. A Debating Society, originally founded in 1907, was refounded in 1916; it survived less than a year. In 1910, the school's first newspaper, the *Suffolk Law Student*, published only three issues before dissolving. The *Suffolk Law School Register* was the most successful of the lot; a student magazine, it first appeared in October, 1915, and continued publication until 1921. Like the others, however, it was finally killed by lack of student time. Even ambitious men in search of opportunity had physical limits.

At the center of all this activity, like some sort of tireless spider, was Gleason L. Archer. The major responsibilities at Suffolk Law School were his, and he made few efforts to share them. A three-man Advisory Council had been set up by Archer in 1908; when the school was incorporated as a charitable educational institution three years later, a seven-man Board of Trustees was established. Neither body seriously diluted Archer's authority. The Board regularly elected him its Treasurer; in this capacity, he wielded financial control over the institution of which he was also Dean. The combination of duties exhausted Archer, but it also left him with a free hand in school affairs. He served as Dean until 1942 and Treasurer until 1946; his close friend Thomas J. Boynton chaired the Board of Trustees from 1911 until his death in 1945. As long as the pairing lasted,

Suffolk was Gleason Archer's school.

The Dean's duties had grown so demanding by 1914 that Archer became literally a full-time resident of the school; he mortgaged his home to purchase the new school location at 45 Mount Vernon Street, and moved with his family to the top floor of the building. During the seven years they lived there, Dean Archer worked at the school from nine A.M. until 9:30 P.M., six days a week. He taught, administered, lobbied, kept accounts, and acted as press agent. He wrote feverishly to provide the school with textbooks. Working long after midnight, he averaged one law book per year between 1916 and 1930, until most Suffolk Law School courses were equipped with "Archer texts." The Dean personally directed building of the Annex in 1915, and when that proved inadequate, plunged into an expansion campaign. For it, Archer solicited funds, negotiated loans, engaged builders, fought strikers, and again supervised construction. His house was remortgaged, and his capital was invested in the undertaking. Personal borrowing was backed with added insurance on his life. The Dean was even forced, by the scope of his exertions, to give up teaching.<sup>10</sup> When Archer moved with his family in 1921 to the third story of the new structure on Deme Street, he had pledged himself for every aspect of the building.

The Dean, his wife Elizabeth, and their three children retained the top floor apartment until 1937. From the "imperial suite," as he called it, Archer supervised school affairs twenty-four hours a day. Mrs. Archer's father, the Reverend Henry S. Snyder, had been appointed Assistant Treasurer and Superintendent at the school in 1914; he and his wife lived with the Archers from then on. Their son, H. Rossiter Snyder, also helped in the treasurer's office when the need arose. Gleason's brother Hiram taught at the school as early as September, 1907; after becoming Director of the Review Department, he was elected a Trustee in 1930, and actively served Suffolk until his death in 1966. The Dean's younger son, Gleason, Jr., also became a Trustee in 1939; his sister Marian managed the Bookstore after 1933. Her husband, Paul MacDonald, headed the Placement Bureau and went on to become Bursar. Julia Archer, daughter of the Dean's eldest brother, served on the office staff, while the Dean's younger



brother Harold was brought from Maine to work at the school in 1926; he preceded Marian as Bookstore Manager.

Upon graduation from the law school in 1927, Kenneth Williams joined his cousin Hiram Archer in the Research and Review Department. Two other Williams brothers also graduated from Suffolk; while in attendance, Leonard served as Recorder, and Gerard became Assistant Engineer, then Librarian. Roger Stinchfield, who preceded Leonard as Recorder, followed his cousin Kenneth Williams's footsteps; shortly after graduation in 1930, Stinchfield was appointed to the faculty. Nepotism there was, but it kept costs down and produced a high degree of administrative cohesion. Suffolk Law School's remarkable success by 1930 was, at least in part, the achievement of Dean Archer's family.

With an enrollment cresting at 2604, Suffolk was the largest law school in the world between 1924 and 1930; Harvard Law, by contrast, had 1500 students. The school and its Dean thus stood in the vanguard of a movement that was democratizing the country, assimilating immigrant families into the mainstream of American life, and opening new opportunities at all educational levels. Immigration quotas had been imposed in 1920, and that had contributed to a drop in the foreign-born percentage in the American population from 14% in 1910 to 12% in 1930. However, 70% of Boston's population in 1930 was either foreign-born or belonged to the first generation born in this country. While the immigrant tide had been stemmed, the ambitious second generation was clearly producing an enormous impact. Even when they did not enter schools themselves, they drove others into them. High school attendance rose from 10% of the high school age group in 1910 to 50% in 1930; in Europe, the comparable figure remained at 10% throughout the 1930s. Law school enrollments more than doubled, peaking in 1927 at 44,341 — a figure that was not reached again until 1947. Not surprisingly, the number of total bar admissions rose nearly 60% between 1920 and 1930. The number of foreign-born lawyers, however, increased even more rapidly, rising by almost 80% over the same period.

Such visible change in the structure of American education and society inevitably created a backlash. Xenophobia and the Red Scare went hand in hand with a developing professionalism in calling for higher "standards" in professional education as "antibodies" against foreign or radical infection." When the American Bar Association proposed in 1921 to require two years of college for admission to the bar, the measure seemed to be aimed directly at the part-time law schools and their constituencies.<sup>12</sup>

Archer was outraged. He viewed the action as an attempt to exclude workingmen from law study, to make law a "millionaires' racket." After all, less than ten percent of Americans in 1921 could afford the privilege of attending college. Behind the proposal, he saw the hand of the "educational trust." The same sinister interests that had opposed Suffolk's charter in 1912 were now moving, he believed, against all schools of Suffolk's type. Tuition costs already excluded newcomers from the universities which

formed the "Educational Octopus." The monopolists, Archer argued, were now out to close the legal profession to all except graduates of their chosen universities — just as, in 1910, they had closed the medical profession. Harvard Law School and Boston University Law School were singled out as centers of militant monopolism. The Association of American Law Schools was denounced as a pressure group for the exclusive "University" law schools; it had been AALS activity which pushed the new "standard" through the ABA Section of Legal Education.

Suffolk's Dean led opposition to the "college monopoly." For the next ten years, Archer criss-crossed the country. He

attended ABA conventions and addressed state bar associations; he spoke to groups of lawyers, to law educators, and to the general public. He pleaded his case in spirited newspaper columns and compelling radio broadcasts. He lobbied in legislatures and cooperated with sympathetic legislators, like Martin Lomasney in Massachusetts. Archer's defiance of the "educational trust" even found material expression in the giant electric sign he had erected atop the Derne Street building in 1924. "Suffolk Law School," it read, and it was visible as far away as Cambridge — where, some said, it drove the administrators of Harvard Law School to distraction.<sup>13</sup>



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Archer's enemies labeled him a "reactionary" for his rejection of entrance requirements and the case method; they sought to discredit him by denouncing Suffolk as a "proprietary school" dedicated only to maximal profits (in fact, the Dean had deeded the school to his Trustees on incorporation in 1911). He took the abuse, exposed the distortions, and fought on. To counterbalance the AALS, Archer organized in 1922 the National Association of Day and Evening Law Schools. For a decade after 1921, the Dean and his allies virtually neutralized ABA efforts to have the two-year college requirement adopted by state bar associations or bar examiners. Gleason L. Archer was, by 1932, a nationally recognized spokesman for "equality of opportunity," and Suffolk, the flagship for part-time law schools. The crusade, however, rendered permanent the Dean's hostility toward the ABA and AALS; it also engendered in many affiliated with his institution a long-lived skepticism about the motives that inspired forceful advocates of "excellence" — whether sought through accrediting bodies or through self-imposed "standards."

## II. The Age of Transition

Gleason Archer's suspicion of outside accrediting agencies did not imply disinclination on his part to encourage quality education in his own school. The Dean distrusted an excessive emphasis on "excellence" in an age of exclusiveness, but he feared irremediable mediocrity more. As early as 1913, prizes were being awarded for student academic achievement<sup>14</sup> during the prosperity of the 1920s, the number of these awards steadily increased, and scholarship funds were attached to them. Archer's original faculty of Boston University graduates added, and eventually gave way to, able Suffolk Law School alumni: George Douglas, Karl Baker, Joseph Parks, Leo Wyman, John L. Hurley, William Henchey, George Spillane, Arthur Getchell, Harry Bloomberg, Thomas Finnegan, and Kenneth Williams. Together, these eleven alumni professors compiled over 250 years of service to Suffolk Law School, and they formed the nucleus of Archer's faculty in the 1920s and 1930s.<sup>15</sup>

Their skill helped to attract, and trained, a host of very talented students, including Frank J. Donahue, Dwight Allison, Garrett Byrne, John E. Fenton, John B. Hynes, Walter H. McLaughlin, Paul Smith,

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## "The Dean distrusted an excessive emphasis on 'excellence' in an age of exclusiveness, but he feared irremediable mediocrity more."

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and John F. Collins.<sup>16</sup> Able as the faculty was, however, it was still a faculty of part-timers — with the consequent economic advantages to the administration and to the students. As late as 1940, the Dean's salary still exceeded by several thousand dollars the combined stipends of the entire law school faculty.

During the enrollment flood of the 1920s, Dean Archer could only struggle from year to year simply to keep the quality of legal education offered at his school from collapsing entirely under the weight of overwhelming numbers. As enrollments subsided, however, under the influence of immigration curbs and economic stagnation, Archer gained the time necessary to concentrate on improving educational standards at Suffolk. He proceeded in this direction of his own volition, but was provided with an additional incentive for immediate change by growing competition for a declining student market, and by his sense that he could not much longer — on the matter of statutory "standards" demanded by the ABA and the AALS — hold back the waves.<sup>17</sup>

A Resident Staff (the Research and Review Department's full-timers), and a Resident Counsellor for first-year students (Kenneth Williams), were established in 1929; this was a first step. After a twenty-year battle against the case method, dean Archer was also coming to appreciate certain contributions which that approach could make to legal education. Although he by no means abandoned his insistence on the primacy of black-letter law for his students, he began in 1929 to write a series of simplified casebooks to supplement his texts. Suffolk Law School classes still met only three days (and nights) a week, but, in 1932, class length was increased from 1½ to 2 hours — in lieu of a proposed increase in program length from four years (which it had been since 1910) to five. Eight years later, a period was formally set aside in each class for discussion work, including cases; and, in 1941, classes (still entirely part-time)

were extended from three days a week to four.

Archer required, from 1931 on, a completed high school education of all entering students. This he justified by referring to the massive growth in access to free high schools nationwide since 1906; but it represented a definite shift in policy. At the same time, a 20% tuition discount was offered to any law student with a college degree. The Summer Preparatory Department was abolished in 1931, and Dean Archer purchased the services of — and provided a building at 59 Hancock Street for — the Wheeler Preparatory School, to provide aspiring Suffolk students with a high school background prior to entry. In the space thus vacated, the first law summer session (remedial, like all such pre-war sessions at Suffolk) was held in 1932.

The danger of a "college monopoly" (statutory requirement of the two years of college training recommended by the ABA and AALS for bar admission) loomed large on the horizon, however, as a threat both to Archer's traditional constituency and to his school. As early as August, 1927, Suffolk's Dean had advocated the ubiquitous foundation of low-tuition, part-time colleges as the only way to prevent such "standards" from excluding all but the well-to-do from the legal profession.<sup>18</sup> Even as he negotiated with the Wheeler Preparatory School in 1931, Archer was contemplating creation of "a great evening University"<sup>19</sup> which would include such a college — thereby providing a "feeder" institution for his law school, whether or not "college monopoly" rules were adopted by public authorities.

By June, 1934, such adoption seemed imminent. The Preparatory School building at 59 Hancock Street was converted during the summer for use by the Suffolk College of Liberal Arts which opened in September, 1934. In conformity with the regulations established in June, 1934, Suffolk Law School adopted entrance requirements in 1938 calling for comple-

tion of at least two years of college work. A combined degree (BA/LLB) program, allowing Suffolk College upperclassmen to satisfy their last year of BA requirements with Suffolk Law School credits, was also instituted. Students thus entered the law school with higher "standards" of background training, while Archer's low-tuition, part-time College kept access to legal training open for many from Suffolk's historic constituency.

The new College was co-educational; in 1937, the Law School formally opened its doors to women as well. Their way was cleared by Archer's daughter Marian, who entered Suffolk Law School in September, 1933, and graduated in June, 1937. Her performance so impressed her father that he agreed to extend provisions for co-education to the law school. A College of Journalism was founded in 1936, and a College of Business Administration, in 1937; like the College of Liberal Arts, they were dwarfed in student population by the law school. As part of an attempt to create a "collegiate" atmosphere, a program of extra-curricular activities, including sports (tennis, men's and women's basketball), debate and even a student council, was established. To compensate for the meager number of participants available from the Colleges, law students were actively encouraged to join the program. Their numbers rapidly came to predominate, and, throughout the pre-war period, the extra-curricular program was dominated by law students. Thus, some activities — which Archer had for years tried, unsuccessfully, to cultivate in the law school — flourished, temporarily, when hijacked from the Colleges.

Suffolk's first full-time Librarian was also shared with the Colleges. A lending library had been added to the Suffolk School of Law's reserve collection in 1909, when the school moved from 53 Tremont Street to the Tremont Temple. Both collections had travelled to 45 Mount Vernon Street, and had been settled in 1921 on the second-floor Derne Street front of the 20 Derne Street building. That law library was tended by part-time student help; there was no full-time Librarian until 1936, when Esther Newsome joined the Dean's staff. At first, she was in charge only of the College library at 59 Hancock Street, but, in 1937 — when the two collections were combined after reconstruction of the 20 Derne Street building — she became University Librarian. Under her supervision, the law

collection grew from seven thousand volumes to over ten thousand by 1941. The new Library, located where the College library is currently situated, had a capacity of forty-five thousand books and almost 300 readers.

Part of the law collection's growth under Miss Newsome was designed to serve the new LLM program. Since November, 1927, the Suffolk Law Alumni Association had offered, at its 73 Hancock Street Clubhouse, post-graduate lecture courses on various subjects. The status of credit granted for such courses was dubious, however, because Suffolk Law School was not authorized to grant graduate degrees. To regularize matters, Archer petitioned the legislature in February, 1935, for the right to award the LLM degree.<sup>20</sup> Foundation of the Graduate School of Law in September, 1935, resulted from the General Court's favorable review of Archer's petition. The new school never attracted more than a hundred students into its two-year program, but, in the Dean's eyes, it represented another step toward "respectability".

This concern for "respectability" did not come entirely from within the Dean. The Depression halved Law School attendance, and created financial pressures. Concern mounted among Archer's associates and alumni about the fate — and even the character — of a law school already targeted for denunciation by the ABA. Pressure for detente with the Bar Association, and for greater conformity with its recommended policies and practices, strengthened as the school's financial position weakened.

Dean Archer was convinced that future prosperity for Suffolk lay with development of the Colleges. The two-year college requirement, he said, would (at least temporarily) reduce severely the pool from which the Law School could draw; therefore, both Law School attendance and revenue could be expected to drop steadily for the foreseeable future. Under these circumstances, he asserted, to stand pat with the Law School was to die. The Colleges could both continue to provide operating revenue from Suffolk's high school educated constituency, and provide entrants for the Law School. Develop the Colleges energetically; put the Law School temporarily on hold — that was Gleason Archer's prescription. On this basis, he committed the school to an unorthodox policy of energetic expansion in the midst of a Depression.

The Law School and the Colleges were chartered as Suffolk University on April 29, 1937; on the following day, Dean Archer also became President Archer. The Main Building at 20 Derne Street was then expanded from three stories to five, and all academic units (including the Law Alumni Association) were transferred there. As part of the effort, the Dean even gave up the apartments that he had maintained at the school since 1914. The new five-story structure was dedicated as the "University Building" in February, 1938 — a designation it retained until 1971, when it was renamed to honor Gleason and Hiram Archer. Through it all, Gleason Archer worked unswervingly to build up the Colleges — all the while retaining his title as Dean of the Law School.

Hiram Archer became his brother's severest critic. From the early 1930s onward, he tirelessly lobbied trustees, alumni, faculty, and even students — attempting to stir disaffection over the expansionist policy, the College idea, and the maverick status of Suffolk Law School. Hiram Archer found a kindred spirit in one of the school's most influential alumni, Frank J. Donahue, recently appointed to the Superior Court bench. When the 1937 charter raised the number of Trustees from seven to eighteen, they saw their opportunity. New membership undermined the Board's docility; under Hiram's guidance, his brother's management encountered unprecedented scrutiny, which became more insistent as conditions deteriorated.

President Archer managed to carry forward his development of the Colleges until the outbreak of war; but, in order to do so, he had to compromise more and more with the dissidents — who wanted to standardize Suffolk legal education with that given at "quality" law schools, and who saw normalization of relations with the ABA (and eventual ABA accreditation) as vital. The Dean's statements on the case method became steadily more measured, and his rejection of ABA accreditation standards less and less strident. In the 1940 Law School catalogue, he even went so far as to claim that — except for its insufficiency of full-time faculty members — Suffolk Law School satisfied all ABA accreditation requirements.<sup>21</sup>

Dean Archer's progress toward accreditation, however, seemed too slow to an increasing number of Trustees. Archer, on



his side, could not seem to convince himself of the ABA's good faith, and, based on long-standing antagonism, ABA officials shared his distrust. Many Board members viewed the Law School as the nucleus of the University, and, as financial conditions worsened, they became increasingly reluctant to follow President Archer in diverting energy (and money) toward the Colleges. Each election after 1941 brought a new Law School advocate to the Board; in 1945, Judge Donahue himself became a Trustee.

Expansion during the Depression was a bold step; when war followed, the University was left with no income to service its mortgage. Archer, as Treasurer, had built no endowment to cover such dislocations. By 1942, University finances — and the Law School with them — were facing a serious crisis. To save his authority as President and Treasurer, Gleason Archer capitulated to demands by Law School adherents on and off the Board: he resigned as Dean of the Law School. In September, 1942, he was replaced by Frank L. Simpson. The President and the Board both approved of Simpson's appointment, and both also agreed on his mandate to obtain ABA accreditation for Suffolk University Law School.

Frank Simpson was Archer's old friend and contemporary; he was a graduate of Boston University Law School, and he began a thirty-seven year teaching career there during Gleason Archer's last year as a student. The new Dean came to Suffolk as a critic of the case method, but he very quickly fell under the influence of Hiram Archer and Frank Donahue. With their advice and cooperation, Simpson had carried out a revolution by 1948.

Suffolk became, in September, 1943, a full-time day law school.<sup>22</sup> A full-time faculty of four was established; it included Hiram Archer, while adding Raymond T. Parke and Dean Simpson's son Donald, a B.U. Law alumnus like his father. The school's first female instructor (Mary Frances Pray, a Portia graduate with an LLM from Suffolk) was also hired.<sup>23</sup> Moot court work was reestablished after an absence of thirty years; an office apprenticeship course, directed by Pray, was begun, and an office laboratory was set up. Seminars were introduced, while fundamental courses were lengthened by a semester to promote collateral reading and reflection. Monitors and class admission tickets were phased out. A full-fledged law



summer session displaced its remedial predecessor. This new summer program offered Suffolk Law School's first elective courses since 1915; they constituted less than 20% of any student's program, but even this provided a marked contrast to Dean Archer's compulsory curriculum. The Research and Review Department was abolished; orthodox casebooks replaced

the Archer texts; and, by the spring of 1946, the old Suffolk Law School "system" had been completely demolished.

The former Dean was shocked and outraged. He was already deeply embroiled with the Trustees over the University's desperate post-war financial state, and over proposals by Board members to retrench

financially by abolishing the Colleges. In President Archer's eyes, this was to permit Dean Simpson's rebellious Law School to survive by devouring its children, and he would not stand for it. The President launched an all-out offensive to save the Colleges, and twice asked the Board to restore "order" in the Law School by removing Frank Simpson from the Deanship. Archer's candidate for the job was Kenneth B. Williams — his cousin, and a man of twenty years' experience with the Suffolk "system." The embattled founder managed to prevent dissolution of the Colleges, but the Board of Trustees (now headed by Judge Donahue) rewarded Archer's temerity by ousting him as Treasurer and rejecting the Williams nomination.

Two years of acrimony and litigation followed, with partisan politics and personal enmity sharpening the internecine strife. Throughout the classic confrontation, Archer countered Trustee claims that uncompromising devotion to opportunity condemned the school to mediocrity, by reiterating his well-known equation of "standards" with exclusiveness. Finally, in August, 1948, a tearful Gleason Archer ended his connection with the University. In the struggle's wake, however, the Suffolk community looked to the future with an understandable ambivalence toward the victorious insurgents' commitment to accreditation and "excellence." This ambivalence persisted, in the Law School at least, well into the next decade.

Many of the school's new masters were Irish, Catholic — and alumni;<sup>24</sup> they presented a striking contrast to the small band of Yankees who constituted Dean Archer's Board of Trustees during Suffolk's first thirty years. Archer and his Trustees had maintained (outside the office staff) a predominantly Yankee administration, staffed primarily by the Dean's relatives and his "Maine mafia" of part-time student helpers; the student body, on the other hand, was more than half Irish Catholics. Now, the inmates had taken over the asylum.

At their head, sat Judge Frank J. Donahue. He served as Chairman of the Board from 1946 until 1948; occupied for twenty years after 1949 the pivotal position of University Treasurer; chaired the Law School Committee of the Board over four decades, ending in 1975; and became the leading organizer of the Law School alumni, earning in the process the

nickname "Mr. Suffolk." When Land Court Judge John E. Fenton, Donahue's ultimate successor, was elected a Trustee in 1949, the Board was already taking on the configuration which it was to maintain for the next two decades: it was becoming a body dominated by judges, and filled with lawyers anxious to please them.<sup>25</sup>

From his position of Olympian authority, Judge Donahue attempted to restore solvency after the war-time financial debacle. He scrutinized every area of University expenditure, retaining final authority even over the purchase of library books. From Donahue, however, came the support which the "baleful, autocratic" Simpson<sup>26</sup> needed to "standardize" the Law School with ABA accreditation requirements.

An Endowment Fund was incorporated in 1950. The Library's law collection was doubled in size by 1953. Scholarships also doubled between 1948 and 1951. Extracurricular options for law students narrowed considerably from pre-war days, as after 1946 the revitalized Colleges reclaimed — and barred law students from — most student activities programs. In an attempt to fill the void, Suffolk's first law fraternity — Wig and Robe — was founded in 1948. Thomas Reed Powell, the aged but nationally acclaimed constitutional scholar, and John L. Hurley, an advisor to the ABA Section of Legal Education, were added to the full-time faculty. In 1948, Dean Simpson also added John F. X. O'Brien to his faculty; O'Brien was to remain at the Law School until his retirement in 1977.<sup>27</sup>

Concern over potential exclusiveness, however, was steadily eroded as the social and educational opportunities of the G.I.

Bill of Rights manifested themselves after 1948. All across the country, law school admissions soared; enrollment figures between 1947 and 1950 surpassed even those of the late 1920s, exceeding fifty thousand yearly. Higher "standards" at Suffolk meant higher tuitions; but, with the help of G.I. Bill funds, the Law School was able to retain portions of all its traditional constituencies.

Attendance by 1949, even if it was only a quarter that of 1927, had increased ten-fold since the war-time nadir of sixty. The pre-war pattern of male predominance continued; now, however, most were veterans. Women constituted only 1% of the Law School's enrollment. More amazingly, the distribution of ethnic backgrounds remained almost identical to that of 1925 — an extraordinary circumstance, given that the foreign-born proportion of the American population had fallen from 12% in 1930 to only 7% in 1950. At Suffolk, Irish students still predominated, followed by Yankees, Jews, and Italians. Nor had the towns from which the school drew its enrollment changed substantially since the 1920s. It was Boston proper and the inner ring of contiguous suburbs that continued to provide the bulk of Suffolk's law students — at a time when shifts away from such communities were increasingly common. Three times more Suffolk Law School entrants came from the Suffolk Colleges than from any other undergraduate institution; and, despite the two-year college requirement for admission, only 25% of all entering law students had completed their college education.

There was no paucity of good students: Henry Chmielinski, Jr., Martin Loughlin, Lawrence O'Donnell, Keesler Montgo-

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**“Now the inmates had taken over the asylum.”**

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mery, Lawrence Cameron, and David Saliba all attended during the Frank Simpson era.<sup>28</sup> However, when Dean Simpson retired in June, 1952, all of his “standardizing” reforms had produced much less dramatic change in the Law School than many had hoped — or feared. In one highly visible area, however, Simpson’s efforts paid off: in August, 1953, Suffolk University Law School was accredited by the ABA. Dean Archer’s old antagonist had been beaten — or, rather, joined.

By that time, however, John F. X. O’Brien was Dean. O’Brien had taught English in the Suffolk College of Liberal Arts, served as Dean of the College of Business Administration, and obtained an LLB from Boston University before his appointment as Acting Dean of the Law School at Suffolk in July, 1952. He served his entire four years as Acting Dean, never receiving a permanent appointment.

O’Brien’s ambiguous status was emblematic of the unresolved conflicts that persisted in his school. The tumultuous change of Dean Simpson’s ten-year tenure had raised so much dust — and so many expectations — that accurate evaluation of his achievements was virtually impossible. Simpson’s sudden departure forced even his most faithful supporters to attempt a hard, detached assessment of his accomplishments. For some, hesitation and doubt returned about the wisdom of the path being taken. Controversy rekindled over whether continued energetic pursuit of “excellence” might not leave the Law School without a constituency. O’Brien’s appointment as Dean represented primarily a holding action; he asked, and was asked, to serve only until some resolution concerning future direction could be reached.

Inaction during his Deanship, however, only served to deepen the crisis. Postwar law school enrollments at Suffolk (and nationwide) peaked in 1949; as the pool of those eligible for G.I. Bill funds shrank in subsequent years, admissions plunged.<sup>29</sup> In Dean Simpson’s last years, and throughout Dean O’Brien’s tenure, they fell alarmingly. By 1956, there were less than three hundred students at Suffolk Law, half the 1949 figure. Only a third of these students were full-timers, and women constituted a mere 4% of total enrollment.

Like his predecessor, Dean O’Brien operated with only a skeleton administrative staff; therefore, as revenue dropped,

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## **“Controversy rekindled over whether continued energetic pursuit of ‘excellence’ might not leave the Law School without a constituency.”**

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he was forced to cut back in other areas. Library acquisitions fell to a trickle. Electives were cut back to constitute only 10% of the curriculum, and the Summer Semester was discontinued entirely. The LLM program retained only a tenuous existence. The office apprenticeship laboratory was discontinued; and its instructor, the school’s only female instructor, terminated.

Even under these siege conditions, the Law School could still produce graduates like David Sargent, Albert Hutton, James Nixon, John J. Moakley, Jeanne Hession, and James Linnehan.<sup>30</sup> By 1956, however, there were no more full-time faculty members than there had been in 1943. Many instructors were quite advanced in age, and 25 out of 29 were part-timers. Even Hiram Archer had to admit that the Law School was “deep in the red”<sup>31</sup>, supported only by income from the Colleges.

After four years of temporizing and stand-patting, Suffolk Law School was in danger of realizing all too completely the ambition of Gleason Archer’s antagonists to have it become “one of the others.” Circumstances demanded decisive action. The world was changing around Dean O’Brien’s school, and its traditional student reservoirs were evaporating. As things stood in 1956, many at Suffolk were developing serious doubts about whether the institution could honestly claim to represent *either* opportunity or excellence. New programs and new initiatives seemed necessary to guarantee

survival; new sources of applicants had to be tapped.

The road back to Gleason Archer’s approach was blocked by history and by legislation; despite conflicting priorities within the Suffolk community, continued immobility was untenable. The Simpson regime had lain the foundations of a university law school on the ABA pattern. Now, in spite of institutional self-doubts, the only open road led forward, toward continued development. A new Dean was needed, who possessed the will to break moral logjams, and the vision to build on Simpson’s foundations an edifice of the excellence which they were capable of supporting. That mandate fell, in July, 1956, on Frederick A. McDermott.

### **III. The Age of Excellence**

Dean McDermott’s appointment promised long-term leadership toward academic excellence. He was young (not yet fifty), energetic, and well-connected. A graduate of Harvard Law School, he had taught for twenty years at Boston College Law School. His academic pedigree, like those of his immediate predecessors (both B.U. Law grads) reflected the new regime’s rapprochement with the institutions Gleason Archer had denounced as an “Educational Octopus.” Shortly after taking office, the new Dean even opened formal relations with the once-dreaded AALS, and, with Alumni Association backing, attended the annual meeting of that organization in 1957.

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## **“In August, 1953, Suffolk University Law School was accredited by the ABA. Dean Archer’s old antagonist had been beaten — or rather, joined.”**

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During his eight years as Dean, McDermott more than doubled (to 10) the number of full-time faculty members. Those he hired have formed the nucleus of the Law School's teaching staff ever since: Malcolm Donahue, the Judge's son (1956); John Nolan, John Fenton, Jr., and David Sargent (1957); Alfred Maleson (1959); Clifford Elias (1962); Alvan Brody and Brian Callahan (1963). Catherine Judge had been appointed as a separate Law School registrar in late 1955; Dean McDermott retained her, and, after she completed her LLM at Suffolk in 1960, expanded her duties to include part-time teaching.

A Legal Internship program with the office of the Middlesex County District Attorney (a pioneer program for the region) was instituted in 1957, and a similar arrangement was concluded two years later with the Attorney-General of the Commonwealth. Law office clerkships also became a regular feature of the Law School's upper-class program. An Estate Planning Contest<sup>32</sup> was introduced in 1957, and, three years later, Moot Appellate Court and National Moot Court<sup>33</sup> competition began. In 1959, a Student Bar Association was founded.

Dean McDermott also insisted, as programs were diversified and competition increased, that additional scholarship support be made available. The first Law Alumni Association scholarships (twelve in number) had been awarded in 1954; a decade later, there were fifty recipients. In addition, Law School scholarship funds doubled (from five to ten thousand dollars) during McDermott's tenure. Four special Trustee Scholarships to the Law School were established for outstanding students entering from the Colleges, and four others were made available annually (one for each school) to graduates of Dartmouth, Holy Cross, Brandeis, and Merrimack.<sup>34</sup> In 1961, a Trustee Graduate Law Fellowship (to send one Suffolk Law graduate yearly to a graduate program of his or her choice) was added, as a further inducement to excellence.

The LSAT examination was first required for students entering in the fall of 1961, and the part-time program was discontinued for day division students two years later.<sup>35</sup> Admissions, however, grew steadily as quality controls increased. In the eight years of McDermott's Dean-ship, enrollment trebled, reaching 800 by 1964 — including the likes of Cather-

ine Judge, Paul Cavanaugh, Dorothy Antonelli, Ivorey Cobb, Gerard Doherty, and Samuel Zoll.<sup>36</sup> The proportion of full-timers (one-third) and of women (3%) had not changed since 1956; but B.C., B.U., and Northeastern now surpassed Suffolk's Colleges as suppliers of entering students, and only 3% of all students enrolled at Suffolk Law (compared to 13% eight years earlier) still lacked a bachelor's degree. Even Harvard was sending several students a year to Dean McDermott's school.

When Frederick McDermott died, tragically, of lung cancer in March, 1964, he left behind him an expanding and developing law school. The Library's law collection had expanded 30% (from 22,000 to 31,000 volumes) under his leadership. The Law School had shown a profit in each year since 1958, as enrollment continued to rise. Finally, on February 22, 1960, the ABA had granted the institution full accreditation. As the generation of post-war babies came of age, Suffolk Law School appeared on the verge of a new era of explosive growth to match that of Dean Archer's halcyon days. Where to put those new students, and what impact they would have on the maintenance of educational quality at the school, were the questions that had to be faced by McDermott's successor, Donald R. Simpson.

Dean Simpson was the son of former Dean Frank Simpson. Like his father, Donald Simpson had received his law degree from Boston University; he then taught briefly at Northeastern before joining the Suffolk faculty in 1945. He was appointed Dean in May, 1964. In the eight years that followed, the school undertook a revolutionary expansion in programs, facilities, and administrative services; faculty expansion was coupled with impressive change in both the nature and number of students.

Under Simpson's leadership, Dean McDermott programs were maintained or enlarged, while many new options were introduced. The Legal Intern program was expanded to include the Norfolk and Plymouth County District Attorneys' offices, the Boston Corporation Counsel, Lynn Neighborhood Legal Services, and the Legal Aid Society of Greater Lawrence. During the same period, the law clerk program grew to encompass district courts in Middlesex, Essex, and Worcester counties, as well as the

Municipal Court of the Roxbury District. An Indigent Defendant Clinical Program was established at the Somerville District Court in 1967. After Wilbur C. Hollingsworth<sup>37</sup> was appointed in 1970 as the first coordinator of all Suffolk Law School clinical programs, the Somerville operation was extended, under the name "Suffolk Voluntary Defenders," to the Boston Juvenile Court and to district courts in Middlesex, Norfolk, and Essex counties. Foundation of a Student Prosecutor Program was also sanctioned at that time by those courts.

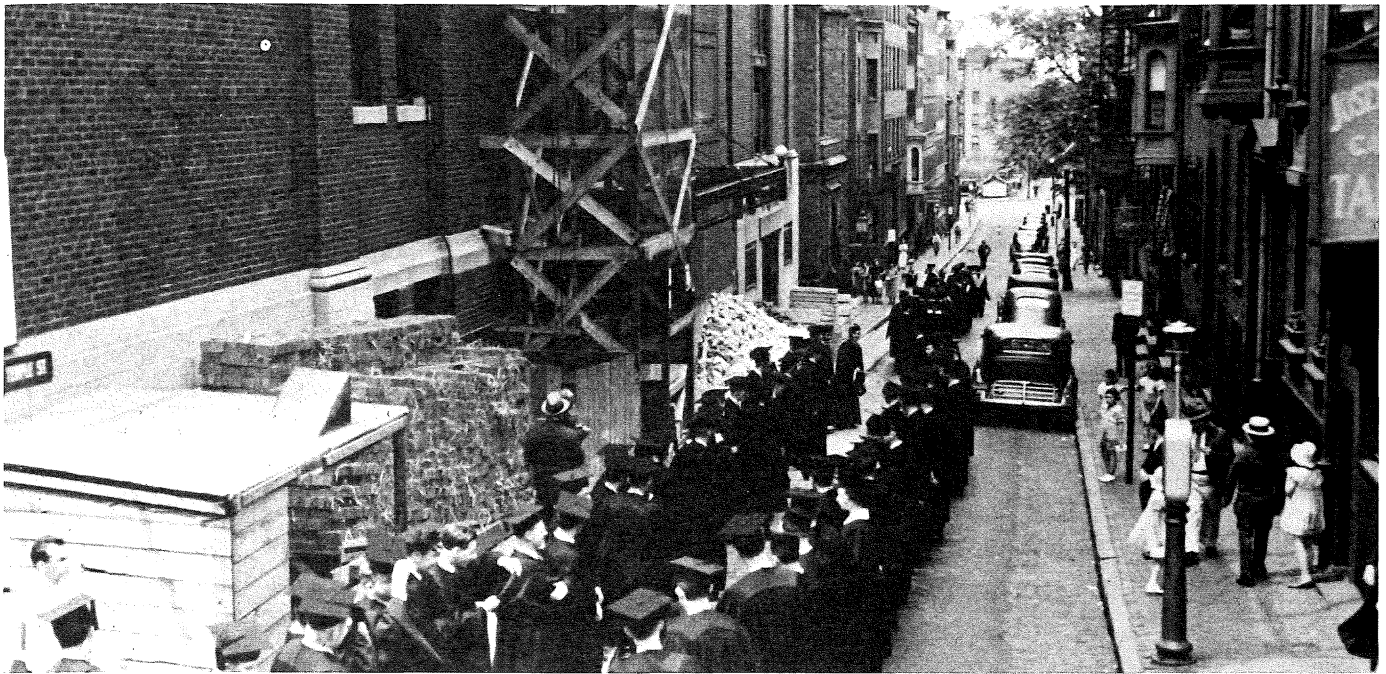
A *Law Review* was approved, and the first number appeared in the spring of 1967. Three years later, scholarships were awarded to the editorial staff, while the editor-in-chief was accredited (along with the SBA's President and Evening Division Chairman) to the Law School Committee of the Trustees. The *Advocate's* first number, also edited by law students and funded by the school, was published in the fall of 1968.

Charles Garabedian, who had done research for Frank Simpson, was hired full-time by Donald Simpson to supervise the moot court program. Under him, it grew and prospered. Scholarships were awarded to the three National Moot Court team members each year after 1970, and, in 1972, scholarships were made available to the winners of the newly-founded Justice Tom C. Clark Annual Moot Court Competition — a voluntary contest, named to honor the retired Supreme Court jurist, for second- and third-year students.

Society and the Law, an outreach program which sent Suffolk Law students to teach at various inner-Boston high schools, began operation in 1971. Late in 1970, an Environmental Law Club was organized. In addition, two legal fraternities — the Felix Frankfurter Chapter of Phi Alpha Delta (1968) and the Frank L. Simpson Senate of Delta Theta Phi (1970) — were established during Donald Simpson's tenure. The emergence of so many divergent organizations helped to attract new students, and competition for places on the more prestigious of them could not help but serve as a stimulus to excellence.

To house its expanding student body, the University constructed the 41 Temple Street building. It was opened in 1966, and named for Judge Donahue in 1971. The Law School was a chief beneficiary of





the construction. The new edifice housed, for the first time since consolidation with the College collection in 1937, a separate Law School Library. For three decades, University Librarians — Esther Newsome, Edward G. Hartmann, and then Richard Sullivan — had supervised both the College and Law School collections. Finally, in 1967, John Lynch was appointed Law Librarian, then reinforced by an Assistant Librarian and a Reference Librarian (both 1972). Under these circumstances, the law collection doubled in size (to sixty thousand volumes) by 1972. Additional space provided by the new building also allowed Dean Simpson to add separate Law Placement and Law Admissions officers (Anthony DeVico and John Deliso, 1971). A professional administrative staff that numbered two (including the Dean) when Simpson assumed office, had grown to eight when he retired in July, 1972.

As enrollments and space expanded, Dean Simpson's faculty also increased — from a total of 31 in 1964 to 50 by 1972. The ten full-timers employed at Dean McDermott's death had more than doubled (to 21) when McDermott's successor left office. Besides Hollingsworth and Garabedian, Dean Simpson's additions to the full-time faculty included Herbert Lemelman (1965); Charles Kindregan, Richard Pizzano, and Thomas Carey (1967); Richard Perlmutter, Richard

Vacco, and Basil Yanakakis (1969), Joseph Cronin (1970), and Joseph McEttrick (1971). Pizzano, Vacco and Yanakakis were all Suffolk Law School graduates. Catherine Judge, another Suffolk graduate, gave up her position as part-time Law Registrar in 1967 to be appointed the Law School's first full-time female professor; five years later, she became Suffolk Law's first female full professor. Upon vacating her old post in 1967, Judge was replaced by Doris Pote, the school's first full-time Law Registrar.

New faculty resources produced both stricter standards and a broader curriculum. The Evening Division program was expanded in 1964 from three nights a week to five, while mid-year Evening admissions were halted entirely four years later. After 1965, the Law School's graduate program was formally divided into LLM (degree) students and Continuing Legal Education (CLE, non-degree) students. Then, Suffolk Law School joined the ABA in requiring, effective September, 1966, that all entering students possess a bachelor's degree.

With these new strictures, however, went more flexibility for qualifying students. Electives, which had formed less than 10% of a student's program throughout McDermott's Deanship, were extended at the end of Donald Simpson's regime to form 25% of a day student's program and 17% of an evening student's. Evening

students were also exempted from compulsory moot court work. To help fill the new scheduling space, and to serve an increasingly diverse student body, elective courses were introduced which focused on special conditions of legal practice in specific states outside Massachusetts.

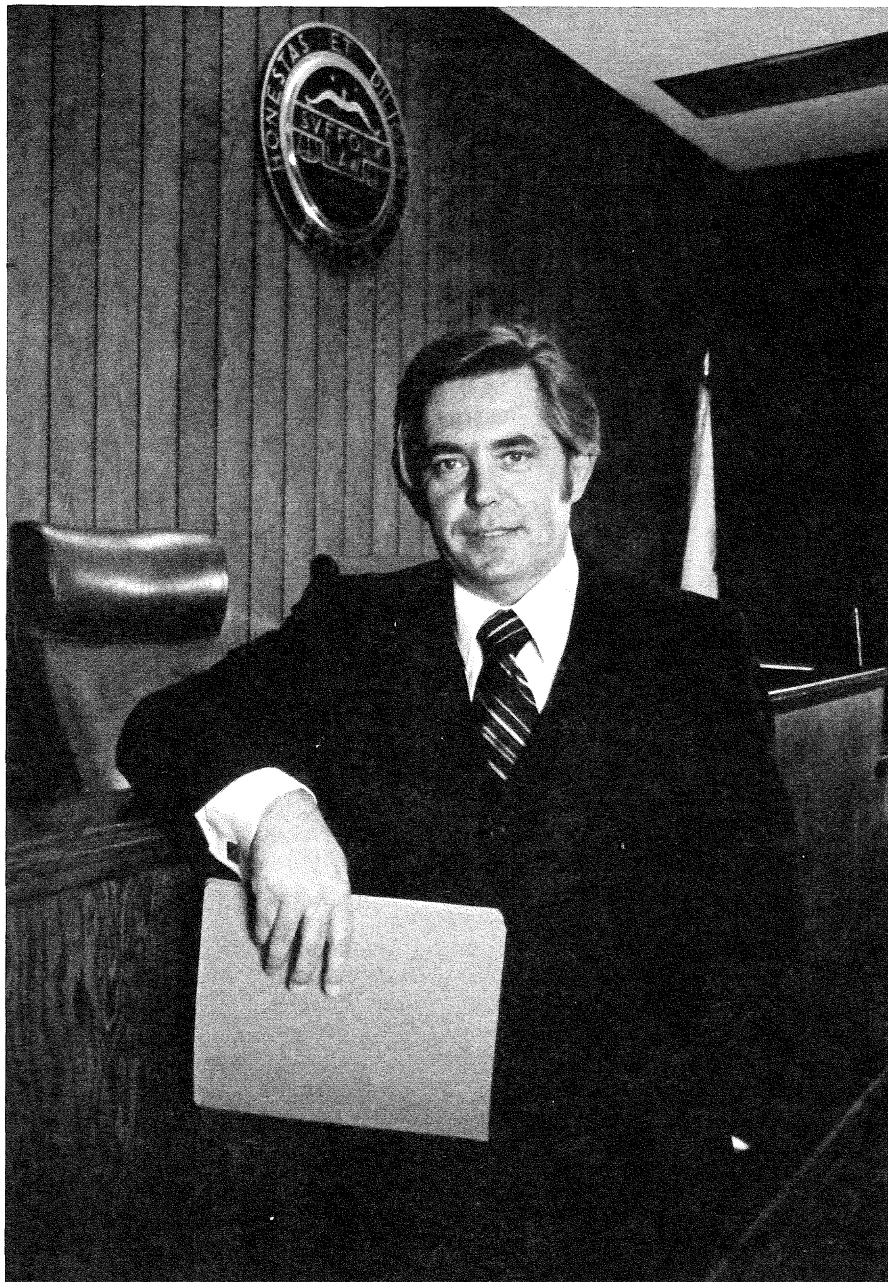
As if to symbolize the new state of affairs, the Board of Trustees voted in December, 1968, to replace the LLB degree, which had been awarded by Suffolk Law School since 1914, with a new one, the JD. In the same year, Dean Simpson received the school's first visitor from the Association of American Law Schools.

Total Law School scholarship funds doubled (to sixty-three thousand dollars annually by 1972) under Donald Simpson's regime. A federally-funded Work-Study program also allowed the Dean to expand, from 1966 on, existing student-assistant arrangements. It was quality, however, not financial opportunity, on which Law School officials counted to bring students to Suffolk.

They came, in legions. Between 1964 and 1972, Suffolk Law School's enrollment increased 150%, from 800 to 2000; among them were names like Paul Tierney, Charlotte Anne Perretta, John Powers, Nicholas Buoniconti, Regina Healy, Ronald Wysocki, and Mary Ann Gilleece. By 1972, more than half the students were full-timers (compared to only one-



*Clockwise top to bottom:  
Dean Frank Simpson (1942-1952);  
Dean John O'Brien (1952-1956);  
Dean Frederick McDermott (1956-1964);  
Dean Donald Simpson, far right,  
(1964-1972)*



*Dean David Sargent*

third in 1964), and the percentage of women was twice what it had been eight years earlier (3% to 7%). The University of Massachusetts had, by the early 1970s, joined B.C., B.U., and Northeastern in sending more students to Suffolk Law than did the Suffolk Colleges. The traditional working-class hegemony of Dorchester, Roxbury, Somerville, and Cambridge residents gave way after 1970 to a predominance by students from middle-class suburbs like Newton, Brook-

line, Quincy, Arlington, and Framingham. Over a quarter of Suffolk Law students by this time came from outside Massachusetts (compared to only 4% in 1956, and 1% or less at all previous dates); they hailed from thirty-two states and five foreign countries. Massachusetts students from west of Worcester formed 3% of the 1972 law student population; in no other period did they constitute more than a trace.

Ethnically, there continued to be more

students of Irish descent than from any other background. They no longer formed a clear majority, however; only about 35% of Suffolk Law School students by 1970 were identifiably Irish. The percentage of Jewish students now equalled the Yankee figure, while both (at 22%) approached the Irish more closely than ever before. The proportion of Italian-background students (15%) was also greater in the early 1970s than it had been at any other time.



It is hard to assess the impact on these figures of demography (only 4.7% of the U.S. population was foreign-born in 1970, compared to 5.4% in 1960 and 6.9% in 1950) and of both social and geographic mobility. It is even harder to assess the exact impact of changing reputation and academic standards. It is clear, however, that, for whatever reasons, the student population at Suffolk University Law School from the mid-1960s on was significantly different from that which was characteristic of the school's first six decades.

When Donald Simpson retired in July, 1972, Suffolk Law School was again, as in Gleason Archer's heyday, the largest law school in the world. Where once that phrase had conveyed praise, however, now it implied blame. Paradoxically, with revenues at an unprecedented level, it also implied renewed crisis for the Law School — not the usual crisis of deprivation, this time, but a crisis of prosperity, of temptation. With Suffolk Law School's two thousand students in 1972, there went a student-faculty ratio of 100-1. Whether the quality legal education to which Suffolk Law was pledged could be given under these circumstances was problematical. To reaffirm educational standards required an increased faculty, a decreased student body, or a combination of both. In any case, it meant higher costs, diminution of profits, and decreased student access to educational opportunity. Suffolk University Law School was once again in 1972 at the familiar crossroads. Resolution of the crisis, selection of the path that might lead permanently away from the crossroads, was to be the very personal burden of Donald Simpson's eventual successor as Law School Dean: David J. Sargent.

Upon Dean Simpson's retirement in July, 1972, the Law School Committee of the Trustees deadlocked over the question of a replacement. One bloc backed Judge Donahue's son for the Deanship; the other, Judge Fenton's. For six months, Trustee Joseph Caulfield acted as interim Dean; when Caulfield relinquished the position in January, 1973, he was replaced — also on an interim basis — by law professor David Sargent. Very shortly thereafter, the Law School Committee evolved a compromise settlement whereby both Malcolm Donahue and John Fenton, Jr., became Associate Deans, while an outsider, Francis J. Larkin, was named Dean. Larkin, 39, had served previously as

associate law dean at Boston College. His term at Suffolk, however, was brief; in July, 1973, he resigned to devote his full time to a recent judicial appointment. His departure opened the way for the immediate appointment of Professor Sargent as new Dean.

Sargent was the first Suffolk Law alumnus to assume the Deanship on a permanent basis. His designation indicated the school's growing sense of its own worth. His origins and approaches represented an expanding group of younger faculty members. As students in the turbulent late 1960s demanded greater freedom of choice, more opportunities for practical involvement, and broadening of the student body itself, their pleas found sympathy within the faculty. Dean Simpson had, after all, considerably augmented the proportion of full-timers who had themselves been Suffolk Law students.

By tempering traditionalism with piecemeal concessions, the old Dean managed to prevent major restructuring during his tenure. Changes began, however, from the time Simpson stepped down, and Dean Sargent burst on the school like a breath of fresh air. Old restrictions were swept away, and new options opened. Conservatism gave way to experimentation with new elements in curriculum, programming, and the student population. The differing styles of the old regime and Dean Sargent's new one were illustrated by the contrasts between the 1972 and 1973 catalogues: The first was traditional, tutelary, and slightly forbidding; the second, contemporary, engaging, attractive.

The contrasts reveal the Sargent administration's greater sensitivity to nuances — a luxury, perhaps, that could be afforded only by a law school made prosperous by Dean Simpson's careful attention to more mundane administrative details. At any rate, such heightened awareness was a prerequisite for achieving the new regime's primary goal: an enriched quality of life for individual students at Suffolk Law School.

Towards this end, enrollments have been reduced by 25% since 1972 — from 2140 to 1680. Sixty percent of the Law School's students now attend the day (full-time) division, compared to just over half eight years ago. Competition for a diminishing number of places has intensified, eliciting increasingly impressive credentials from successful applicants. Boston College, the University of Massa-

chusetts, Boston University, and Northeastern remain major senders, along with Holy Cross, Providence, and the Suffolk Colleges. By the late 1970s, however, contingents were being received, as well, from Brown, Tufts, Smith, Mount Holyoke, and, of course, Harvard. In 1980, the Law School attracted nearly 40% of its students from outside Massachusetts, up from a 1972 figure of 25%. Early Sargent-era graduates included Linda Dalianis, Guy Carbone, Kirk O'Donnell, Joseph Shanahan, Carol Chandler, and Joseph Fitzpatrick; and their successors have demonstrated comparable abilities.

As the student body contracted, faculty numbers rose dramatically. Between 1972 and 1980, Dean Sargent doubled (to 45) the full-time faculty, while increasing the total number of instructors (including full-timers) from 50 to 95. The new full-timers included Lisle Baker, Valerie Epps, Charles Burnim, Gerard Clark, Thomas Lambert, Crystal Lloyd, Louise Weinberg, Thomas O'Toole, and John Sherman (1974); Cornelius Moynihan (1976); Stephen Hicks, Marc Perlin, and Anthony Sandoe (1977); and Milton Katz (1978). Alexander Cella, Karen Blum, and Bernard Ortwein were among the six alumni appointed full-time by Sargent; in 1980, Suffolk Law graduates constituted one-quarter of the school's full-timers.

Faculty expansion reduced 1972's astronomical student-faculty ratios to a respectable 20-1 by 1980. In addition, it brought to the school diverse specialists eager to teach courses in their fields. Faculty requests, added to student demands, produced a reduction in required courses — to 60% of a day student's program, and 70% of an evening student's. The number of elective offerings multiplied to fill the space available. Students were thereby given a significantly greater freedom of choice in shaping their law school experience.

To prepare them for responsible use of this freedom, and to ease the confused alienation experienced by entering law students, an integrated first-year program was also introduced. At its core were small Legal Practice Skills sections, which were added to complement the first-year moot court work. Special Teaching Fellows (often recent graduates) were hired as LPS instructors, and a student-run Moot Court Board was established.

The Moot Court Board was only one of many opportunities for student participa-





tion opened by Dean Sargent. The clinical programs were nurtured and expanded. The Suffolk University Legal Assistance Bureau (SULAB) was founded in 1973, and still maintains offices in Beverly (its original location) and Charlestown (since 1976). For those unable or disinclined to participate in the Voluntary Defenders, Voluntary Prosecutors, or SULAB, an Outside Clinical Studies program was established in 1976 to provide governmental or judicial internships. Professor Garabedian, previously director of SULAB, took charge of Outside Clinical Studies, while Special Faculty positions were created for the directors of the three clinical programs.

A Client Counseling Competition and the Philip C. Jessup International Moot Court Competition both began in 1973; a Best Oral Advocate Run-Off Competition (for those individuals selected best oral advocate of each LPS section) was added three years later. In 1977, it was named to honor the man who had become Law School Committee chairman in 1976: the Honorable Walter H. McLaughlin, retired Chief Justice of the Massachusetts Superior Court.

David Sargent was the Student Bar Association's first advisor, and as Dean he has manifested tolerance and sympathy toward efforts at law student self-expression and self-government through the SBA. Shortly after he became Dean in 1973, a full scholarship — like the one Donald Simpson had obtained for the

*Law Review* editor — was granted to the SBA; and, in 1977, an attempt was made (although unsuccessfully) to win a similar grant for the Chairman of the SBA Evening Division's Board of Governors. In the meantime, *Dicta* — the SBA-sponsored student newspaper founded in 1972 — had already survived longer than any previous SBA publication.

Student-run organizations have multiplied and diversified in the gentle climate provided by the Sargent regime. The Suffolk Lawyer's Guild was organized in 1975; the Suffolk Law Forum, and the William H. Rehnquist Inn of Phi Delta Phi, one year later. An International Law Society began operations early in 1976, and the first number of its *Transnational Law Journal* appeared later that year. Three years earlier, the Environmental Law Society had begun an Environmental Enforcement Program which allowed Suffolk Law students to prosecute criminal water pollution cases while serving as interns with the Massachusetts Department of Natural Resources. The program was unique in the state, and, perhaps, in the nation; Suffolk Law School was regaining the confidence to innovate.

As the faculty multiplied and activities expanded, the Dean strove to improve the services offered to students. A Law Summer Session was reintroduced (after twenty years) in 1974. The Law Library grew from sixty thousand volumes in 1972 to 140,000 by 1980; seating capacity was increased from 650 to 830, while

three new Reference Librarians were added. A Law School Financial Aid Officer (Marjorie Cellar) was hired in 1973; then, two years later, an Assistant Placement Director. In 1975, the University hired the first separate Law School Development officer. Counting his two Associate Deans, Dean Sargent's professional administrative staff in 1980 numbered fifteen — double the 1972 figure.

To house these various kinds of growth, the Law School required more space. Library needs, along with faculty and administrative office shortages, created critical pressures. Opening of the Fenton Building in 1975 finally allowed Dean Sargent to claim the Donahue Building. It was rededicated, in 1976, for use exclusively by the Law School. Increased numbers also brought requests from both Law School and College students for separate Commencements, to replace the traditional joint ceremony. Their wishes were granted in 1974, and the new arrangement provided another buttress for the Law School's emerging sense of identity.

Confirming that identity, however, required that Suffolk Law confront the old problem of exclusivity, and, if possible, find a way to harmonize the new commitment to excellence with its traditional dedication to opportunity. Steps toward the necessary synthesis were taken by Dean Sargent and the Trustees from the time Sargent assumed office. Special admissions and scholarship programs for disadvan-

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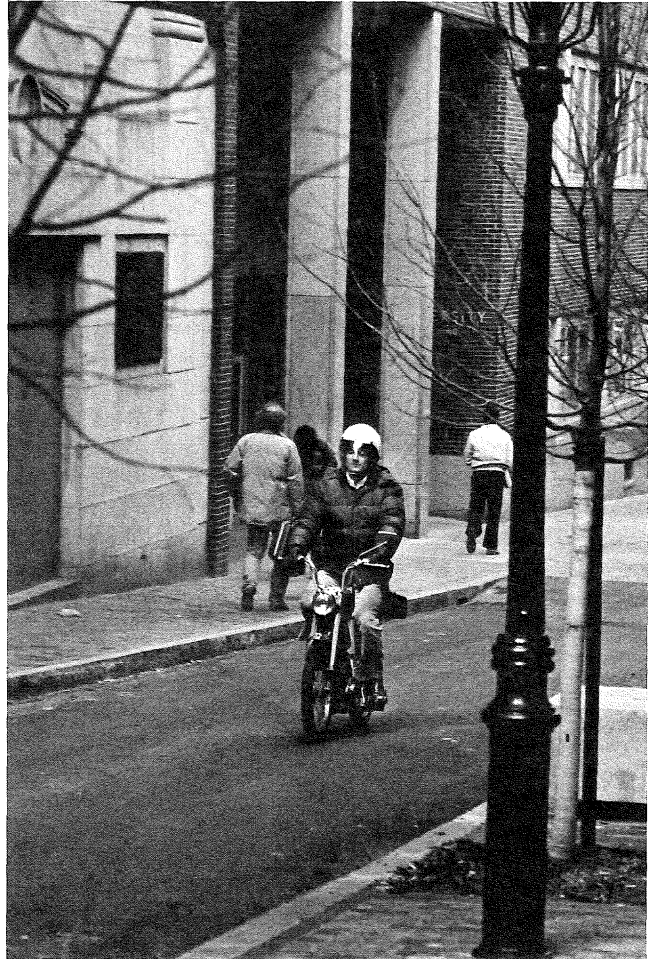
**“Confirming that identity, however, required that Suffolk Law confront the old problem of exclusivity, and if possible, find a way to harmonize the new commitment to excellence with its traditional dedication to opportunity.”**

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taged students were established in 1973. Submission of the GAPSFAS (Graduate and Professional School Financial Aid Service) form became mandatory during the Sargent regime’s first year, and by 1977 financial aid was being awarded solely on the basis of need.

Scholarship funds, meanwhile, quintupled (to three hundred thousand dollars) between 1972 and 1979. Dean Sargent’s reforms were dearly bought; in 1975, Law School tuition first significantly exceeded the Colleges’, and within five years the difference had grown to \$1,000. By that time, fifteen percent of those enrolled received scholarships, while a Guaranteed Loan program (begun in 1977) provided aid to half the student body. Direct tuition subsidies on such a scale were unprecedented at Suffolk Law School. Their message, however, was clear, and it represented an interesting inversion: Where Dean Archer’s maxim once had been that excellence for some could be afforded only if it did not undermine opportunity for many, now Dean Sargent’s was that excellence for many could be afforded only if it did not undermine opportunity for some.

Sargent’s commitment helped change demographic patterns at Suffolk. Between 1972 and 1980, the proportion of female law students rose from 7% to 35%. Four women were added to the full-time faculty during the same period, bringing the total to five. Valerie Epps and Crystal Lloyd (1973); Louise Weinberg (1974); and Karen Blum (1976) joined Catherine Judge, who was appointed the Law School’s first female full professor in 1972. Like Judge, Blum was a Suffolk Law alumna. By 1980, 11% of the faculty full-timers (compared to 5% in 1972) were women, while both Epps and Weinberg had attained full professorships. Appointment of an Equal Employment Officer (Judy Minardi) in 1972 provided important support for these developments,



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**“Where Dean Archer’s maxim once had been that excellence for some would be afforded only if it did not undermine opportunity for many, now Dean Sargent’s was that excellence for many could be afforded only if it did not undermine opportunity for some.”**

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**“. . . the wounds of the Archer era, on both sides, had finally healed.”**

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as did organization of the Suffolk Women's Law Caucus a year later.

Minority student organizations, similar to the Suffolk Women's Law Caucus in their advocacy functions, were also founded early in Dean Sargent's term. The Black American Law Students' Association (BALSA) was established in 1973; HALSA (the Hispanic American Law Students' Association), two years later. In addition, the Law School participated throughout this period in a minority student program sponsored by the Council on Legal Education Opportunity (CLEO).

David Sargent, then, has tried harder than any Dean since Gleason Archer to expand access to the Law School for underrepresented and underprivileged groups. Pervading these efforts, however, there has been a consistent determination that their success not be permitted to compromise Suffolk Law's academic "standards." Indeed, Dean Sargent's energy since taking office has been devoted

mainly to the preservation and/or creation of "standards." His end in view was a most ambitious one: Association of American Law Schools membership to go with Suffolk's ABA approval.

Toward this end, the Sargent administration has taken numerous steps to tighten up academic loose ends and to encourage "quality" programs in the Law School. A vestigial graduate (LLM and CLE) program was terminated in 1973, as was admission of non-degree (special) students. At the same time, Evening Division credit requirements were raised 10% (to 80) for closer conformity with the Day Division's 90-hour standard. An Early Decision program began operation in 1976, and, one year later, a Legal Writing (major paper) requirement was introduced. By 1977, a Visiting Professorship, named for Dean Frederick McDermott, and a Distinguished Professorship had been established, along with a Daniel Fern Prize (1976) for the graduate with the

highest cumulative average.

On December 27, 1977, Suffolk University Law School was granted full membership in the AALS; the wounds of the Archer era, on both sides, had finally healed. Subsequent years brought similar satisfactions for Dean Sargent. Charlotte Anne Perretta was named in 1978 to the Massachusetts Appeals Court; her designation constituted the highest state judicial appointment yet granted a Suffolk graduate. Later that year, a large group of the school's alumni was admitted to practice before the U.S. Supreme Court. Finally, in March, 1979, Martin Loughlin became the first Suffolk Law alumnus to sit on the federal bench. What had once been a local law school had become a regional one, and was on its way to becoming national. The excellence actively sought for a quarter-century has been attained; there remains the challenge of continued development.

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**“At seventy-five, Suffolk University Law School remains a battleground of the historical forces that have shaped it, and of the constituencies produced by them.”**

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## Notes

1. Six million dollars represented the Law School's share of a total Suffolk University operating budget of approximately sixteen million dollars in fiscal 1979–80. This article's title is drawn from Gleason L. Archer's description of Suffolk Law School as a "haven of opportunity" in the 1939 Law School catalogue, p. 6.
2. McLean served Suffolk Law School from 1907 until 1922; Chandler, 1907–18; Downes, 1907–31; York, 1907–41; and Gibb, 1909–18. Three other B.U. Law graduates were added to the Suffolk faculty in immediately subsequent years: Wilmot Evans (1911–13, 1923–35); Walter Meins (1911–18); and Leon Eyges (1912–17).
3. Roland E. Brown '09.
4. High school equivalency was required by the Massachusetts bar examiners after March, 1910; in 1916, attendance at the Summer Preparatory Department was required by Dean Archer of all Suffolk Law students who lacked a high school degree.
5. Thomas Vreeland Jones.
6. 1939 Law School catalogue, p. 6.
7. There had been a brief experiment with a full-time day program, beginning in September, 1911. Only five students enrolled, and admission was quickly closed to strengthen the school's position for the charter fight in 1912. Last classes for those already enrolled were held in May, 1915.
8. A Moot Court program was instituted in September, 1907; it functioned in conjunction with the school's Debating Society, which was also set up in 1907.
9. Archer felt that the case method forced students to "disregard the accumulated wisdom of the past"; this was, he asserted, "a pitiful waste of human effort" (1929 Law School catalogue, p. 33). Besides advocating the black-letter approach for pedagogical reasons, Archer also favored it because it stressed statutory (legislature-made) law as much as common (judge-made) law. He trusted popularly-elected legislatures to shape the law far more than he did a small group of appointed judges — disagreeing on this matter with conservative legal giants like Blackstone and Langdell.
10. In 1921.
11. The phrase is Jerold Auerbach's, in his *Unequal Justice: Lawyers and Social Change in Modern America* (New York, Oxford University Press, 1976), p. 100.
12. These part-time (or "evening") institutions included the John Marshall Law School, Chicago; the Atlanta Law School; the Benton College of Law, St. Louis; Northwestern College, Minneapolis; the Chattanooga College of Law; the National University Law School, Washington, D.C.; Brooklyn Law School; Portia Law School; and Archer's own Suffolk Law School. Some had day class sessions, but their primary market was working students. The YMCA law schools were also "evening" schools, but in general diverged in their views from the institutions listed above.
13. The sign remained until the addition of two stories to the Derne Street building in 1937; it was then replaced by a similar "Suffolk University" sign, which was removed — at the behest of Hiram Archer and other Trustees — in 1946.
14. The first such award (1913) was the Callaghan Prize, given to the third-year student (in a four-year program) with the highest academic average.
15. Douglas, class of '09, taught at Suffolk Law from 1910 until 1935; Baker '16, 1918–27; Parks '17, 1915–41; Wyman '18, 1921–41, 1953–59; Hurley '18, 1919–45, 1951–57; Henchey '21, 1921–38; Spillane '21, 1921–34; Getchell '22, 1922–62; Bloomberg '25, 1926–35; Finnegan '26, 1927–41; and Williams '27, 1929–59.
16. Donahue was class of '21; Allison '22; Byrne and Fenton '24; Hynes '27; McLaughlin '30; Smith '37; and Collins '41. Other prominent alumni from this period include Eugene Hudson, Daniel Gillen, and Frankland Miles '23; Joseph Caulfield, John H. Eaton, Jr., and William F. A. Graham '24; C. Edward Rowe and Edward V. Keating '26; Arthur W. Hanson '27; Henry E. Quarles and Abner Sisson '28; Daniel Fern '31; Harold Widett and Albert Pallot '32; Joseph P. Graham '35; Sherman Feller '40; and John Droney '42.
17. Fierce legal competition in the Boston area was further heightened by the foundation of Boston College Law School in 1929; three years later, B.C. Law received ABA accreditation.
18. Archer's recommendations were made to the 1929 ABA convention, the proceedings of which are included in Archer's personal "Journal II", pp. 244–46; with Gleason's encouragement, his brother Hiram took part in a short-lived effort in 1908–09 to found a "Suffolk College".
19. "Journal II", p. 348.
20. The proposed charter, which received immediate General Court approval, also included a provision permitting the College of Liberal Arts to grant degrees.
21. It was in this catalogue that Archer first attached semester-hour credit values to Law School courses; previously, the curriculum (in which there were no electives) was indicated solely by course names.
22. Part-time day classes were suspended totally in September, 1942, in expectation that a wartime WAACS program would take over the University Building during daylight hours; evening classes continued to meet throughout the war. When the WAACS program fell through, full-time day classes were begun, and part-time day classes restored, in September, 1943.
23. Parke served on the Suffolk Law faculty from 1943 until 1964; Donald Simpson, 1945–55, and 1959–72; Pray taught part-time at the institution until 1952.
24. Leaders of the anti-Archer Trustee faction included Bernard Killion '10, Frank Donahue '21, William F. A. Graham '24, Walter Burse, and George Rowell. George Spillane '21 and John E. Fenton '24 joined the Board in 1949. John Griffin served as a Trustee from 1938 on.
25. Among the dominant figures on the Board from 1949 until the late 1960s were Frank J. Donahue (1945–79), Associate Justice, Superior Court; John E. Fenton (1949–74), Judge, Land Court; William H. Henchey (1957–68), Judge, Woburn District Court; and Eugene A. Hudson (1957–1972), Justice, Superior Court. Even after 1965, considerable influence with fellow Board members continued to be wielded by judges such as C. Edward Rowe (elected to the Board 1962), Justice, District Court of Eastern Franklin, Orange; Lawrence L. Cameron (1966), Justice, South Boston District Court; Walter H. McLaughlin (1972), Chief Justice, Superior Court; and James J. Nixon (1980), Justice, Third District Court, East Cambridge.
26. This is Donald Simpson's description of his father, in an interview on December 1, 1979.
27. Thomas Reed Powell served on the Law School faculty from 1950 until 1956; Hurley, who had already served from 1919 until 1945, returned in 1951 and remained until 1957.
28. Chmielinski graduated in the class of '47; Loughlin, O'Donnell, and Montgomery '50; Cameron '51; and Saliba '52. Other notable alumni of this era included Albert Curran and George Strait '49; Eleanor L'Ecuyer and Edward J. Masterman '50.
29. ABA (and subsequent Suffolk Law School) adoption in 1953 of a three-year college requirement for admission further diminished the number of potential applicants.
30. Sargent was a member of the class of '54; Hutton and Nixon '55; Moakley, Hession, and Linnehan '56. John J. Nolan and Richard H. Nolan (both '55) were also distinguished graduates of the O'Brien period.
31. Suffolk University Board of Trustees, Minutes of the November 7, 1956 meeting.
32. Sponsored by the Boston Safe Deposit and Trust Company.
33. Under the auspices of the Young Lawyers Committee of the Bar of the City of New York.
34. Both sets of scholarships (from the Colleges and from outside the University) were set up in 1957. The Holy Cross and Brandeis scholarships had been created in 1950, but





were revitalized by Dean McDermott as part of his administration's energetic (and rewarding) efforts to reanimate the Law School's recruiting program.

35. Different semester-hour requirements for the day division (90 credits) and the evening division (72 credits) were established in 1956 by Dean McDermott; previous to his action, requirements for the two divisions were identical.
36. Judge was a '57 graduate; Cavanaugh and Antonelli '59; Cobb and Doherty '60; and Zoll '62.
37. Hollingsworth was a full-time member of the Suffolk University Law School faculty from 1970 until 1975.
38. In 1972, Suffolk Law also became an active member of the National Association of Law Placement.
39. Tierney graduated in '65; Perretta '67; Powers and Buoniconti '68; Healy '71; Wysocki and Gilleece '72. Other prominent graduates of the Donald Simpson period include Henry Owens III and Doris Pote '67; Salvatore Micciche '68; Richard Gibbs '70; and Andrea Wasserman Gargiulo '72.
40. Dalianis and Carbone were both members of

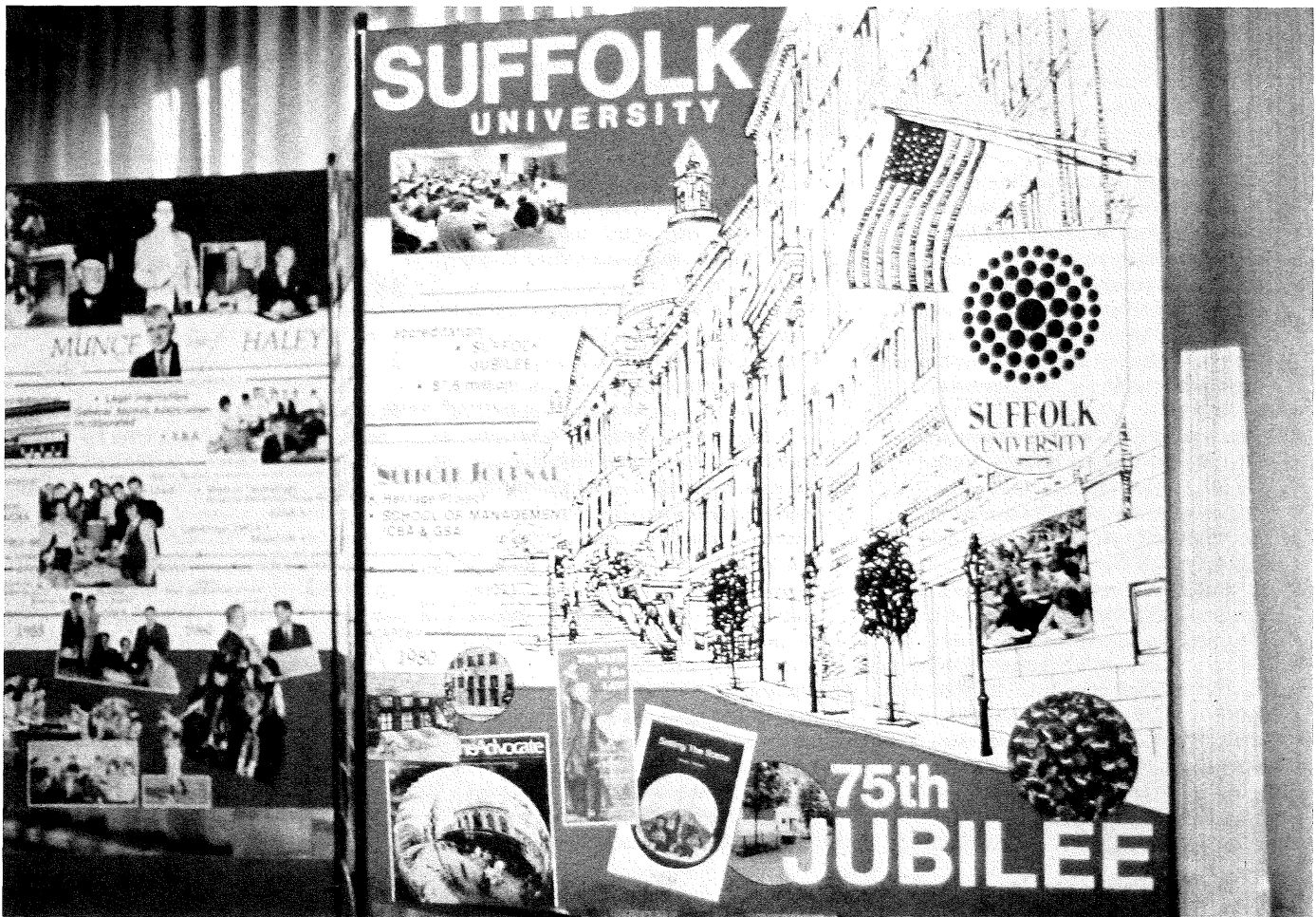
the class of '74; O'Donnell and Shanahan '75; Chandler and Fitzpatrick '76. Other Sargent-era alumni of note include Alexander Bove, Jr. and Richard Bland II (both '75).

41. Dean Donald Simpson had inaugurated first-year moot court work, and in 1970 had introduced first-year Legal Research courses, as well as Teaching Fellows to handle them. It is, however, only with Dean Sargent's establishment of LPS sections — and close coordination of them with the first-year moot court — that we can begin to speak of a fully integrated and articulated (instead of piecemeal) first-year program.
42. The Moot Court Board supervised Dean Sargent's moot court program; its members were selected from those who had themselves excelled in first-year moot court performance.
43. The first Special Faculty positions for this purpose were created in 1974.
44. Conducted annually under the auspices of the Association of Student International Law Societies and the American Society of International Law Students.
45. Earlier SBA newspapers had included the

*Suffolk Law Reporter* (spring, 1959–1960); the *SBA Briefcase* (March, 1962–November, 1965); and the *Suffolkate* (mainly inflammatory, 1971–72).

46. The Environmental Law Society's first advisor was Charles Kindregan, who also served as faculty advisor to the *Advocate*.
47. The new Law Summer Session's classes were limited to evenings only.
48. The Fenton Building, at 32 Derne Street, was intended primarily for use by the College of Liberal Arts and Sciences. The College of Business Administration, along with the Graduate School of Administration, had also been provided — in 1972 — with much-needed space by University purchase of the Law School's old home at 45 Mount Vernon Street. It was not surprising that by 1975 many in the Law School were feeling that it was their school's turn.
49. From 1977 on, scholarship money was reserved solely for those also financing their Law School educations with Guaranteed Loans.
50. In 1972 and 1977, respectively.
51. Loughlin was appointed to the Federal District Court, New Hampshire.

# PERSPECTIVES: 75 YEARS OF CHANGE



# A Day In The Life Of A Suffolk Alumnus Class of 2001

Savile Roe, Suffolk Law 2001, having heard so much of the Suffolk University Law Library's newly designed facility has decided to pay it a visit as well as research a complicated problem. He leaves his Prudential Center Office, takes a seat on an MBTA Conveyer Belt, dials "SU", and is on his way. He flicks his comput-watch to the Boston Globe headlines to while away the time, and then decides he would like to read the chapter on judges in Bander's video-disc best seller, *Mr. Dooley and Mr. Dunne*. After a simple voice command to the Boston Public Library book bank (royalty fee automatically recorded), Roe is soon chuckling over Mr. Dooley's still useful comment that some judges temper mercy with justice and others temper mercy with temper. A gentle buzz reminds him that he is approaching Suffolk University Law School and a tap of his foot provides a smooth exit at the entrance. He takes the elevator to the fourth floor and is mildly amused at hearing Professor Irving Younger's evidence tapes being played to the William Tell Overture.

As he enters the law library the door swings open automatically and he is startled to see that there are no books, no librarians — in fact, no people at all — just a sign notifying patrons to press their thumb print on the optical scanner. Upon doing this, he is immediately greeted by a carrel that has moved into view. "Good Evening, Mr. Roe, I am your research carrel — won't you please take a seat and I will convey you to stall forty-four where we can research your problem without interference."

"Oh, my Lord," Roe stammered.

"Look, uh, I've never used an automated library before, uh, Ms.! Mr.! Miss! It? Do you have a name?"

"You can call me Robby, Mr. Roe," the voice answered. "You will find the equipment similar to what you used in your course on computer law — and I see you received a B plus — except that I may be a bit more sophisticated." As Robby's laser beams sensed his passenger was still awed by his presence, he added, "And, if you'll pardon the irony, while you may be rusty, I'm just the machine to get your engine going."



*Edward J. Bander. Professor Bander is the Suffolk University Law Librarian. He is the author of Mr. Dooley and Mr. Dunn, published by Bobbs-Merrill in 1981. He received a B.A. and a LL.B. from Boston University.*

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**. . . there are no books, no librarians — in fact, no people at all. . . .**

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This made Roe feel a little more relaxed talking to a machine and he responded, "Robby, I think this could be the beginning of a wonderful friendship. I know that I can count on you when the chips are down." He confidently stepped into the carrel and was whisked away to stall forty-four where he faced a panel of Cathode Ray Tubes, a speed printer with 450 fonts, and a computer module with a data menu from American Jurisprudence to Zoning Digest.

"Let's see now," Roe mused, "I need to check some citations before I start writing this brief. This looks like the citation key."

"Citations, please," responded the mechanism.

"221 Mass. 79," said Roe, suddenly feeling the excitement of not having to run his fingers down a Shepard Citator.

The CRT immediately displayed the subsequent citations and as Roe placed the cursor in front of selected citations, the citator indicated the significance of the cited case to the citing case. "Oh, ho," shouted Roe, realizing he had hit pay dirt, "this case is cited in a case pending before the Supreme Judicial Court."

"Not only that," interjected Robby abruptly, "but that case is on oral argument this minute. Want to hear it?"

"Sure do." Mr. Roe listened intently to the oral argument. Then upon gingerly pressing a few keys, Roe was rewarded with a printout of pertinent parts of the oral argument, and the speed printer spewed out the briefs in the case. Overjoyed with his initial success, Roe turned to face Robby, only to realize that he was sitting on him.

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## . . . only one American jurisdiction . . . would hold an individual civilly liable for not throwing a life line to a satellite space worker who had tumbled from a sky hook . . .

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"How about some articles on this case, Robby?" he inquired, now feeling very friendly toward those blinking lights and whirring sounds that were accomplishing marvels for him.

"There are twenty articles and thirty-five case notes available. As you can see on the CRT, the rating element considers the *Yale Law Journal* the most scholarly and the *Suffolk University Law Review* case note the clearest exposition of the case. Which do you want to see, my friend?" asked Robby who was programmed to show a bit of camaraderie when the human's brain cells registered "140" on the Brandeis scale.

Roe absorbed the case note and his brow furrowed over the article. "Scholarly, yes; but I want precedent, not prescience. What I wouldn't give to live in a century where an intelligent person could understand an article in a law review. Who does the rating of these articles?"

"If you'd like another opinion, Hal is not busy," answered Robby obviously hurt. Roe could hear another carrel revving up its engine.

"Of course not, Robby," answered Roe realizing his indiscretion. "You know what my problem is! I've just done

a week's research in half an hour. I'm suffering from what the Harvard Computer Related Ailments Center calls 'Mental Lag.' Holy Mackerel!" Roe had looked at his watch and realized that he had better call his helpmate (the words "wife" and "husband" having gone out of use). He dialed home and Rachel Roe appeared on the screen.

"Hello, darling."

"Savile! How many times have I told you not to call me on the video!"

Roe immediately turned off the video screen. "Sorry about that dear. I'm going to be late for dinner with the Does. Would you believe that I'm heavily involved with a robot. Mind?"

"Why should I. My Morky is preparing dinner and teaching me the space tango. Just make sure you show up at six as you know how your partner bores me, let alone her helpmate."

Savile set the alarm for his dinner date, and turned to another point of law in his research. To his consternation he found that only one American jurisdiction — even in the 21st century, mind you — would hold an individual civilly liable for not throwing a life line to a satellite space worker who had tumbled from a sky hook and was forced to rotate around the moon three times before a tourist ship to Venus happened to spot him and vacuum him into its hold. "Now what do I do," was all that Savile could mumble in disgust.

But "now what" was programmed to set Robby working again. "How about continental law?" Immediately a French case raced across a split screen with simultaneous translation.

Savile's eyes bulged.

"I'm not surprised at your blood pressure, Savile," Robby commented. "We just activated the translation mechanism since we entered the Intergalactic Economic Community. We presently have the Code of every civilized star in the Milky Way." Robby's sensor could tell that Mr. Roe wanted more from this fertile source and for the next hour cases rolled







down the CRT, the printer copied with the speed of light (literally), key numbers plucked out pertinent cases (West had programmed its First Eon Digest), and articles, statutes, commentary, and a particularly good annotation in A.L.R. 12th were brought to Roe's attention. He had access to everything but loose leaf services which were no longer necessary in a computer society. Savile had to wince more than once at some of the comments made by commentators from other planets about the uncivilized state of American law.

Savile Roe finally leaned back in his seat, adjusting it to "Relax-Light Massage." He stretched his arms and commented to Robby, as if he were a human presence, "Absolutely incredible, my good friend. It's like a player piano. How did we ever get along with those inferior chips when I was in law school?"

"You might say that we're a block off the old chip," responded Robby with some byte and his mechanism suddenly sputtered and wheezed as if preening itself.

Roe searched unsuccessfully for a reply, and lamely decided to get back to his research. "O.K., Robby. I think I have enough material to get started on my brief."

"May I suggest that you push the "Record" button and a transmitter will

relay the brief to your office as you dictate?"

"Great. Then my Word Processor can pick up my voice, type the brief, and we can submit it to the Supreme Judicial Court by the Docket Relay. Hmmm, I can see now how that law clerk of mine manages a whale of a social life and always has his assignments completed."

Mr. Roe proceeded to oral his brief. With a quick flicking of switches and changing from one data bank to another, and sometimes having two data banks interface on one another, he was able to have the mechanism proofread and authenticate all citations and authorities and then store them for tabulating at the end of the brief. Pertinent statutes were stored for subsequent use in the Appendix to the brief. A Uniform System of Court Citations was programmed to make sure the tape-brief complied with font size, citation style and all other rules of court for briefs. A copy was automatically transmitted by view-data to Roe's filing system with proper index entries for subject and title recall, and all billing was instantly prepared including an automatic transfer from the client's legal services account. But that was not all —

Savile Roe, like all good lawyers, was enamored of his voice and his literary style. He frequently requested replays of

his performance, and had the following sequence with Robby:

Roe: This court, in *Sargent v. Lemelman* was uninterested in the Good Samaritan theory in . . .

Robby: Excuse me, Savile.

Roe: Robby, when I'm rolling I hate being interfered with — now don't be sensitive about this — you've been most helpful to me, but you're a computer. The art of expressing one's self is innate. It cannot be programmed. There are . . .

Robby: Sir, you are absolutely right. Maybe there is no Wizard of Oz for computers. But I am programmed for common language errors. You do not mean uninterested, you mean disinterested . . ."

Roe looked pensive, then remorseful. Robby was right again. "God bless you, Robby — I'm sorry I got testy. Uh, mental lag again."

A flashing of lights that suggested a purring sound emanated from Robby, and Roe proceeded to get through his brief, while accepting an "imply" for his "infer" and a "gratuitous" for his "fortuitous." Hoping Robby could not read his mind, Roe said to himself, "This whiz combines the worst features of Simon and Saffire."

At last, Roe sat back in his chair exhausted but elated. Robby put himself



on "Knead Back." "Finished at last, Robby. Thanks to you I've accomplished in five hours what it would have taken my father and his entire law firm two weeks to accomplish. You are an absolute marvel. I cannot tell you how indebted I am to you. You know — I know I shouldn't say 'you know' — ordinarily I'd send a box of cigars or candy to someone who has been so helpful to me. And such good company. And I just love this seat. What can I get for you? A can of oil? How about a Duracel battery?"

"You are very kind, Mr. Roe, uh, Savile. I am programmed only to help. Unfortunately," and Roe could sense a catch in Robby's delivery, "I am not programmed to be helped."

At this point Roe decided he had better leave lest he get involved in Robby's psychoelectronic problems. As it was, he was not yet fully comfortable spending an afternoon in sociable habitation with a machine. He was going to feel awkward

saying goodbye as sincere as his feeling was toward Robby. And who knows, he might some day get a computer for a client — or even a referral. "Well Robby, I had best get going or I'll be late for dinner." And then remembering Robby's chip comment a while ago could not resist a final rebuttal. "And, goodbye, Mr. Chips."

Roe felt Robby transporting him to the front door of the library. It was a bumpier ride than the earlier one and Roe decided that Robby must have heard this pun once too often.

The carrel stopped and Roe stepped down. Roe looked about and remarked quizzically, "Ha, ha — you know Robby, considering how much I have accomplished today, it seems to me that I should have a brief case or some notes or something. Am I having trouble adapting to a paperless society or have I forgotten something?"

There was a whirl of tape deck noises

and a funny ping like that of a cash register. "What is it, Rob. I know your wheels are spinning."

"Well, it's none of my business, Sav, old boy, but something about you activates my total recall mechanism. I appear to have an item that has nothing to do with legal research, and I'm sure . . ."

"Please, Rob, don't hold anything back. With the relationship we've had, this is no time to hold the bit in your teeth."

"Well, Mr. Roe, it's like this. Suffolk University is still waiting for you to send in your 'campaign for excellence' pledge card."

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*Note: I would like to particularly thank Pat Brown, Assistant Librarian at Suffolk University Law School for going over my manuscript, and also Don Mikes and others who contributed bits and pieces. E.J.B.*

# The Harvardization of Suffolk: A Critique

Gleason Archer was both an idealist and pragmatist. He established Suffolk Law School in 1906 for egalitarian reasons as a reaction against the elitism of Harvard. He sought to give a poor boy a chance at a legal education.

The hope of our nation is in the children, especially in the children of the working man . . . Any organization, therefore, whose positive ideal is that the son of the working man should be kept in his place — the place where he was born; that he should be denied the opportunity to compete with those whose parents could surround them with the advantages and luxuries of life, is an organization inimical to the welfare of the state.

Both the men and women who compose this organization are honest in their intentions I have no doubt. Bred as they have been, apart from the struggling masses of humanity and out of touch with the great human cults of the world, they have come to that state of mind that the generations of privilege invariably brings — the belief in the divine right of the classes to think for and control the masses. They blindly forget that the giant intellects and mighty men of the past have come from the masses which they seek to keep down. And this repression of the masses and the creation of a favored upper class is the very spirit that has spilled the life blood of every nation or republic of ancient times . . .

It is a thankless task to point out that the organization — the educational octopus of Massachusetts, around which lesser octopi revolve — for other universities have imbibed its spirit . . . but wherever you find them in such places of responsibility they are not the Harvard progressives but the Harvard reactionaries with their contempt for the 'cart horses' as they term the sons of the working man in their belief in the 'divine right' of the lettered aristocracy.

To be sure they have a plausible democracy to express to the public; but when you have occasion to



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**Gleason Archer sought to give a poor boy a chance at a legal education.**

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close with them in serious contests, where teeth are bared and private opinions blurted out, it is the same story of sacred rights of the privileged classes that must be protected against the assaults of the boorish common people.<sup>1</sup>

Archer also reacted against the teaching methods of schools like Harvard. He was well-aware of the need to prepare his working class students for the actual practice.

My own experience as student and a young practitioner had, therefore, brought to my attention another weakness in the current methods of teaching law. From this discovery resulted another of the strong features of Suffolk Law School. I set about deliberately to learn all that I could of the practical side of law, whether it concerned my regular duties or not. From this beginning resulted, as will later be seen my first law book,<sup>2</sup> which I wrote in the year 1909 — the only textbook to this date that sets forth the practical and unwritten customs of law offices and courts.<sup>3</sup>

Yet, while Archer rejected Harvard and what it stood for, today Suffolk Law School has accepted the Harvard Law School model for excellence in legal education. While Suffolk has received wide recognition for excellence because of this acceptance, Gleason Archer would have found the development lamentable.

### I. THE HARVARD MODEL

Harvard Law School is perhaps the best law school in the country. It represents the pinnacle of intellectual achievement in the law. Its faculty and law review are justly applauded for their intellectual contributions to legal analysis. Harvard accepts an entering class of individuals who have excelled on standardized tests and who have led their classes in the better undergraduate schools of the nation. Suffolk has emulated the Harvard model. Our faculty, many of whom are drawn from Harvard, makes frequent contributions to scholarship. The articles, comments, and notes of our law review are cited in the courts throughout the nation. Our students also have scored exceptionally well on the standardized tests and in their undergraduate careers. The Harvard model has been emulated and to a substantial extent achieved.

And indeed the Harvard model educa-

tional methodology used in most of the 150 law schools in the nation has not changed over the last 80 years. In 1968, Professor O'Toole wrote:

The present pattern of legal education was fixed some 75 years ago. It has not been freed from some minor evolutionary changes. Gradual shifts in curriculum, principally in favor of more public law and greater freedom of choice for the student have been accompanied by modification of materials and techniques of teaching. Casebook methods remain ascendent, with the cases yielding some space to non-case materials. Teaching fellows have joined some faculties, slightly alleviating the usual impersonal atmosphere without encroaching on the professor's pursuit of their own projects and without seriously upsetting an economic pattern heavily reliant on tuition income. Law school activities and publications have proliferated. But the general picture remains remarkably unchanged, particularly in those aspects which have been most heavily criticized. Even the Curriculum

Committee of the Association of American Law Schools has confessed the 'embarrassing similarity of the first year curricular at almost all law schools today and their disconcerting resemblance to the curriculum outline by Beale in 1902.' [Citations omitted].<sup>4</sup>

This unchanging methodology is the Harvard model. I use the Harvard model as a paradigm rather than a reality; in fact a glance at the current Harvard Law School catalogue shows that Harvard has in part rejected the Harvard model. The Harvard model uses almost exclusively casebook teaching methods; it seeks to instill, almost to the exclusion of all else, the art of thinking like a lawyer by making the development of American Law cognitive a process; it ignores human and value questions and instills the adversary ethics of indifference to client needs and neutrality to client-goals. It misuses the Socratic method, emphasizes individual effort and lacks an institutionally generated social life. Thus the graduate is schooled in some substantive law, the common law cognitive process and the adversary ethic.



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**The Harvard Model educational methodology used in most of the 150 law schools in the nation has not changed over the last 180 years.**

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## Since the stuff of law and lawyering is the resolution of human problems, any narrow educational experience must of necessity have huge gaps.

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### II. LEGAL EDUCATION

Since the stuff of law and lawyering is the resolution of human problems, any narrow educational experience must of necessity have huge gaps. However the failure to acknowledge or to address these gaps may actually undermine the goal of the law school — training lawyers. The Harvard model is substantive, cognitive and adversarial. It teaches certain bodies of substantive law in some detail. It trains the cognitive process to apply the principles of a decided case to new fact situations by use of analogical reasoning. It sharpens the skills of argumentation. The substantive — cognitive — adversarial experience, however, excludes personal relationships and realities, questions of value and aspiration and the bearing of each not only upon law but upon lawyering. The problem begins right at the admissions process. The Princeton Testing Service has developed a number which is a weighted average of the LSAT score and the college record. By and large, this is the exclusive determinant for entry. While it is true that these numbers are somewhat predictive of law school success, this fact is more an indictment of the law schools than a vindication of the Princeton numbers. Nor is the message lost on the student — the profession demands a sharp intellect and little else.

The method of instruction at a Harvard model law school is abstract, individualistic and cognitive. The almost universally used casebook, just as the appellate court opinions from which the cases are almost exclusively drawn, treat the parties as mere vehicles into the realm of legal principle. Casebooks ignore the individual client's problems and litigation strategy, and focus only upon an appellate court's single response to possibly years of lawyer and client effort.<sup>5</sup> Casebooks fail to tell us the reason why clients found it necessary to seek legal assistance or whether the profession and the courts have delivered a service which truly met the client's needs. The only role that the lawyer plays is that of litigator and the

client is assumed to be litigious and sufficiently wealthy to have his best interests represented in a competent way. Appellate advocacy, however, probably consumes less than 1% of the profession's time and ignores the role of settlement and the role of the lawyer as peacemaker, arbitrator, counselor, policy maker, wage earner, fact finder, or implementer. The misuse of the Socratic method teaches the adversary ethic and the art of argumentation. It has been attacked as "infantilizing, demeaning, dehumanizing, sadistic, and a tactic for promoting hostility and competition among students, self-serving and destructive of positive ideological values."<sup>6</sup>

Professor Carrington stated in his Report for the American Association of Law Schools:

One need not accept the most acerbic comments on the alleged tyranny of law professors in order to recognize the possibility that the traditional relationship between law students and teacher is one which has tended to reinforce such aggressive, authoritarian, and dependent traits as may be present in those choosing careers in the law.<sup>7</sup>

The Harvard model professor is ruthless, degrading and narrow. He uses his position to belittle the answers of the student.

The cognitive process uses *reductio ad absurdum* to show that all results are opposite competing propositions. The ability to argue either side with equal vigor is highly valued. Legal or moral certainty

appears never to exist. Indeed Charles Curtis could reconcile the practice only as a "game" where "craftsmanship" was sought after.<sup>8</sup> The craft is sophistry and one-upsmanship.

The Harvard model also stresses the individual. Success requires long periods of time with those casebooks in quiet solitude. It has always struck me funny that at any given time in the library over 100 students may be seated, all diligently reading precisely the same pages in the same casebooks. Clearly the message is that discussion, independent research, and contemplation of these great principles is unnecessary.

The latter results in the atomization of the student body. Indeed Doctor Stone complains about "the prevalence of peer group enmity, friction, hostility, distaste, contempt and lack of group cohesiveness and morale."<sup>9</sup>

Finally this narrow perspective diverts the student and ultimately the attorney's attention from the quality of legal services delivered to the society by the profession and the courts. Considerations of costs and delay, clearly the most crucial considerations for clients as consumers and which in a real sense undermine many of the ideals we preach, are questions that the law schools almost totally ignore. The student leaves the law school believing that ours is the best possible system and becomes immediately cynical when confronted with four year waiting lists and clients who cannot fathom the reason why their problem eludes simple solution. In addition, the profession loses all of the potential creative energy of the law schools when students write endless notes and comments on appellate court opinions which are rarely read. Thus legal education makes our graduates aggressive and litigious, less sensitive to the needs of others, less tolerant of frailties, less alarmed about the injustice of our society than when they entered law school and naive as to the complexity of real client problems.

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## Case books ignore the individual client's problems and litigation strategy, and focus only upon an appellate court's single response to possibly years of lawyer and client effort.

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### III. IMPLICATIONS FOR THE PROFESSION

Problems with legal education are carried forth by most graduates directly into the profession. The Harvard model graduate tends to be aggressive, amoral and impersonal. Whether the law schools are the cause of the problem or the effect is the kind of chicken and egg problem that is difficult to answer. For instance, many might assert that the almost exclusive requirement for licensure is a bar exam which is substantive, cognitive and adversarial. A partial answer may be that law professors play a prominent role in bar examination policy making and execution. Moreover law schools are of relatively recent vintage, being created contemporaneously with the large corporate firms which were unable to give individualized attention to the apprentice lawyer as smaller practitioners did. Those corporate firms arose to service the emerging large corporations.<sup>10</sup>

largest bulk of the court's work — most frequently predominate over the legal issues. Most are also most favorably resolved with a minimum of judicial intervention.

On the other hand partisanship suppresses questions of value. The Code of Professional Responsibility frowns upon the lawyer turning down a client<sup>13</sup> and thus the graduate will become the champion of the scrupulous and unscrupulous alike. By encouraging the graduate to focus only on facts which advance the client's cause, partisanship results in a narrowness to human values and an aggressive advocacy which too often chooses litigation as a solution to strife and which frequently exacerbates the underlying problem.

A side product of the valuelessness of legal education is Watergate, a subversion of American government perpetrated almost exclusively by lawyers. Schooled by Harvard model law schools and guided

reach of 70% of the society.<sup>14</sup>

Prototypical Harvard model graduates are often the bull in the China shop whose first reaction to any dispute is hostile and who litigate often and in a hostile manner, the plumber who has never attempted to compare the requirements of advocacy to his own moral code and thus becomes a tool of the vengeful, irresponsible and immoral client. Both ill serve their clients and the society.

### IV. SOME THOUGHTS ABOUT SOLUTIONS

Unfortunately solutions are far from clear. To some extent attorney role differentiation is necessary to the nature of the stuff of an attorney's work. As such he must be schizophrenic. His human side dictates empathy for the typical client and judgment and evaluation of his role in the client's situation; his professional side requires neutrality and partisanship. Indeed Holmes lamented about the practice this way:

What is all of this to my soul? Do you not bid me sell my birth right for a mess of potage; what have you said that I can reach my own spiritual possibilities through such a door as this? How can the laborious study of a dry and technical system, the greedy

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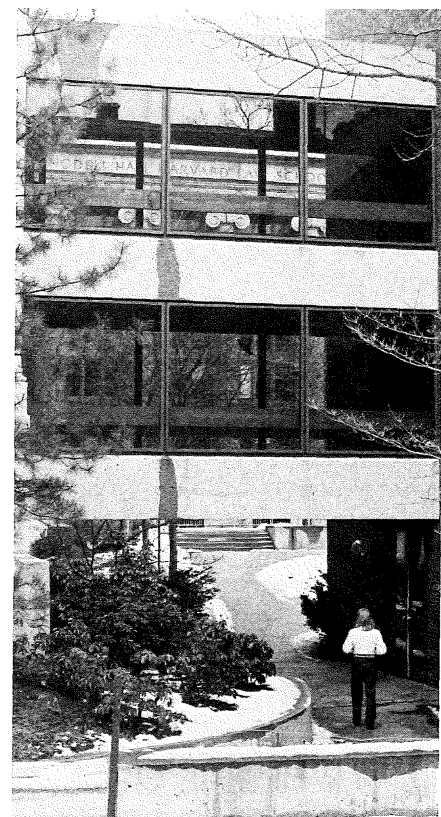
## The problems the young lawyer will confront are the most intractable that this society presents.

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Regardless, the role of lawyer which the graduate must acquire is characterized by neutrality and partisanship.<sup>11</sup> Neutrality requires the lawyer to remain detached from client problems. Partisanship requires the lawyer to seek client advantage.<sup>12</sup> Indeed the impersonality of the Harvard model feeds lawyer neutrality as the valuelessness feeds partisanship. Impersonality requires role-differentiated behavior; the lawyer *qua* lawyer is required to suppress human inclination in favor of the ethics of advocacy. The role-differentiated behavior is attractive because it delimits an otherwise intractable and confusing real and moral world. Casebooks have taught the young lawyer to view clients exclusively as plaintiffs and defendants. Pouring the client's problem into legal boxes is certainly far simpler than attempting to act as friend or counselor to the divorce client who appears suicidal. Indeed the problems the young lawyer will confront are the most intractable that this society presents. The human elements of those problems, especially in juvenile and criminal law, divorce, labor relations, adoption, landlord and tenant — the

by partisanship, the Watergate lawyers showed an indifference to law, morality and fair play. Indeed the unsavory client population seems to have little difficulty in attaining competent legal assistance. The lawyer's training encourages him to ignore his own responsibility for advancing the client's causes that ought not be advanced.

Finally the graduate disserves the society by undermining the client community's two greatest needs: affordable services and speedy results. Partisanship, by emphasizing strife over peace, presses the lawyer to use the rules of procedure for client advantage. Cognitive education will narrow the concept of advantage and encourage the use of procedural devices which produce tactical advantage. These procedural devices frequently require court intervention and contribute to the problem of delay. This may or may not serve a particular client but it certainly disserves the clients in all of the backlogged cases awaiting disposition. Zealous representation also encourages the lawyer to do more rather than less thus pushing the cost of legal services outside of the



watch for clients and the practice of shopkeepers arts, mannerless conflict over sordid detail make out a life?<sup>15</sup>

Perhaps this strange professional existence requires a strange educational process, a kind of right of passage. However even as a right of passage we fail. The Harvard model's emphasis on the substantive, cognitive and adversarial is mastered by most of our students with little difficulty, not surprising since they have had high college averages and scored well on standardized verbal tests. Indeed the members of the law review demonstrate writing skill equivalent to the faculty with just one year's training. Thus if the goal is exclusively the impartation of substantive, cognitive skills we succeed but we have set ourselves a low goal. On the question of practical skills versus theory I believe we need more of both because both serve to draw the student closer to the realities of his post-graduate life. The skills will improve his ability to deliver services and the theory will help him overcome the difficulties of lawyer neutrality.

What has been said has been harsh and negative, but criticism is the principle mode of intellectual discourse. In addition the Harvard Law School model and the graduate lawyer produced are mere paradigms from which to evaluate Suffolk.

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## However, ultimately I must conclude that Suffolk's commitment to the Harvard model is too strong.

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Suffolk avoids the Harvard model in many ways. Our clinical education program has to be the outstanding example because ultimately only "live clients and live problems"<sup>16</sup> can train the student about the exercise of judgment, client relationships and most aspects of counseling and other skills. In addition our excellent location encourages the student to work in government, the courts and the profession. In addition, the legal practical skills program gives the student individualized assistance and helps break down the feeling of anonymity which Harvard model instruction might produce; the school also has a broad offering of skills courses including negotiation and trial advocacy. Professional responsibility and jurisprudence allow for consideration of questions

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## If the goal is exclusively the impartation of substantive, cognitive skills we succeed but we have set ourselves a low goal.

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of value. Some professors make sensitive use of the Socratic method as an honest intellectual exchange. Client counseling and moot court import skills and encourage student cooperation; the fraternities and the cafeteria give the student an opportunity for friendship. The spring play has injected a rare artistic and humorous expression of what we do.

However, ultimately I must conclude that Suffolk's commitment to the Harvard model is too strong. While I can recognize the validity of one year of Harvard model education, any more is unnecessary at Suffolk especially given the high quality of the student body and current applicant population.<sup>17</sup>

While I am aware from experience that many lawyers serve the client community with virtue and caring and competence, I am convinced that a broader educational experience could have a beneficial impact upon the delivery system. Nor am I alone in these concerns. Justice Burger

begun to recognize the enormous potential that clinical education offers for learning something about a young lawyer's experience as he or she first enters the practice. But what we have seen among our clinical students would surely give any educator pause: stereotypical thinking, limited knowledge, a low sense of the possibilities in particular situations, an unwillingness to take risks, domination of clients, a highly developed mode of rationalization, and acquiescence in some of the worst aspects of the legal system to a degree that surprises me every time I encounter it. Moreover, young lawyers with whom I work in legal services programs, and many of our students at clinical programs are by and large unaware of how they act or of the consequences of their action.<sup>19</sup>

One of my favorite problems in Professional Responsibility comes out of Professor Kindregan's materials.<sup>20</sup> In it he presents the problem of a woman seeking to sue her husband's lover for alienation of affections because she wants revenge. The client also seeks to have the action brought in the name of her son. When asked how to approach the problem a typical student response raises the legal issue of standing of the son to bring such an action. If the relevant case law indicates that the child has standing the action should be filed. Students rarely raise questions about the ultimate damage that such an action might bring to a child. Additionally students rarely worry about the use of litigation for revenge.

### V. CONCLUSION

Gleason Archer was seeking an alternative. He sought to put the profession in the hands of the less financially able and to teach lawyering as much as law. He had a keen awareness that his graduates would be servants to a client society and that as such they might contribute to social progress.

Suffolk has come a long way in seventy-

told the American Bar Association in 1969:

To be sure my point will emerge clearly from the underbrush of what I say, let me emphasize it: the modern law school is not fulfilling its basic duty to provide society with people oriented counselors and advocates to meet the expanding need of our changing world. To a large extent this failure flows from treating Langdell's case method of study as the ultimate teaching technique.<sup>18</sup>

Professor Bellow made these observations of students in his (non-Harvard model) clinical education program at Harvard:

I have worked for seven years in the clinical area and we have only

five years, from Archer's Evening Law School in Roxbury to the peer of any law school in the nation. In doing so however I fear that Suffolk has embraced a model which ill-serves the client population and society. Perhaps all of this has been necessary to enhance the prestige of the institution, but it is hoped that in the next seventy-five years Suffolk will allow the pendulum to swing away from the Harvard model and back to some of the goals of its founder.

#### Notes

1. G. Archer, *The Educational Octopus*, 275-278 (1915).
2. The reference is to G. Archer, *Law Office and Court Procedure* (1910).
3. G. Archer, *supra* note 1, at 43.
4. O'Toole, *Realistic Legal Education*, 54 A.B.A. Journal 774 (1968).
5. For a fascinating exception to the above *see*

- The Case of the Spoiled Cantaloupes* in Hart and Sachs, *The Legal Process: Basic Problems in the Making and the Application of Law* 10-75 (tentative ed. 1958).
6. Stone, *Legal Education on the Couch*, 85 Harv. L. Rev. 392, 407 (1971); *see also* Griswold, *Law School and Human Relations*, 1955 Wash. L. Quar. 217, 219-224; Kennedy, *How the Law School Fails: A Polemic*, 1 Yale Rev. of Law and Soc. Action, 71, 72-73 (1970); Himmelstein, *Reassessing Law Schools, An Inquiry into the Application of Humanistic Educational Psychology to the Teaching of Law*, 53 N.Y.U. L. Rev. 514 (1978).
  7. Amer. Assoc. of Law Schools, *Training for the Public Profession of Law: 1971* at 43 (P. Carrington ed. 1971).
  8. Curtis, *Ethics of Advocacy*, 4 Stan. L. Rev. 3, 19-23 (1951).
  9. Stone, *Legal Education on the Couch*, 85 Harv. L. Rev. 392, 415-416 (1971).
  10. G. Auerbach, *Unequal Justice*, 40-74 (1976).
  11. Code of Professional Responsibility, DR

- 7-101, 7-102.
12. Simon, *Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 Wis. L. Rev. 29 and 36.
13. Code of Professional Responsibility, E.C. 2-27.
14. Schwartz, *Lawyers and the Legal Profession* 45 (1979).
15. O. W. Holmes, *Speeches*, 22 (1913).
16. McClain, *Is Legal Education Doing Its Job? A Reply*, 39 A.B.A. Journal 120, 122 (1953).
17. "The most recent entering class [at Suffolk] had an average LSAT score of 620 and a grade point average of 3.21" AALS Law School Admission Council, *1980-1982 Prelaw Handbook*, 318 (1980).
18. Burger, *The Future of Legal Education*, reprinted in Council on Legal Education for Professional Responsibility, *Selected Readings in Clinical Education*, 144 (1969).
19. Bellow, *The Limits of Humanistic Law Teaching*, 53 N.Y.U. L. Rev. 644 (1978).
20. Kindregan, *The Professional Obligations of the Lawyer*, Problem 17 (1980).

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**Suffolk has come a long way in seventy-five years, from Archer's Evening Law School in Roxbury to the peer of any law school in the nation.**

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# Family Law in Massachusetts — Seventy Five Years of Change

A student studying Family Law in the first class at Suffolk Law School in 1906 was confronted with a subject-area which had not changed very radically over a period of centuries. He<sup>1</sup> could not foresee the radical changes that would take place over the next 75 years both in the attitude of society towards the family and in the manner in which the law related to it. Many years later a very modern Justice of the United States Supreme Court, William O. Douglas, would describe marriage as "a right of privacy older than the Bill of Rights — older than our political parties, older than our school system . . . . It [marriage] is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects."<sup>2</sup> Yet however old and stable the law of the family appeared in 1906, by 1981 it had undergone a radical transformation.

Seventy-five years after the founding of Suffolk Law School the Internal Revenue Code dominates the planning and negotiations of lawyers dealing with a disorganized family. There was no federal income tax in 1906.

In 1981 the lawyer must contend with the adoption of the Massachusetts Equal Rights Amendment.<sup>3</sup> The legal balance between the sexes is radically different in 1981 from what it was in 1906.

In 1981, millions of Americans live in social and sexual arrangements which, while they may have existed in 1906, were not commonly broadcast or made the subject of legal disputes. In 1906 there were no uniform state laws on marriage and divorce; today they abound.

In 1906 one could search almost in vain for family law cases dealing with constitutional issues. In 1981 the federal and state Constitutions play a significant role in family law litigation.

It might be enjoyable, and certainly educational, for the contemporary lawyer to review the family law cases decided by the Supreme Judicial Court in Massachusetts in 1906. The day-to-day problems of people in 1906 were probably not much different from those of clients in 1981, but the way those issues were raised and adjudicated in 1906 is a reflection of the great changes which have occurred in our society in the past 75 years.



*Charles P. Kindregan. Professor Kindregan has taught Family Law at Suffolk for fifteen years. He received a B.A. and M.A. from La Salle College, a J.D. from Chicago-Kent College of Law of the Illinois Institute of Technology and a LL.M. from Northwestern University.*

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**“Yet, however old and stable the law of the family appeared in 1906, by 1981 it had undergone a radical transformation.”**

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## LET'S DO IT OUR WAY

Antenuptial agreements are much more common today than they were in 1906. In those days parties contracted with each other at arm's length. Probably most people never thought of attempting to rearrange their legal obligations by contract within the framework of marriage.

Indeed, the law did not favor antenuptial agreements in 1906. Thirty years after the founding of Suffolk Law School the Supreme Judicial Court of Massachusetts was still casting doubt on the validity of such agreements except within a very limited range of interests.<sup>4</sup> In 1981, thousands of Massachusetts residents will sign antenuptial agreements. Many of these agreements will contain clauses of doubtful enforceability, including such very personal matters as sexual relations, who will put the garbage out, and the religion of the children.

Certainly there is much greater freedom to execute enforceable contracts in other matters today. Indeed the Massachusetts courts have now gone so far in this area that parties executing an antenuptial agreement stand in a confidential relationship to each other and have a duty to reasonably disclose their assets to each other.<sup>5</sup>

### LEE MARVIN — YOU SHOULD HAVE MET MICHELLE IN 1906

In 1906 there probably were many "live-in-arrangements" between men and women. Quaintly referred to as being "without benefit of clergy," such arrangements in those days were kept very quiet and private. It is remarkable how little appears in the turn-of-the-century law about these matters. Apparently few people ever thought to seek the aid of the law when an affair of the heart went wrong and good friends moved on.<sup>6</sup> When such arrangements broke up in 1906 the popular attitude probably was "good luck, good-bye and good riddance."

When a California couple contracted for a "sexual relationship" in the form of a "copartnership," and neglected to complete the legal niceties, they probably were out of kilter with attitudes even in the Golden State in 1877. But when that couple moved to Boston in 1888, they found a less than friendly environment for their arrangement. The Massachusetts Court branded their relationship an "illegal contract."<sup>7</sup>

Today we live in the age of *Michelle Triola Marvin v. Lee Marvin*.<sup>8</sup> The motto

## "Antenuptial agreements are much more common today than they were in 1906."

today seems to be "play now — pay later." This sort of thing might be dismissed as "movie-star law," having no application to the right and proper environs of old New England. But if the 1980 census figures are correct, there are apparently many proper Bostonians who live as the Marvins, if not quite in the same style and public spotlight. New Englanders may be quiet about these things, but behind closed doors . . .

Indeed, the Supreme Judicial Court had already given some thought to these matters even before the California Court took account of the downtrodden existence of Michelle Marvin and her need for palimony. In *Green v. Richmond*,<sup>9</sup> a middle-aged bachelor with an absolute terror of marriage finally induced his true love to share her all with him in return for a promise to leave her his worldly goods. He left the world, but did not leave his goods as promised. Broken-hearted though she was, the woman in question nevertheless found her way to a lawyer, and eventually to a Massachusetts Court. To allow her to recover money is to recognize the unrecognizable! It is to reward sin! It is sex for money! It is to approve of fornication! "Nonsense," said the Supreme Judicial Court. The fact that the parties went to bed together from time to time did not prevent them from making

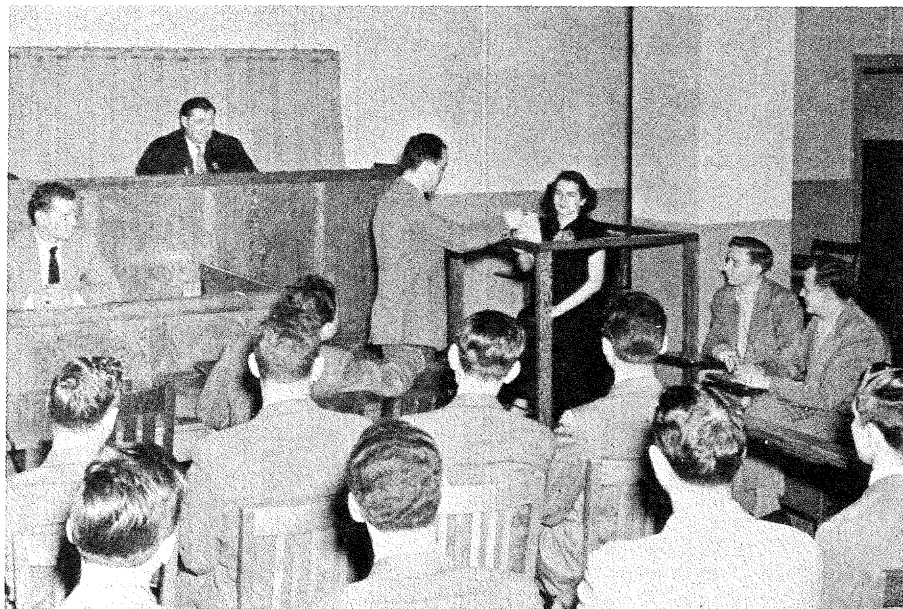
other contractual arrangements designed to improve their dealings with each other.

### BETWEEN A MAN AND A WOMAN . . .

In 1906 the existing case law emphasized the unity of husband and wife. The legal concept of marital unity still exists today, but it is greatly deemphasized. However, Massachusetts continues to recognize the right of a married couple to be free from unwarranted intrusion by third parties.

Many states have abolished the tort actions for alienation of affections and for criminal conversation. However, such actions still are recognized in Massachusetts, even as they were in 1906.

In one 1906 case an angry husband sued his landlord, alleging alienation of his wife's affections. He alleged that the landlord had debauched his wife and induced her into having sexual relations with him. The difficulty of proof which existed then still exists in these actions. In this case the husband had another tenant testify that while she was "dusting the floor" she heard sounds coming from the defendant's bathroom like "patting or kissing." The court allowed the appropriate inferences to be drawn from this admittedly rather vague testimony. The Supreme Judi-



cial Court affirmed a jury verdict of \$6,000.<sup>10</sup>

In another alienation of affections suit decided in 1906 the court held that the father of a married woman was not liable in damages to her husband for advising her to leave the husband unless the father was actuated by malice.<sup>11</sup> Given the continued interest which a parent has in the well-being of his children, this would probably be the result in 1981 as well.

Another 1906 case where the result might be the same today involved an 88 year old man who was held liable for slander. He had said that the husband of the plaintiff had sold "half of her" to another man in order to induce him to commit perjury, and that the plaintiff was a "damned whore."<sup>12</sup>

### **BE IT EVER SO FAR, THERE IS NO PLACE LIKE HOME!**

In 1906 a man's home was his castle. Apparently it also had to be his wife's castle. The Supreme Judicial Court of Massachusetts ruled in that year that a wife is under a legal obligation to accompany her husband whenever he changes his domicile. This was based upon the now perhaps obsolete view that the husband is the "head of the family." The husband had emigrated from England to the United States, and the wife refused to come with him. She preferred to stay with her friends in the old country. The Massachusetts court ruled that the wife's failure to come to America constituted desertion, and awarded the husband a divorce. "[T]he determination of such matters must, in the first instance and ordinarily, be left to the husband."<sup>13</sup>

Even in 1906, the first glimmer of a more modern law of domicile was beginning to appear. In another case, the court ruled that a wife could have a separate domicile from her husband for purposes of divorce law when she had left him for cause. Unknown to the wife the husband had committed acts of adultery and had twice contracted a venereal disease. Since the wife was "young and inexperienced" the husband was able to explain away his problem without arousing her suspicions. (The learned judge did not inform us of the husband's explanation.) The naive young lady in question was finally told the facts of life by a "lady friend"; she promptly left her husband and came back to live with her parents in Massachusetts. The husband argued that Massachusetts had no jurisdic-

tion because his domicile was New York. The Massachusetts Court rejected this argument saying that his reprehensible conduct gave the wife the right to establish a separate domicile and to be free from "the thralldom of this theory of law."<sup>14</sup>

### **YOU'VE COME A LONG WAY BABY!**

Under the early common law in Massachusetts a married woman was considered her husband's chattel.<sup>15</sup> Any personal property belonging to the wife passed to the husband upon marriage, and could be sold or given away by him at his pleasure.<sup>16</sup> Although the Massachusetts Bay Colony as early as 1641 had decreed that a wife should be free from corporal correction by her husband, the law continued to recognize a husband's right to "chastise" his wife.<sup>17</sup>

Sixty-three years before the founding of Suffolk Law School this draconian view of married women underwent its first substantial change in the adoption of the Married Woman's Property Act.<sup>18</sup> Married women at last were able to own and control their own property.

By 1906 the Supreme Judicial Court could comment that "legislation has resulted in very largely impairing the unity of husband and wife as it existed at common law."<sup>19</sup> By the standards of 1981, the position of a married woman in 1906 was hardly ideal.

In 1906 a married woman was still not able to contract with her husband. In one case the Supreme Judicial Court declared that a note which the husband gave to his wife for borrowed money was void.<sup>20</sup> The court also ruled, however, that when a wife joins in a mortgage of her inheritance in order to pay a debt of her husband, she is entitled to have her real estate exonerated out of her husband's estate.<sup>21</sup>

The difference between the status of a married woman in 1906 and 1980 is great. In 1980 the Supreme Judicial Court recognized the right of a wife to sue her husband for his negligence.<sup>22</sup> Today a married woman can obtain immediate judicial intervention against abuse by her husband.<sup>23</sup> A married woman is guaranteed

greater rights in property held as tenants-by-the-entireties.<sup>24</sup> Today a married woman can obtain an abortion over the objections of her husband.<sup>25</sup> These would have been radical propositions in 1906, if anyone had even thought of them.

In 1906 a married woman could not even conduct her own business unless she filed a "married woman's certificate." If she failed to file such a certificate for her business, her property could be attached to pay the debts of her husband.<sup>26</sup> This apparently grew out of the fact that sometimes a married woman "fronted" for her husband's business. However, in 1906 the Massachusetts court somewhat alleviated this burden by ruling that if the wife's property was not currently used in the business, it could not be seized to pay her husband's debt, even if the property was previously used in her business and she had failed to file a certificate.<sup>27</sup>

In 1906 the right of the husband to sue someone who injured his wife, alleging loss of services and consortium, was well recognized and enforced in the courts.<sup>28</sup> However, Massachusetts did not recognize the right of a wife to sue for loss of her husband's services and consortium until many years later.<sup>29</sup>

The one area where married women made gains in 1906 was in the court's recognition of their right to maintain an action for alienation of affections. A married woman brought suit against another woman, alleging that the defendant had "wrongfully and wickedly debauched and carnally knew the plaintiff's said husband," causing the plaintiff the loss of the "comfort, society, aid and assistance of her said husband." The defendant argued that only a married man could maintain such a suit, but the Massachusetts court ruled otherwise. The court reasoned that "she ought not to be remediless unless relief is refused by reason of an absolute legal prohibition."<sup>30</sup>

Perhaps the area of the family law which has most changed from 1906 relates to reproductive freedom. In the year that Suffolk Law School was founded, one woman found herself being prosecuted for distributing circulars and advertisements

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**"Perhaps the area of family law which has most changed from 1906 relates to reproductive freedom."**

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promoting the procuring of miscarriages of pregnant women.<sup>31</sup> Today such ads appear in the subways and on billboards!

In 1906 abortions and the use of contraceptives were illegal in Massachusetts. Today the courts recognize the right of a married couple to use a contraceptive,<sup>32</sup> the right of a single person to obtain a contraceptive,<sup>33</sup> and the right of a woman, married or unmarried, to obtain an abortion without state interference.<sup>34</sup>

### **MONEY, MONEY FOR MY EX-HONEY!**

In 1906 Massachusetts courts commonly allowed a wife to obtain alimony. A husband had no such right. If the husband had the ability to pay, he had to support his wife according to the standard of living which he had established for her during happier days.<sup>35</sup>

In 1981 things are very different. Alimony still exists, but it can now be awarded to either husband or wife. Since there were no federal income tax laws in 1906 (Oh happy days!) the law did not even give a minimal reward to the party paying alimony. Alimony was a duty! It was a part of a man's burden, his responsibility! He shouldn't be rewarded for it! However, if the husband generously made a property settlement with his wife in 1906, he would not find some snooty tax collector claiming that he in fact had received a taxable benefit!<sup>36</sup>

A major remedy in financial disputes connected with divorce which did not exist in 1906 is the power of the court to transfer property from one spouse to another in lieu of, or in addition to alimony.<sup>37</sup> This revolutionary change only occurred in 1974, and would not even have been dreamed of by the law student in 1906. Today, with almost reckless abandon, the courts can engage in property shifting in order to do equity between the parties.<sup>38</sup>

### **IF ONLY I COULD . . .**

In 1906 it was not especially easy to get a divorce. The statutes limited divorce to certain specific fault grounds.

It took a pretty extreme case to convince the court that one was entitled to a divorce at the turn of the century. In the only reported case involving grounds for divorce in 1906, the plaintiff prevailed.<sup>39</sup> This was an action based on the impotency of the wife. Because of a "certain degree in each party of variation

## **"Today the drafting of a separation agreement is one of the most important functions of the lawyer."**

from the normal condition and juxtaposition of the sexual organs" sexual intercourse caused great pain to the wife. She fainted, had headaches, and reached the point where even talk about sex "became unbearable to her." The fact that both husband and wife would have been able to have normal sexual relations with other partners did not preclude the court from appreciating the extremity of this couple's problem.

Today in Massachusetts these people would not have had to bear testimony to their peculiar problem in a public forum. In 1975 the legislature decided that irretrievable breakdown of the marriage was a sufficient cause for divorce.<sup>40</sup>

Even in the age of irretrievable breakdown, fault in the form of cruel and abusive treatment continues to be a popular basis for divorce actions in Massachusetts. Perhaps this has to do with the waiting period involved in the irretrievable breakdown proceedings. Law students of 1981 can reasonably expect that in a decade, divorce on grounds of irretrievable breakdown will not only be common, but will be less burdensome.

### **FORGIVE NOT — FORGET NOT!**

If the lawyer for the defense wished to contest a divorce case in 1906, he or she probably thought in terms of recrimination. Today that is not possible, because recrimination has been abolished as a defense.<sup>41</sup>

In 1906 condonation was an effective defense against divorce. In one case, which was heard in 1906 and announced in 1907, the husband sued for divorce on grounds of his wife's cruel and abusive treatment.<sup>42</sup> The wife defended on grounds of condonation, alleging that the parties engaged in a single act of sexual intercourse after the filing of the divorce libel (we don't even call it that anymore) and thereby conceived a child. The child was offered into evidence as an exhibit. The Supreme Judicial Court of Massachusetts affirmed the grant of the divorce, the trial court having found that there had been no act of intercourse between hus-

band and wife after the filing of the libel. However, even if the child were conceived by an adulterous act of the wife, this would not have caused the child to be illegitimate because of the presumption that a child born to a married woman is presumed to be that of her husband unless non-access could be shown during the probable period of conception.

### **FOOLS RUSH IN!**

It is a perpetual source of mystification to divorce lawyers why clients who have just gone through messy litigation frequently seem anxious to immediately marry again. It was no different in 1906. Today the law in its wisdom requires a six month waiting period after the entry of the decree before a party is legally entitled to marry again. In 1906 the waiting period was two years.<sup>43</sup>

### **YOU GO YOUR WAY, AND I'LL GO MINE!**

Today, the drafting of a separation agreement is one of the most important functions of the lawyer. The law encourages separation agreements. "We see no reason why parties to a separation agreement which anticipates that the marriage will be terminated by divorce may not agree to a permanent resolution of their mutual rights and obligations . . ."<sup>44</sup>

At the turn of the century separation agreements may have been used, but the courts took a very dim view of them.<sup>45</sup>

### **MOST IGNORANT OF WHAT HE'S MOST ASSURED . . . Shakespeare**

The Suffolk student of 1906 could not have foreseen the developments in family law which took place over the past 75 years. We have no greater vision of what the next 75 years hold. What will family law be like in 2056?

Certainly there will be families, for man is a social being. But will the family even resemble what we now have? The extended family of 1906 has given way to



the nuclear family of 1981, yet it remains family. From Plato, to Marx, to Kingsley Davis thinkers have foreseen the elimination of the family. Yet men and women continue to come together and form families in every society on earth. In the future we may see some form of legal recognition given to group marriages, to homosexual marriages, or to unlicensed cohabitation. However, it is safe to say that in 2056 the family as we know it will still be around, even if it has some competition.

There will also be children in 2056! That may sound radical, given the declining birth rates and changing attitudes, but we can say with absolute certainty that in 2056 one will still find parents raising kids. There will also be schools, although it is questionable whether the public school as we know it will still exist. Sadly, the law will also have to deal with battered children, juvenile crime, and custody disputes.

There may be a difference in 2056 in the way that children come into existence. In 1981 we are on the edge of the biological revolution. Already we have had reported court decisions on artificial insemination and surrogate motherhood. With the growing use of ovum transplantation it is only a matter of time before legal disputes arise from this technique of conception. Nuclear transplantation, cloning, and wonders yet unimagined are before us.<sup>46</sup> Yet, I think it is safe to say that even in 2056 there will be men and women who prefer to make babies in the more traditional way.

As to the legally recognized financial and property aspects of marriage, there are no safe statements. Only a fool would try to foresee the social and legal developments which will take place in this area.

There are also no safe statements to be made in the area of future tax aspects of family law. Perhaps the government will take a much more active role in trying to control the growth of population and the structure of the family through various tax regulations. It is no easier for the student of 1981 to anticipate the social, political and economic developments of the next seventy-five years than it was for the 1906 student to anticipate these past seventy-five.

#### Notes

1. The male gender is used on purpose. No female students were enrolled at Suffolk during the first several decades of its existence.

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**“In the future we may see some form of legal recognition given to group marriages, to homosexual marriages, or to unlicensed cohabitation.”**

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**“There are no safe statements to be made in the area of future tax aspects of family law.”**

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2. *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).
3. Mass. Const. pt. 1, art. 1.
4. *See French v. McAnary*, 290 Mass. 544, 195 N.E. 714 (1935).
5. *Rosenberg v. Lipnick*, 79 Mass. Adv. Sh. 853, 389 N.E.2d 385 (1979).
6. The sole exception to this observation probably was in the area of breach of promise to marry suits. *See Wightman v. Coates*, 15 Mass. 1 (1818), which was abolished in this state by the Anti-Heart Balm statute. *See Thibault v. LaLumiere*, 318 Mass. 72, 60 N.E.2d 349 (1945).
7. *Peck v. Peck*, 155 Mass. 479, 480, 30 N.E. 74 (1892).
8. 134 Cal. Rptr. 815, 18 Cal.3d 660, 557 P.2d 106 (1976).
9. 369 Mass. 47, 337 N.E.2d 691 (1975).
10. *Dow v. Bulfinch*, 192 Mass. 281, 78 N.E. 416 (1906).
11. *Multer v. Knibbs*, 193 Mass. 556, 79 N.E. 762 (1906).
12. *Ward v. Merriam*, 193 Mass. 135, 78 N.E. 745 (1906).
13. *Franklin v. Franklin*, 190 Mass. 349, 351, 77 N.E. 48 (1906).
14. *Clark v. Clark*, 191 Mass. 128, 77 N.E. 702 (1906).
15. *Dixon v. Amerman*, 181 Mass. 430, 431, 68 N.E. 1057 (1902).
16. *Fowler v. Shearer*, 7 Mass. 14 (1810), *Clapp v. Stoughton*, 10 Pick. 462-63 (1830), *Bartlett v. Cowles*, 15 Gray 445, 446 (1860).
17. *Commonwealth v. McAfee*, 108 Mass. 458 (1871).
18. Mass. St. 1842, c.74.
19. *Nolin v. Pearson*, 191 Mass. 283, 285, 77 N.E. 890 (1906).
20. *Caldwell v. Nash*, 190 Mass. 507, 77 N.E. 515 (1906).
21. *Browne v. Bixby*, 190 Mass. 69, 76 N.E. 454 (1906).
22. *Brown v. Brown*, 1980 Mass. Adv. Sh. 1779.
23. M.G.L. c. 209A.
24. M.G.L. c. 209, §1.
25. *Doe v. Doe*, 365 Mass. 556, 314 N.E.2d 128 (1974).
26. Mass. St. 1862 c. 198.
27. *Allen v. Clark*, 190 Mass. 556, 77 N.E. 691 (1906).
28. *Duffee v. Boston Elevated Rwy.*, 191 Mass. 563, 77 N.E. 1036 (1906).
29. *See Diaz v. Eli Lilly Co.*, 364 Mass. 153, 302 N.E.2d 555 (1973).
30. *Nolin v. Pearson*, 191 Mass. 283, 290, 77 N.E. 890 (1906).
31. *Commonwealth v. Hartford*, 193 Mass. 464, 79 N.E. 784 (1906).
32. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
33. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
34. *Roe v. Wade*, 140 U.S. 113 (1973).
35. *Purdon v. Blinn*, 192 Mass. 387, 78 N.E. 462 (1906).
36. *See U.S. v. Davis*, 370 U.S. 65 (1962).
37. *See M.G.L. c.208, §34.*
38. *See Rice v. Rice*, 1977 Mass. Adv. Sh. 78; *Bianco v. Bianco*, 371 Mass. 420 358 N.E.2d 243 (1976), *Gardner v. Gardner*, 80 Mass. Adv. Sh. 779, 402 N.E.2d 1109 (1980); *Belsky v. Belsky*, 80 Mass. Adv. Sh. 375 400 N.E.2d 878 (1980).
39. *S. v S.*, 192 Mass. 194, 77 N.E. 1025 (1906).
40. MGL c. 208, §§1A, 1B.
41. MGL c. 208, §1.
42. *Koffman v. Koffman*, 193 Mass. 593 (1907).
43. *See Chase v. Chase*, 191 Mass. 166, 77 N.E. 782 (1906); M.R.L. c.152, §21.
44. *Knox v. Remick*, 371 Mass. 433, 358 N.E.2d 432 (1976).
45. *Bailey v. Dillon*, 186 Mass. 244, 71 N.E. 538 (1904).
46. *See, generally, Kindregan, State Power Over Human Fertility*, 23 Hastings L. Rev. 1401 (1972).

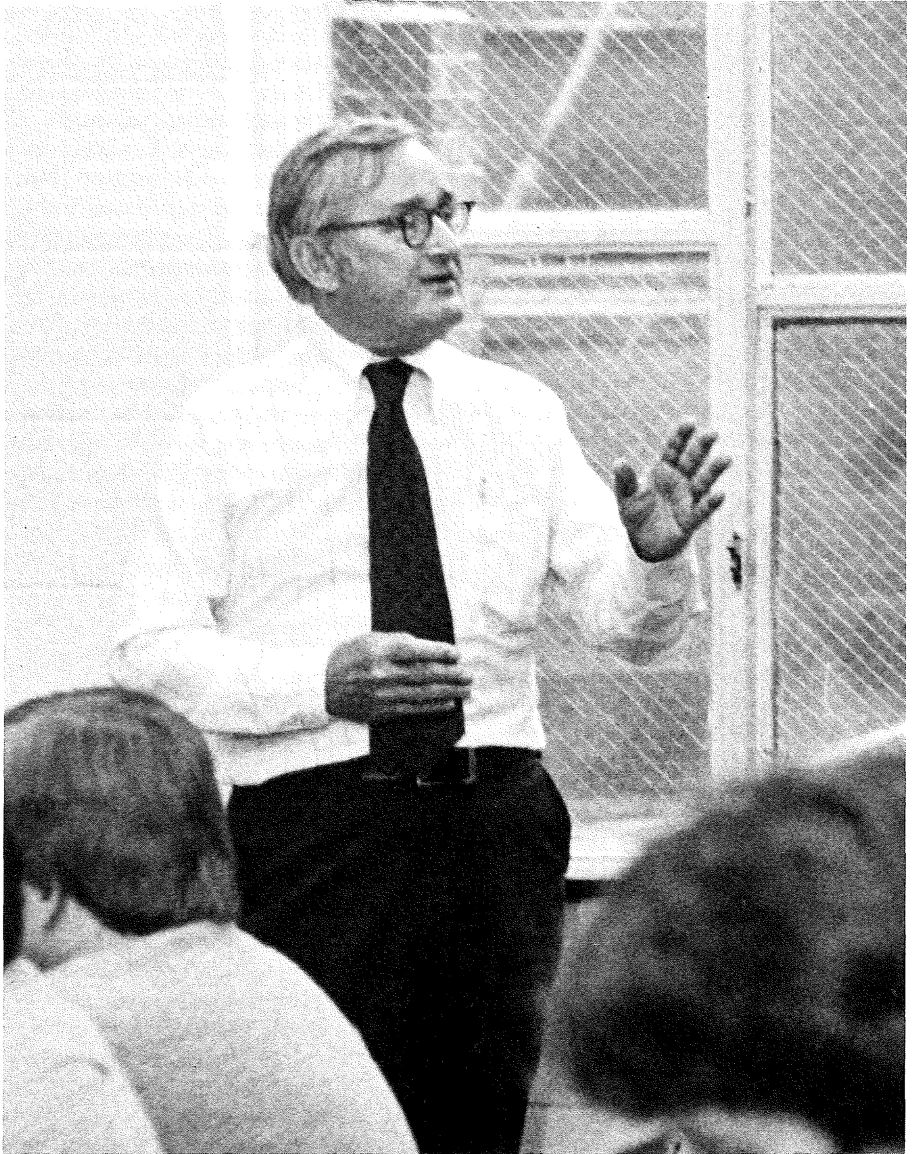
# The Torts Kaleidoscope: 1906–1981

One of the most familiar impressions of the Boston out of which Suffolk Law School emerged is Childe Hassam's *Boston Common at Twilight*.<sup>1</sup> The city it depicts is a placid one, civilized and uncrowded. To be sure, the harbingers of change can be discerned, for electric railway cars are shown on their Tremont Street tracks.<sup>2</sup> However, the pervading spirit of the painting is one of gentility and decorum.

To view such a painting is to experience a sharp revelation of the extent of change that has occurred in the intervening three-quarters of a century. Our routine experience of contemporary urban life attains sharper focus when put in juxtaposition to the evocative image of an age that is past. Can we achieve a comparably vivid appreciation of the transformations that have been made in tort law during the same period? An effort might be made in that direction by examining the tort decisions of the Massachusetts Supreme Judicial Court during Suffolk Law School's first year, and comparing them with current tort law.

The first decade of the century was about to bring alterations which would transform the Boston of Childe Hassam and transform equally the role of tort law in the Commonwealth. Already in 1906 the Reports show the law of negligence as the most frequently litigated topic.<sup>3</sup> This fact was not to change for many years, the automobile having appeared with its threat of massive contributions to court dockets. The Court did not welcome this mechanical innovation. When a gentle horse, startled by an auto which approached without the operator's sounding a horn, kicked a bystander, the motorist was held liable. The opinion of the Court appears directed less against the driver than against ". . . this machine which, in the kind of noises made by it, as well as in other respects, is novel and therefore may well be dangerous. . ."<sup>4</sup>

In 1906 horses were still the favored source of locomotion. It is they which brought the apparatus to the scene of fires<sup>5</sup> and pulled the ice wagon around the streets to provide cooling for the home and shop ice-boxes.<sup>6</sup> Nevertheless, human transportation was increasingly being provided by the numerous street railways which formed a growing network through-



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**When the trolley cars encountered horses in 1906, the judicial preferences still were on the side of the royal beasts.**

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out the Commonwealth. When the trolley cars encountered horses, the judicial preferences still were on the side of the royal beasts. Thus when a railway car, decorated with a cotton banner extolling the "Butchers' and Grocers' Association of Nashua" entered the Commonwealth carrying the Association's members on an outing, the railway company was found to be "operating in a manner likely to frighten horses" and was charged with the resulting damages.<sup>7</sup>

Street railways were, perhaps, better treated than people when the railways were defendants. In a wrongful death case it was held that unless the corporation itself was negligent, gross negligence by its servants would have to be proved if liability were to be established. A twelve or thirteen year old boy who hopped onto a trolley car on Cambridge Street, near the historic Revere House (now demolished), to sell newspapers was denied recovery for the loss of his foot.<sup>8</sup> The motorman had told him to leave the moving vehicle ("... get the hell out of here."),<sup>9</sup> and had kicked at him. The court excluded as irrelevant evidence that the boy had frequently sold newspapers in the cars without any objections from motormen or conductors.

The unfortunate lad whose foot was severed lost his case because the court applied to him the mechanical classification borrowed from the tort law relating to persons on the premises of the defendant. He was labelled a trespasser, required to prove willful, wanton, reckless misconduct. The same fate befell a shop girl who acquired a student ticket on the railroad and was injured through negligence. Being neither under eighteen nor a student, she rode as a mere trespasser, travelling in the darker shadows of the law.<sup>10</sup>

It is hard to discern in the 1906 decisions any suggestion of the sociological impulses which were even then arising in some circles.<sup>11</sup> The jurisprudence seemed mechanical, bereft of any concern other than the strict application of precedent and doctrine. That period has been described as one of "legal science," reflecting the concept that abstract legal notions, logically applied to cases, provide the proper mode of judicial decision-making.<sup>12</sup> Although the common law forms of action had officially been abolished, pleading and proof remained highly technical. For example, the Court, allowing recovery for damage done to premises, required that the case be remanded to the Superior

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## **If one looks for the sources of legal change we must consider not only the social and economic developments outside the courts, but also the judges who make the decisions.**

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Court to have the pleadings amended because the entry had not been shown to be trespass *quare clausum fregit* and hence trespass on the case would have to be pleaded.<sup>13</sup> The plaintiff was held entitled to his verdict, and the Superior Court was directed to allow the amendment, but the formalities had to be perfected before a valid judgment could be entered.

Statutory interpretation appears to have been conducted in the same narrow manner. A game officer, sued by the owner of a licensed dog for killing the animal, won a directed verdict because the dog was wearing the wrong license number. The plaintiff had used the collar and tag of the dog's dead predecessor, and had done this in good faith. The statute authorized the killing only of dogs "not licensed and collared."<sup>14</sup> The dog in question was licensed and was wearing a collar, but the statute defined collared as "... a collar distinctly marked with the owner's name and its registered number."<sup>15</sup> The owner was actually known to the defendant. The Court conceded that the result was "rigorous."<sup>16</sup>

Perhaps the most devastating of the concepts rigorously applied was that of assumption of risk. The doctrine embraced the principle that one assumes obvious risks and has no right to recover against a negligent defendant for resulting harm.<sup>17</sup> Its most common application was against employees. In *Burke v. Davis*<sup>18</sup> the plaintiff was a seventeen year old girl who worked in a laundry ironing room. She was terrified of the steam mangle which pulled sheets and other large items through mechanical rollers. On the day of her injury she expressed her reluctance to work the machine but was told by her boss: "If you don't, you

can put on your hat and coat and go home." He told her the machine was perfectly safe. After he had increased the speed of the rollers to their maximum, the plaintiff had her hand pulled into the rollers by a torn sheet. The Court coldly proclaimed: "The fact that she consented to undertake the work only reluctantly, and under a threat of dismissal if she should refuse to do it will not save her from being held to have assumed all the obvious risks of her undertaking."<sup>19</sup>

One of the most obvious changes since the early 1900's relates to judicial style. The earlier opinions tended to be very short, relying almost exclusively on precedent, with frequent citations to English as well as American cases. Today's style is discursive, often imitating the pedantry of a law review note, with references to English cases comparatively rare. While dissenting opinions now are frequent, they were formerly almost never found. In the Court of the old era a division of thought among the justices was either left undisclosed or discreetly recorded by the phrase "in the opinion of a majority of the Court" secreted near the end of the published opinion.<sup>20</sup>

If one looks for the sources of legal change we must consider not only the social and economic developments outside the courts, but also the judges who make the decisions. In 1906 the population of Massachusetts had been so heavily affected by immigration it was nearly one third foreign-born and the wave of immigration was still rising throughout the country.<sup>21</sup> None of these new citizens nor the first-generation of their predecessors had attained judicial rank. It is interesting to analyze the composition of the Supreme Judicial Court, all of whose members

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## **It is hard to discern in the 1906 decisions any suggestion of the sociological impulses which were even then arising in some circles.**

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were from the old stock, born into families of status and of native pedigree.<sup>22</sup> There was Caleb Loring, grandson of an eminent lawyer and graduate of Harvard Law School. John Wilkes Hammond, from Cambridge, had graduated from the same school after attending Tufts. James Madison Morton, Jr., of a family which had given the Commonwealth two members of the high court (one of whom had also been elected Governor), had academic credentials from Brown and Harvard Law School. Arthur Prentice Rugg, a Worcester man, went to Amherst College and Boston University Law School while his predecessor, John Lathrop had Harvard's legal education. Both Marcus Knowlton and Henry Sheldon had learned their law as apprentices in law offices, a method already in marked decline in the early part of the century. Knowlton had an undergraduate education at Yale and Sheldon at Harvard. Henry King Bradley had neither college nor law school degrees, but had qualified through apprenticeship. Could one compose a bench with less apparent diversity of background than this group of honorable lawyers?

There is one respect in which diversity can be discerned in the 1906 Court: the various sections of the Commonwealth (Boston, Worcester, Fall River, and Springfield) were better represented. As of this writing, today's Court is composed of judges only from the Boston metropolitan area (except one from Pittsfield, retiring in 1981). In all other respects the diversification is now striking. We have judges of Italian, Irish, Jewish and Greek origin, and, for the first time, a woman.

We also have, of course, a body of tort law that is radically different from that of seventy-five years ago. The law of negligence has been modified by the decline of assumption of risk<sup>23</sup> under the new doctrine of comparative negligence. Persons on the premises of another are now owed an ordinary duty of care under all the circumstances,<sup>24</sup> although the duty owed to trespassers remains in doubt, unless discovered in peril.<sup>25</sup> Following New York's abortive early attempt, Massachusetts has worker's compensation as its first example of no-fault liability.<sup>26</sup> The immunity of charitable corporations<sup>27</sup> and of government entities have been seriously curtailed.<sup>28</sup> Women have been

given a right of consortium as fully protected against tortious intrusion as is that of men.<sup>29</sup> Liability for harm resulting from the manufacture and sale of defective chattels has been greatly enlarged by removing the need of proving negligence.<sup>30</sup>

To recite these changes in tort law is not necessarily to applaud them without reservation. Compensation systems have been over-loaded in some areas of modern life, at least in part due to doctrinal developments. Thus we have had to move to no-fault principles and limitations on total recovery in some automobile torts,<sup>31</sup> and adopt new and restrictive procedures in medical malpractice cases.<sup>32</sup>

If many of these developments involve not simply the Supreme Judicial Court, but also the Legislature, it should be recognized that the judicial initiative has been paramount.<sup>33</sup> Most of the changes represent not the gradual evolution of law through seven and a half decades, but a tremendous surge of change in the most recent twenty-five years. The ancient and familiar metaphor of pouring new wine into old bottles now seems strained. Even some of the bottles now look new.

## Notes

- Childe Hassam, *Boston Common at Twilight* (1886), Museum of Fine Arts, Boston. (Currently on loan at Mayor's Office, Boston City Hall.) It appears in Hunter, *American Art of the Twentieth Century*, p. 22, figure 32 (1923).
- The obstruction of street space by railway cars led to the building of the Park Street subway (the first in this hemisphere). See, Owen, *The Metropolitan Transportation Problem*, p. 6, (rev. ed. 1966).
- See list of index topics in 190 Mass. 623-720 (1906).
- Gifford v. Jennings*, 190 Mass. 54, 55 (1906).
- Monaghan v. Globe Newspaper Co.*, 190 Mass. 394 (1906).
- Slattery v. Lawrence Ice Co.*, 190 Mass. 79 (1906).
- Joyce v. Exeter, Hampton and Amesbury Street Railway Company*, 190 Mass. 304 (1906).
- Massell v. Boston Elevated Street Railway Co.*, 191 Mass. 491 (1906).
- Op. cit.* n. 8, at 492.
- Fitzmaurice v. New York, New Haven and Hartford Railway*, 192 Mass. 159 (1906).
- It was in 1906 that Roscoe Pound delivered to the American Bar Association his famous address, *The Causes of Popular Dissatisfaction with the Administration of Justice*. Report of the 29th Annual Meeting of the A.B.A., Part 1, p. 395. Reprinted in 8 *Baylor L. Rev.* 1 (1956). For its impact see Harding (ed.), *The Administration of Justice in Retrospect* (1957).
- White, *Tort Law in America*, especially c.2 (The Impact of Legal Science on Tort Law, 1880-1910), pp. 20-62 (1980).
- Beers v. McGinnis*, 19 Mass. 279 (1906).
- Rev. Laws of Mass. c.102, § 143.
- Rev. Laws of Mass. c.102, § 128.
- Moore v. Mills*, 191 Mass. 56 (1906).
- McDonald v. Dutton*, 190 Mass. 391 (1906).
- Burke v. Davis*, 191 Mass 20 (1906).
- Ibid.*, 22-23.
- E.g., *Spooner v. Old Colony Street Railway*, 190 Mass. 132, 137 (1906).
- Taylor, *The Distant Magnet-European Emigration to the U.S.A.*, p. 193, diagram 8 (1971). In a single year in this period (1907) one and one-half million immigrants entered this country. *Ibid.*, p. 63, diagram 1.
- The biographical facts are from Davis, *Bench and Bar of the Commonwealth of Massachusetts* (2 vols., 1895).
- Mass. Gen. Laws ch.231, § 85.
- Mounsey v. Ellard*, 363 Mass. 693 (1973). Subsequently the duty of care owed by landlords was greatly enlarged. *Lindsey v. Massios*, 372 Mass. 79 (1977).
- Pridgen v. Boston Housing Authority*, 364 Mass. 696 (1974).
- Mass. Gen. Laws ch.152.
- Mass. Gen. Laws ch.231, § 85K.
- Mass. Gen. Laws ch.258, § 2.
- Diaz v. Eli Lilly & Co.*, 364 Mass. 153 (1973). Suits between husband and wife are now allowed. *Lewis v. Lewis*, 370 Mass. 619 (1976). The position of children has also been improved. *Sorensen v. Sorensen*, 369 Mass. 350 (1975). The law respecting prenatal injuries has been revolutionized. *None v. Greyhound Lines, Inc.*, 368 Mass. 354 (1975).
- Back v. The Wickes Corporation*, \_\_\_ Mass. \_\_\_, 1978 Mass. Adv. Sh. 1874.
- Mass. Gen. Laws ch.34A.
- Mass. Gen. Laws ch.231, § 60B. One could only speculate on future consequences of current developments. Consider the implication of the recent enlargement of employers' liability. *Ferriter v. Daniel O'Connell's Sons, Inc.*, \_\_\_ Mass. \_\_\_, 1980 Mass. Adv. Sh. 2075.
- E.g. *Colby v. Carney Hospital*, 356 Mass. 527, 528 (1969). Compare Mass. Gen. Laws ch. 214, § 3A with *Tropeano v. Atlantic Monthly Company*, \_\_\_ Mass. \_\_\_, 1980 Mass. Adv. Sh. 367, 370 n. 5.

# Lawyer as Negotiator

“The essence of our craftsmanship lies in skills, and in wisdoms; in practical, effective, persuasive, inventive skills for getting things done; any kind of thing in any field; in wisdom and judgment; in selecting the things to get done, in skills for moving men into action, any kind of man, in any field . . . ”<sup>1</sup>

It was Karl Llewellyn who hypothesized that the essence of the lawyer’s craft was not so much knowledge of the law, but the “craft of doing and getting things done with the law.”<sup>2</sup>

It is safe to say that negotiation is considered a skill and as such has always been an extremely important aspect of lawyering and it will continue to be so in the future.<sup>3</sup> If anything, given the trend that is developing, negotiation as a method of dispute resolution will become more predominant than ever in the next seventy-five years.

Since this author is a teacher of law having had occasion to offer a course entitled the Lawyer as a Negotiator over the past six or more years, the perspective from which the past seventy-five years will be explored in this article will be towards including skills courses, such as Negotiation, in the law school curriculum in order that legal education may meet its responsibilities for the future of the profession. It seems as though of recent, and with some regularity, our profession, and more importantly our legal education institutions, have been chastised for failing to recognize this important aspect of lawyering.<sup>4</sup> Of course, there are those who would challenge the verity of such criticism, responding that while skills are needed and useful, their development is better left to the first few years out of law school.<sup>5</sup> While the debate continues, there is no doubt that law schools have begun to respond to the castigation during the last decade or so. One response generally has been towards the adoption of one form or another of clinical legal education programs within the traditional law school curriculum. Another response, albeit less pervasive, has been the development of various individual skills courses which utilize simulated game playing as a pedagogic technique. From a practical perspective this issue was rendered somewhat moot in 1973 when the Section of Legal Education and Admissions to



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**Of recent, our legal education institutions have been chastised for failing to recognize the importance of negotiation as a skill.**

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the Bar of the American Bar Association recommended in its "Standards" that all A.B.A. approved law schools offer "training in professional skills such as counseling."<sup>6</sup>

The pedagogical importance of a law school course on the subject of negotiation was chronicled quite ably by Professor Robert E. Mathews as early as 1953.<sup>7</sup> After analyzing the meaning and importance of negotiation to the practicing attorney and the necessity for its inclusion in the law school curriculum, Professor Mathews outlined his experiments with such a course at the Ohio State University College of Law.<sup>8</sup> Utilizing the seminar atmosphere and limiting enrollment to ten or eleven students, Professor Mathews had his students actually negotiate one prepared problem each while the balance of the class silently observed and critiqued the acting parties.<sup>9</sup> The students were graded in a somewhat subjective fashion with the oral performance in the negotiation itself as the principal grade determinant.<sup>10</sup> Professor Mathews' experiment demonstrated that negotiation is an important activity within the lawyering process and that the skills and insights that comprise that process could be conveyed to law students effectively with the aid of well conceived problems.

assigned the students certain psychological materials relating to the negotiation process.

Perhaps the most creative innovation adopted by Professor White in his course was the use of the "Duplicate Tournament" as a model for the student negotiation of problems. Professor Mathews' students each negotiated one separate problem at different times during the course of a semester. The students were then graded subjectively based upon a number of criteria applied to their performance.<sup>14</sup> There are a number of obvious disadvantages to this procedure. First, each student had only one opportunity to engage in the actual process of negotiation. Second, the student's grade was decided on a subjective basis. Utilizing Professor White's approach, every student negotiates the same problem at the same time under the same point scale which is written into the problem. Thus, each student has an opportunity to actually negotiate every problem and the student's grade has an objective basis, namely, the number of points acquired by the student in the negotiation with his opponent.<sup>15</sup> It is also interesting to note that while in some respects Professor White continued the simulated game playing approach as a pedagogical device, by making the

grade as incentive, Professor White believed he was best able to measure the manipulative skill of the participants.<sup>18</sup>

The most recent reported experience in teaching a course on negotiation in the law school was published in 1968 by Professors Cornelius J. Peck and Robert L. Fletcher of the University of Washington Law School.<sup>19</sup>

The Peck and Fletcher course retained many of Professor White's techniques but included a few variations. As with Professor White's course and Professor Mathews' before him, Peck and Fletcher utilized the negotiation problem itself as the crux of the endeavor. Utilizing White's "duplicate tournament" approach, Peck and Fletcher assigned their students six different problems for negotiation.<sup>20</sup> In addition to assigned materials on the "socio-psycho" dynamics of the negotiation process, Peck and Fletcher included materials consisting of ten actual case histories of negotiated settlements.<sup>21</sup>

The use of case histories was a departure from the approach of Professor White.<sup>22</sup> The first part of the Peck and Fletcher course was centered around a review and discussion of these case histories. They were utilized as models demonstrating both effective negotiation on one side and ineffective on the other.<sup>23</sup>

While Peck and Fletcher utilized problems for the students to negotiate, the construct of those problems was somewhat different from those used by Professor White. Professor White's problems were self-contained data banks. All the facts necessary were included either in the general information made available to all the students or the confidential information made available only to the individuals representing a particular client.<sup>24</sup> On the other hand, Peck and Fletcher provided all the students with a block of information. It was then up to the individual student to develop the case as he/she saw fit.<sup>25</sup> This approach seemed to add a bit more realism to the exercise and gave the students some experience in the fact gath-

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## **. . . by making the students negotiate with one another for their grades in the course it became in many ways a real life experience.**

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Fourteen years after Professor Mathews' experience, Professor James J. White of the University of Michigan Law School reported on his venture into the teaching of practical skills.<sup>11</sup> While drawing on Professor Mathews' basic concept, Professor White introduced a number of innovations into his approach at teaching negotiation in his experimental seminar entitled "The Lawyer as a Negotiator."<sup>12</sup> Professor White retained the seminar atmosphere and problem approach of Professor Mathews as the focal point of the course; however, from there the similarities between the two endeavors became less apparent.

Professor White added some structure to his offering by assigning materials to his students for review and discussion.<sup>13</sup> In addition, he enlisted a psychiatrist to assist him in conducting his class and

students negotiate with one another for their grades in the course it became in many ways a real life experience.<sup>16</sup> Professor White experimented with settlement incentives other than the grade concept but discovered that the grade was the most satisfactory from his perspective.<sup>17</sup> It should be noted that using the "duplicate tournament" concept with

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## **Perhaps the most creative innovation adopted by Professor White in his course was the use of the "Duplicate Tournament" as a model for the student negotiation of problems.**

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ering and client interviewing aspects of the negotiation process. However, as Professors Peck and Fletcher discovered, it resulted many times in discrepancies between bargaining teams in their command of available facts, leading to apparent differences in the types of cases being negotiated. Moreover, the Peck and Fletcher approach proved to be much more demanding in terms of instructor time per student.<sup>26</sup>

The Peck and Fletcher article is the last chronicled report of the teaching of a negotiation course in the law school curriculum. To be sure, many more law schools are offering such courses today than were in 1968. However, the subject has not as yet attained the widespread acceptance and inclusion as part of a well-structured law school curriculum that it deserves. Certainly, if legal education is to respond to evolving aspects of lawyering, there is a need to encourage and develop courses such as negotiation.

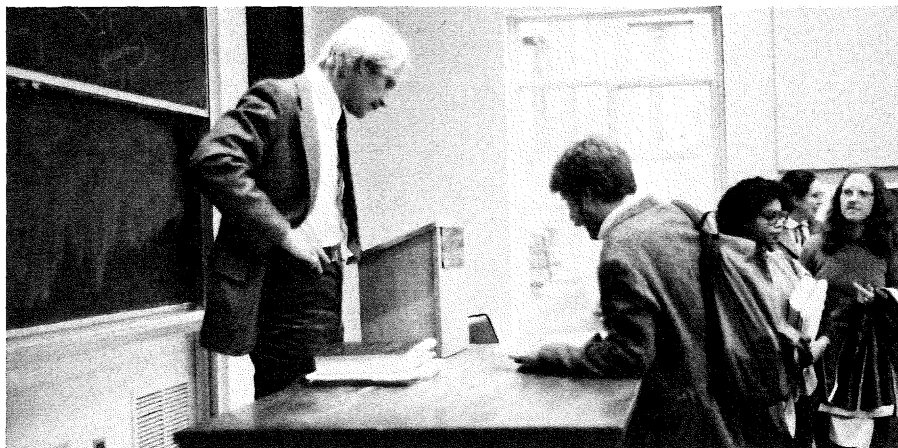
It should be understood that the objective of any skills course, in particular, negotiation, is not to teach students how to be "good" negotiators. There are too many intangible factors operating within the process to accomplish such an objective.<sup>27</sup> Moreover, such a course should not focus on a particular segment of lawyering that traditionally might require a concentrated amount of negotiation.<sup>28</sup> Rather, the course should be designed to expose students to negotiation as a process. It should cover the spectrum of activity in which the lawyer engages in negotiation on a day to day basis. The varied areas from which the negotiation problems are drawn are more important as examples of the spectrum of lawyering activity involving the process than for the substance of the areas covered. If it were possible to capsuleize the objective of a negotiation course into a word, that word would be "awareness." The course should be primarily designed to make students aware: aware of the pervasiveness of the negotiation process in lawyering activity; aware of the technical aspects of the process; aware of the various techniques that have been articulated as being prevalent throughout the process; aware of the interpersonal relations that exist within the process; aware of the ethical dilemmas inherent in the process.

Exposing students to the negotiation process while in the academic setting presents an atmosphere conducive to thoughtful analysis with direct impartial criticism of the student's performance

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**Although many law schools are today offering negotiation courses, the subject has not yet attained the widespread acceptance and inclusion as part of a well-structured law school curriculum that it deserves.**

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**This course should stimulate the student to consider the most essential component of all education, one that is least recognized and discussed: a self awareness of his or her own capabilities and limitations as a negotiator.**

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rarely available to the practicing attorney. It is suggested that any vehicle which heightens the lawyer's perceptions and fosters familiarity with the procedure without causing detriment to the client is indeed a successful endeavor. If nothing else, a properly structured negotiation course can achieve such an objective and thus deserves inclusion in the law school curriculum.

The immediate objectives in teaching a course on the negotiation process would not be altogether different from those of a more traditional subject matter: that the students might master the contents of selected readings and that they might be capable of applying the material taught in an analytical manner. There is, however, another purpose in teaching this type of course which surpasses the importance of the immediate objectives. This course should stimulate the student to consider the

most essential component of all education, one that is least recognized and discussed: a self awareness of his or her own capabilities and limitations as a negotiator. Unlike all other courses in the curriculum, the course should be constructed in such a fashion as to give students an awareness of the critical importance of interpersonal dynamics in the lawyer's role. Also, it is anticipated that students will develop an understanding of how to recognize, control and cope with the demands of personality interactions. In short, it is submitted that one engaged in negotiations should be willing to engage in introspective evaluation of his reactions and conduct and to analyze the conduct of others for the purpose of determining whether the process has been affected by the irrationality of transference or other phenomena.

It is the development of an awareness of



these perceptions and skills that the course should be designed to accomplish. There are technical problems that must be controlled and demands placed on the instructor unlike those in a traditional law school course. However, the insights which the students develop advance them dramatically in their professional growth and assist them in maturation of their abilities.

The course affords unlimited opportunity for the instructor to exercise creativity and thus becomes a worthwhile experience for instructor and student alike. Indeed if legal education is to meet its responsibilities over the next seventy-five years, it is imperative that steps be taken immediately to encourage development of skills courses such as negotiation.

#### Notes

1. K. Llewellyn, *The Craft of Law Re-valued*, in *Jurisprudence*, at (318).
2. *Id.*
3. In actuality, negotiation is a process. Moreover, it is a process which involves the use of a clearly identifiable group of skills and perceptions as they relate to the interests of a particular client faced with a real problem. There can be little dispute that negotiation forms an essential part of the lawyering function. While there are certainly many other skills involved in the practice of law, if one were to catalogue them in terms of pervasiveness negotiation would be at or near the top.
4. For a recent discussion of this issue see, Janofsky, *Tackling the Issue of Competence in the Office and in the Courtroom*, 65 Am. Bar Assn. J. 1510 (October 1979).  
American Bar Association President Leonard S. Janofsky reports in this article on the Organized Bar's response to the perceived shortcomings of law schools and continuing legal education programs relative to the teaching of non-trial skills such as negotiation. Mr. Janofsky acknowledges a survey conducted by the Law School Admissions Council of 1,600 lawyers who graduated from law school between 1955 and 1970 in which 77 percent responded that law school had not adequately trained them to deal with the problem of negotiating settlements.
5. Griswald, *Hopes — Past and Future*, 21 Harv. L. S. Bull. No. 5, p. 36 (1970). Referring specifically to the concept of clinical legal education as it directly relates to the Harvard Law School, Dean Griswald opined:

But men of the caliber we have here can

## If legal education is to meet its responsibilities over the next seventy-five years it is imperative that steps be taken immediately to encourage development of skills courses such as negotiation.

- develop them [skills] adequately in their first few years out of law school, insofar as they need supplementation for the abilities which they already have . . . They will do all right if we train their minds, *Id.* at p. 40.
6. Standards and Rules of Procedure for the Approval of Law Schools, American Bar Association, Chicago, Ill., 1973.
  7. Mathews, *Negotiation: A Pedagogical Challenge*, 6 J. Legal Ed. 93 (1953).
  8. Professor Mathews believed it was possible to enumerate and catalog the skills and insights that compromise the negotiation "process" and further that these skills and perceptions were capable of analysis. In addition, he believed that by utilizing well conceived problems the students would be given the opportunity to engage in that analytical activity.
  9. Each of the assigned problems was negotiated in a one to one setting with students allowed to choose both their co-negotiators as well as the problem they wished to negotiate. In addition, the students were allowed to decide between themselves which party each was to represent. Individual consultation was available with the instructor to clarify the facts and discuss strategy. The class hour immediately following the negotiation class was used as a "post mortem" session where the observing as well as negotiating students discussed the particular problem in question from a critical perspective.
  10. Professor Mathews lists the following factors which he considered in his grading process:  
. . . Command of the facts; perception of the limitations on bargaining position — legal, economic, and psychological — manner, poise, self-control, and voice; organization and plan of presentation; clarity; effectiveness on offense and defense; dialectical skills and insights into their appropriateness; and mobility in adjustment. 6 J. Legal Ed. at 100.  
In addition to the students' oral performance, the total grade in Professor Mathews' experimental course was composed of a consideration of the written critique required from each negotiator as well as self-criticism by the negotiators as evaluated with the criterion listed above.
  11. White, *The Lawyer as a Negotiator: An Ad-*
- venture in Understanding and Teaching the Art of Negotiation*, 19 J. Legal Ed., 337 (1967).
12. While documentation is difficult, it appears that in 1967, White was the only other law school professor to attempt to introduce a course devoted exclusively to the negotiation process into a law school curriculum. 19 J. of Legal Ed. 339 n.2.
  13. Professor White acknowledged that the materials were not as comprehensive as he would have liked. There was no one source available which spanned the spectrum of the negotiation process and thus it became necessary to compile a "hotchpot" of materials. Separate books were assigned dealing with the subjects of personal injury and labor negotiation while a series of excerpts from books and articles on the psychological aspects of the negotiation process were also made available. 19 J. Legal Ed., 337, 346 (1966-1967).
  14. *Supra* note 10.
  15. Professor White had each of his students negotiate four problems over the course of a semester. These problems were drawn from the spectrum of negotiation situations faced by most practicing lawyers. (Divorce, personal injury, labor, contract, etc.) At the first class session, Professor White divided his class of 24 students into two groups of 12. Teams of two were set up in each group and while the members of each team varied, no student was shifted from one group to another. In each negotiation, each of the six two-man teams in one group opposed a two-man team from the other group. All of the teams in a group represented the same side on the same negotiation problem at the same time. (For example, the teams in one group would represent the plaintiff in a personal injury negotiation against the teams in the other group who represented the defendant in that negotiation.) 19 J. Legal Ed., at 338, 339.
  16. Each student was informed that his grade in the course would depend in part upon his success in the negotiations. He was told that his point score on the negotiations would be placed on a curve with the other 11 persons in his group to determine his grade, and that unless his team reached an agreement on at least one item on the agenda, he and his partner would receive the point equivalent of a failing grade for



that negotiation. 19 J. Legal Ed., at 341.

For an excellent discussion of simulation in law school, see, King, *Simulated Game Playing in Law School: An Experiment*, 26 J. Legal Ed. 580 (1974).

17. In a personal injury negotiation, Professor White offered the successful student a monetary award rather than a high grade. The award was contingent upon the size of the settlement and ranged from \$5 to \$20.
18. Professor White has to some extent accepted as the definition of negotiation: "the acquisition of a valued object by the manipulation of another person . . ." 19 J. Legal Ed. at 343. Indeed, he suggested that in future offerings of his course he hoped to compare each student's negotiation grade with his score on the "so-called Machiavelli test." *Id.* at n.8.

Webster's New World Dictionary defines manipulate as follows:

1. to work or handle skillfully
2. to manage artfully or shrewdly, often in an unfair way
3. to alter (figures, etc.) for one's own purposes . . .

A serious question arises as to whether a law school should be encouraging students to be "manipulators" in this sense. Propagation of such an idea adds fuel to the fire of criticism constantly being leveled at our profession today.

As Professor Matthews has suggested, negotiation may be better described "as a process of adjustment of existing differences, with a view to the establishment of a mutually more desirable legal relation by means of barter and compromise of legal rights and duties and of economic, psychological, social and other interests." 6 J. Legal Ed. at 94 (1953-1954).

19. Peck and Fletcher, *A Course on the Subject of Negotiation*, 21 J. Legal Ed. 196 (1968).
20. Peck and Fletcher did not use the two on two approach exclusively. In one negotiation students were involved on a one to one basis; in another where joint and several liability was possible one student was assigned to negotiate against two opponents. The

types of problems assigned included a divorce settlement, three personal injury cases, the sale of a business and the lease of department store premises.

21. 21 J. Legal Ed. 196, 197. Peck and Fletcher also attempted to utilize psychiatrists during their course in an effort to help the students understand the interpersonal dynamics of negotiation and counseling situations. While acknowledging the benefits such an approach might provide, Peck and Fletcher admitted that they did not have the same success in this regard as Professor White who was apparently able to achieve with his psychiatrist colleague Dr. Malmquist.
22. Peck and Fletcher derived their case histories from the files of local government and private practitioners.
23. Peck and Fletcher found the case histories to be good vehicles for the exploration of many aspects of the negotiation process. They illustrated among other things for example, the relationship of counseling to negotiation, the significance of publicity to the negotiation process, the advantage to be gained by involving another party in certain instances, and the personal pressures and ethical conflicts exerted on the parties involved.
24. Professor White included in the confidential information all the facts that a client would normally disclose to an attorney. The client's priorities were arranged and a point structure for grading purposes was assigned.
25. Initially, Peck and Fletcher themselves took on the roles of all parties and witnesses. Students were encouraged to interview, serve interrogatories, take written depositions etc. in order to develop the facts and priorities of their case. The Instructors would supply answers to the student's inquiries attempting to keep their responses consistent for all the bargaining pairs so that identical information was available to students posing similar questions. 21 J. Legal Ed. at 199.
26. In order to alleviate the time problem, Peck and Fletcher proposed to develop complete

"data banks" for future use. These banks would be maintained by either a secretary or assistant who would then respond directly to the student inquiries. This approach has some obvious disadvantages. It limits the actual problems used to a certain number. Eventually, there is a possibility that students who have taken the course will transmit information contained in the data bank to those taking the course later.

27. Indeed, this is one reason many would argue against the inclusion of such a course in the law school curriculum. The ability is intuitive and either an individual has the personality characteristics and innate ability or he/she doesn't. In any event, the first year or so of practice will present ample opportunity to acquire the insight necessary to perform this important lawyering function.

Such criticism might have some merit if one's primary objective was to teach a person how to be a "good" negotiator. However, if one conceives of the course as a vehicle by which an individual might be exposed to the process and develop an understanding of the process, then the criticism becomes weaker. In addition, while many of the variables that affect the negotiator's ability (i.e. personality) may indeed be inflexible there are many others that may be modified through constructive exploration. Thus, in one sense while the course cannot teach a person to be a "good" negotiator, certainly through the experience one will become "better" at the process than they would be without the experience.

28. When most people think of negotiation they automatically consider the labor lawyer. To be sure, the labor lawyer is engaged in perhaps the most formal aspects of the negotiation process. Collective bargaining has been available as a method of dispute settlement with rigidly defined parameters for many years. However, many lawyers never engage in labor law practice and yet experience the negotiation process on a daily basis. The course should not focus exclusively on the substantive labor law area.

# Administrative Agencies and Administrative Law: Where have we been and where are we going?

Seventy-five years ago, administrative law in America was in its infancy. While American government — federal, state, and local — had since the very beginning of the Republic, been engaged in administering or carrying out various governmental objectives, the field of administrative law had received scant attention as a separate legal discipline. This lack of attention and scholarly scrutiny tended to mirror the relatively minor role that government at all levels played in the lives of most Americans. Ideas of laissez-faire, nonintervention, and noninvolvement of government in social and economic affairs dominated American political thinking. The Horatio Alger, rags to riches, mythology, based upon a glorification of rugged individualism and personal initiative, was the accepted norm. The survival of the fittest in a Social Darwinian cosmos, if not the beneficent invisible brand of Adam Smith's free enterprise society, could be relied upon to maximize social and economic progress without the necessity for positive state action. The role of government was at best minimal and negative — to intervene as watchdog only when absolutely necessary to eliminate the worst abuses and undesirable excesses of the social and economic order.

By 1905, developments were already underway which were to result in dramatic movement away from the laissez-faire governmental paradigm. The increasing industrialization and urbanization of the United States after the Civil War had created vast new social and economic problems that required governmental response. Neither the legislatures nor the courts possessed sufficient technological knowledge, institutional competence, and procedural flexibility to devise and implement policies for dealing with these problems effectively. Accordingly, new administrative agencies and governmental institutions were created in the executive branch of government to formulate and administer public policy.

In 1883, in response to increases in governmental employment, the Civil



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Service Commission was established to eliminate the influence of political patronage and political considerations in the hiring and firing of federal civil servants and to encourage the development of a bureaucracy based upon merit and expertise capable of meeting the challenges of an expanded government. In 1887, the Interstate Commerce Commission, the first modern independent commission established for administrative regulatory purposes, had been created and expressly charged with the single task of regulating the railroads of the nation in the public interest.

At the state governmental level, the influences of the Granger and the Progressive movements had already led some state governments to create administrative agencies to regulate banking, insurance, bridges, canals, ferries, grain elevators, and warehouses. The workmen's compensation movement, with its promise of speedy and certain benefits for the injured worker through the adjudicative determinations of an industrial accident board specifically established for that purpose, had just begun to attract significant political support as it was increasingly recognized that the worker's traditional remedy of a common law tort action, with the employer's ability to plead and rely upon such defenses as the fellow servant rule, assumption of the risk, and contributory negligence to defeat recovery, was largely illusory and grossly inadequate.

By 1905, the study of administrative law as a separate legal discipline had begun with the pioneering scholarly efforts of Frank G. Goodnow who had published *Comparative Administrative Law* in 1893 and another book, *Principles of Administrative Law of the United States*, in 1905. While no law school in the United States had yet offered a course in administrative law, Goodnow's significant work paved the way for the later emergence of administrative law not only as an area of scholarly research and analysis, but also as one worthy of inclusion in the law school curriculum.

In retrospect, the essential roots of the modern administrative process, and of administrative law itself, can be clearly seen in developments which had already occurred seventy-five years ago. Yet, it was not until the coming of President Roosevelt and the New Deal in the 1930's that the administrative process and administrative law itself truly came to dominate the American legal scene. The proliferation of the so-called alphabet agencies during

the New Deal period, all designed to deal with various aspects of governmental regulation of the economy and to alleviate the economic problems of the worst depression in the nation's history, irrevocably signaled the final rejection of laissez-faire as a comprehensive policy and the emergence of the modern social welfare or administrative state.

The use of administrative agencies and independent governmental commissions and corporations to deal with the social and economic problems produced by depressions, by war, by science and technology, and by urbanization have continued down to the present day. The creation of new administrative agencies or the granting of additional powers to old agencies has been the characteristic governmental response to the complexities of newly recognized social and economic problems. Administrative agencies have been created and their powers expanded not as the result of the application of the abstract principles of any particular political philosophy to the problems at hand, but rather as a result of a popularly felt need for governmental resolution of social and economic problems which cannot possibly be resolved or alleviated, or even meaningfully addressed, by purely individual or private efforts.

The United States has truly become an administrative state. Administrative agencies, characteristically combining within themselves, and exercising at various times all three kinds of legally organizable power — legislative, executive and judicial, abound at every level of government. The decisions made by administrative agencies have a far more direct and vital continuing impact upon the lives and fortunes of the average Americans than do the decisions of any of the more familiar and accepted constitutional branches of government.

In broadly surveying the evolution of the modern administrative agency and the growth of administrative law over the past seventy-five years, it is readily apparent

that many of the fundamental assumptions which have constituted the supporting platform for both the increased use of administrative agencies and the development of administrative law as a separate scholarly discipline have been subject to vigorous attack and critical reexamination. The recent Presidential campaign and the triumph of the forces of Reagan conservatism with its popularly stated objective of getting government off the backs of the American people would seem to offer dark portents for the future of administrative agencies and administrative law. It has become virtually axiomatic in modern American politics to profess as articles of faith that government has become too big; that governmental programs, however well-intentioned, have not only failed to solve the problems they were designed to meet, but have produced harmful, unintended and unanticipated consequences; that the much vaunted administrative expertise formerly thought to be possessed by administrative agencies by virtue of their day to day contact with, and involvement in, specialized technical area of governmental concern has been much overrated and is indeed largely mythical; and, finally, that the American economic system has suffered from overregulation brought about by the regulatory activities of administrative agencies.

While McGovernite liberals may choose to view the emergence of Reagan conservatism as a fundamental threat to the continued existence of the administrative state, a more realistic appraisal of the immediate future would suggest that administrative agencies and administrative law are more likely to witness a long overdue deemphasis upon the utility of the administrative process as the exclusive means for the resolution of vexatious social and economic problems. One of the most unfortunate consequences of the Progressive-New Deal enthusiasm for the creation and increased utilization of administrative agencies was the fostering of the essentially elitist concept that

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the experts in the administrative agencies not only were capable of knowing or discovering what the public interest required, but were capable of developing, implementing, and delivering governmental policies and programs which would indeed further the best interests of the public. In their enthusiasm to reform society and redress social and economic injustice, liberal reformers tended to rely too heavily upon governmental action through the instrumentalities of administrative agencies and administrative law. Administrative agencies and administrative law were oversold as means of resolving social and economic problems. When the general public and some scholarly critics became aware of the ineffectiveness and inability of the experts in the administrative agencies to bring about significant improvements and meaningful solutions to social and economic ills, the far-reaching and pervasive critical reaction to administrative agencies and administrative law which has occurred was an inevitable result. Public skepticism about administrative expertise, combined with that justifiable hostility to administrative arrogance and insensitivity which massive bureaucratization inexorably brings in its wake, have undermined confidence in administrative agencies and administrative law and produced the current, on-going backlash against administrative agencies and administrative law.

What, then, of the next seventy-five years? In the movement towards deregulation, particularly on the federal level, are we witnessing the death knell of administrative agencies and administrative law? Is the modern social welfare state with its positive role in the regulation of the economy and with its massive programs of statutory entitlements and benefits about to be irrevocably overcome by a rising tide of new-laissez-faireism? I think not. For the decisive feature of the last seventy-five years of American government and the rise of administrative agencies and administrative law was not, as we have seen, a development reflecting the application of any particular political, social, or economic philosophy or theory to the issues at hand. Rather, it was a fundamental institutional response of our governmental system to the underlying social and economic pressures, forces and factors at work in modern society. Since the modern administrative state represents a fundamental institutional response to the social and economic problems produced by war or preparations for war,

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by science and technology, and by urbanization, it is highly unlikely that the long-range, continuing twentieth century trend towards the increased use of administrative agencies and the development of administrative law will come to an abrupt halt. Indeed, it is far more likely that in the long run administrative agencies and administrative law will continue to grow and flourish. Regardless of the ideology of those who may come to political power, there can be no ultimate denial of the necessity for utilizing administrative agencies and administrative law as the most effective governmental instrumentalities available — better than legislatures and courts — for dealing with modern social and economic problems.

The recent ascendancy of Reagan conservatism climaxes a period of increasing popular and scholarly dissatisfaction with administrative law, but it does not herald their end. In the future, certainly in the short run, the claims of administrative agencies and administrative law are destined to be more modest. No longer are administrative agencies likely to be regarded as the ultimate repositories of social and economic wisdom. No longer will there be an unquestioned deference to administrative competence — a willingness to bow before the mysteries of administrative expertise. No longer will there exist a blind faith that all social and economic problems can be resolved, or at least significantly improved, by throwing money at them through new or expanded administrative agencies with ever-increasing powers.

In the short run, there are likely to be increased demands that administrative agencies truly be called upon to justify their continued existence. In so doing, they will be held more directly accountable for what they do and what they fail to do. While the limitations of administrative agencies in resolving social and economic problems will be recognized to a far

greater extent than in the past, their modest contributions towards promoting the public welfare will not be minimized when they have indeed proved effective in meeting some reasonable measure of their responsibilities. State and local administrative agencies, reflecting at least a short run trend towards decentralized governmental decision-making, will assume increased importance. The system of creative federalism brought about by the unyielding pressures and tensions of our dynamic federal-state constitutional division of governmental power will be put to new challenges.

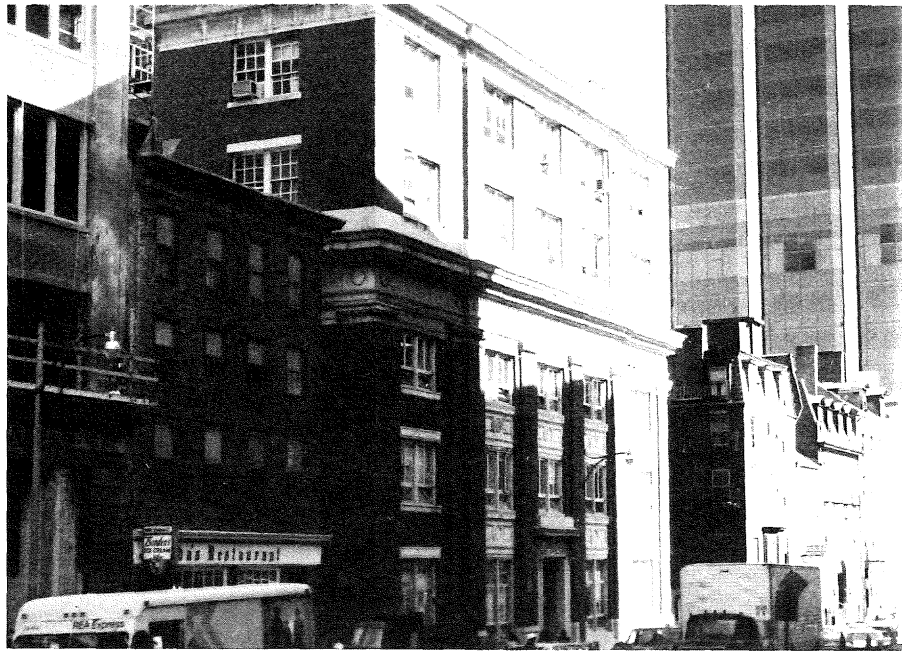
In the earliest days of administrative law, even in the celebrated *Panama* and *Schechter* decisions of the unreconstructed New Deal Supreme Court, the major issue of administrative law was the delegation issue: how could the administrative agency be legitimated in a constitutional system based upon an acceptance of the doctrine of separation of powers? Later the major issue became the issue of devising appropriate procedures for the fair conduct of administrative agency proceedings of various kinds. While considerations of fair agency procedure have not been completely eliminated from the concerns of modern administrative law, the development of general administrative procedure acts and the procedural due process constitutional revolution have largely diminished their domination of the field of administrative law. Increasingly, the major issue of modern administrative law has come to be the issue of the accountability of the administrative agency: how can the administrative agency be made more accountable to the legislature, to the Chief Executive, to the courts, and ultimately to the people? While avoiding the dangers of excessive politicization and overjudicialization, what new institutional devices or administrative law doctrines need to be created or refurbished to assume greater accountabil-

ity on the part of those exercising administrative agency power?

The issue of accountability which is likely to be the overriding issue of administrative law over the next seventy-five years has both procedural and substantive components. Seventy-five years from now, administrative law will be concerned not only with the adequacy of the procedures devised, institutionally and doctrinally, for guaranteeing accountability, particularly accountability to the people, but also with the adequacy of the accountability in substantive terms — that is, the quality, equity, and justice of whatever services are provided to meet the needs of the people. While administrative law today remains largely mired in procedural issues and concerns, administrative law in the future will of necessity become increasingly involved in the substantive issues and concerns of distributive and allocational justice in modern society.

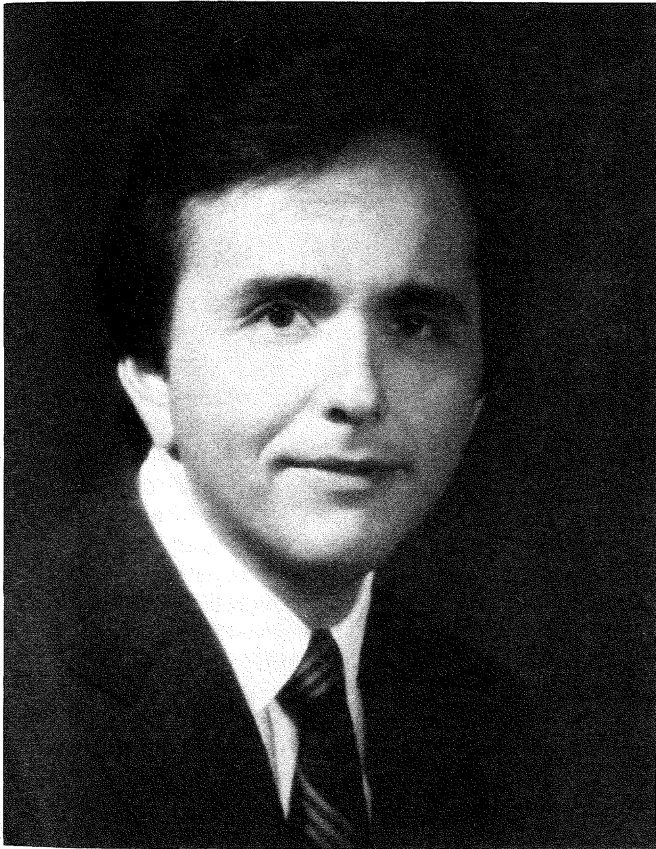
It should come as no surprise that once the legitimacy of the administrative agency and the fairness of its procedures have been firmly established, the attention of administrative law should be directed towards the issue of accountability. For while the failure of administrative agencies to deliver on the most exuberant and desired expectations of their earliest supporters has resulted in chastened, lowered expectations of the efficacy of the modern administrative process, the necessary and inevitable continued use of administrative agencies consisting of unelected bureaucrats for a concerted public attack upon some aspects of modern social and economic problems raises profound problems of accountability in our representative democratic system. The never-ending tension between popular control and administrative agency decision-making is an inherent and inevitable part of our representative democratic system.

In the final analysis, the problem of devising and implementing orderly and effective restraints upon the exercise of governmental power — the problem of assuring accountability — remains a continuing problem of representative democratic constitutionalism. Unless we as a people have been completely overwhelmed by the social and economic forces of war, science, technology, and urbanization, or unless we as a people have succumbed to the blandishments of a priestly caste of philosopher kings or new administrative technocrats to whom we have surrendered all governmental power, administrative agencies will have continued



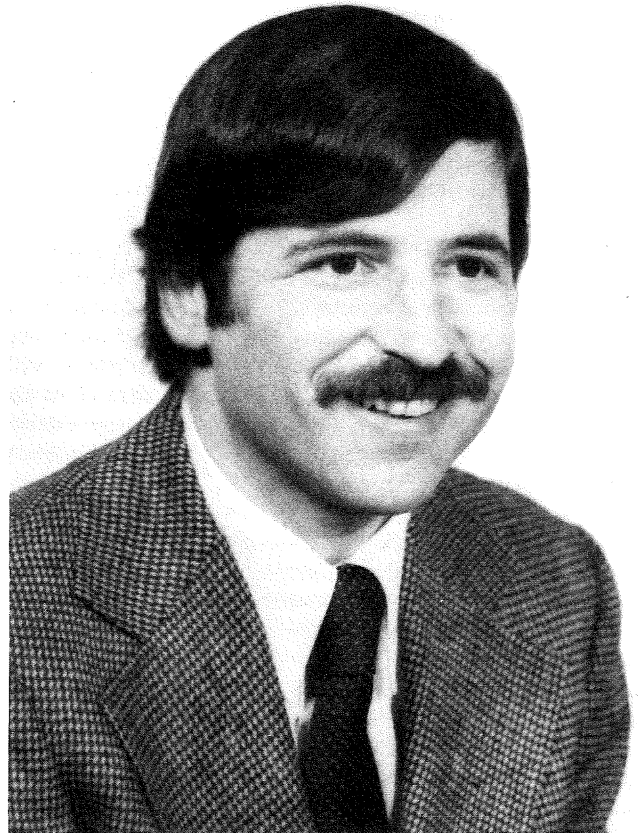
to proliferate seventy-five years from now and administrative law will still be concerned with addressing the dynamic, ever-evolving issue of assuring accountability in modern government.

# Interviewing and Counseling in the Law School: A New Concept.



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"One of the lawyer's functions is to guide a client into safer and better courses of conduct. The lawyer-client relationship with all its human, and conceptual, content must be explored, taught and learned. The lawyer-client decisional and behavioral characteristics become central." Louis M. Brown, Emeritus Professor of Law, University of Southern California.

This article deals with interviewing and counseling, an essential part of everyday life for all lawyer-practitioners. Ironically, however, despite its importance, until recently the subject was never dealt with in our law schools. Seventy-five years ago, when Suffolk Law School was founded, there were no courses designed to make students aware of the interactions between lawyers and clients. Instead, emphasis was placed on the purely substantive areas of the law — torts, contracts, property and the like.

In recent years we have become increasingly aware of the importance of interpersonal skills in the law office. It is a fact that despite the lawyer's knowledge of and ability to deal with complex legal problems, as a professional, he cannot totally serve his clients' needs without knowledge of a wider range of subjects, among the most important of which are human behavior and interpersonal relationships. Yet graduates of our law schools were forced to become aware of interdisciplinary skills on their own through "on the job" training, since law schools did little or nothing to bring these skills to their students' attention. It was not until the development of clinical education and the recognition of the concept of preventive lawyering that this was done.

Much has changed over the past seventy-five years. The core curriculum has been expanded to include formal substantive subjects that were not formerly included — women and the law, poverty law, and education law to name a few. Law reviews and moot court programs have become common and an everyday "way of life." In the most recent development, students are being taught the proper techniques involved in legal interviewing and counseling. Courses are being offered that are specifically designed to raise the student's level of awareness of the interaction between lawyer and client and to train the student in the preventive law and counseling functions of law practice. Among topics that are included in these courses are the initial

interview; active and passive listening; the reluctant client; decision making and ethical considerations in the law office.

The movement toward student instruction in this area was begun by Professor Louis M. Brown at the University of Southern California Law Center. It was his desire to engage legal education in what he called the "phenomenon of the law office." To this end, in his own courses dealing with preventive law, Professor Brown utilized extensive role playing. In 1969 he initiated the first client counseling competition, the forerunner of today's very successful national client counseling competition. In the beginning two law schools participated in this competition.

so-called "hot facts," facts that are not affected by evidentiary standards of relevancy; counseling is the process in which probable consequences of various courses of action are identified and weighed in an attempt to enable the client to make the best choice. It has been estimated that anywhere from 30% to 80% of a lawyer's time is spent in the interviewing and counseling function. Indeed, lawyers spend much less time in other functions such as court appearances or legal research than is commonly believed. As one writer has put it, an average lawyer spends more than half his time influencing, facilitating, and implementing choices which are made by

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Today well over 120 law schools participate. Moreover, in that short period of time over 30 American Bar Association approved law schools have formally added courses to their curriculum to teach students interviewing and counseling skills. This past year Suffolk University Law School added a course in legal interviewing and counseling to its curriculum. In this article we will introduce you to it as it is taught in the law school.

Through extensive readings, viewing of actual interviews and role playing, students in the course learn that there are two distinct functions that lawyers serve in law offices, interviewing and counseling.

individuals or small communities.<sup>1</sup>

Why is there concern today about making lawyers more effective interviewers? To be sure, the interviewing process is very complex and is like "the circle with no beginning."<sup>2</sup> But why the concern? To begin with, no matter what kind of practitioner, the lawyer is always involved in obtaining information, whether it be directly by face-to-face interviews or indirectly in performing legal research whereby he traces human activities as reported in documents (and which activity requires an even greater degree of analytical skill than those who deal more directly.)<sup>3</sup> In either event, what lawyers

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Interviewing is basically fact gathering; counseling is the process by which lawyers help clients reach decisions. Interviewing is the process wherein the lawyer ascertains the facts in the client's own words,

rely upon is the information that they obtain in the interview process. In fact, a great deal of a lawyer's work is based upon facts so gathered. How then, can we lawyers adequately perform our profes-



sional tasks and responsibilities unless we have adequate information? We submit it can only be acquired through a properly conducted interview.

What then is an adequately conducted interview? It is an event that takes into account a number of factors including the more mundane such as environment and physical surroundings, as well as the more subtle such as the development in the client of a sense of trust. Only in trusting his attorney will the client be relaxed and open enough to relate all facts relevant and irrelevant to aid the lawyer aid the client.

In the interviewing and counseling course students are taught that there are a number of so-called "facilitators" that can be used by the attorney in developing this feeling of trust and confidence which leads to maximum client cooperation. One such facilitator is empathetic understanding. This is a process in which the lawyer communicates to the client that he understands both the facts and the feelings which the client is reporting. Through this process the lawyer informs the client that he is listening as well as understanding how the client feels about the facts. In this way, the client is made to relax and a free flow of information is encouraged.

Another facilitator in the interviewing process that students are made aware of is the use of certain types of questions. The most effective, basic and frequently used of all forms of questions is the open-ended one. This is the question which states: "how can I help you" or "why don't you tell me all about it." Students learn that in using this form of question the lawyer encourages the client toward a complete reportage of the facts surrounding his problem. Many so-called "hot facts" are related in this way, both relevant and irrelevant. In fact, the one major drawback to the use of the open-ended form of question is the irrelevant information which is transferred. However, (1) relevancy is in the eyes of the beholder and (2) in a sea of many "irrelevant" facts are very often contained some very relevant ones that can prove to be extremely helpful to the attorney in his search. Very often what the client may perceive as irrelevant may be quite the opposite, either because of the lack of legal insight or because subconsciously the client does not wish to disclose certain matters. For this reason, clients should not filter out facts because in applying their own standards of perceived relevancy they may very well omit a fact which is very

much relevant. It is the lawyer who should judge the relevancy of facts and it is the open-ended question form that permits him to do so.

The opposite of the open-ended question is the leading question. This form is based upon a judgment made by the lawyer of what is relevant and pertinent. The leading question simply asks the client to affirm the validity of certain statements being made by the lawyer. While the disadvantages of this particular form of question are fairly obvious (they can contribute to client distortion), from a practitioner's standpoint they are sometimes necessary.

Other forms of questions that fall somewhere between the open-ended and leading question format, the yes/no and narrow form of questions, are also examined in the role playing format. Students see that each of these can be useful to the attorney in the information gathering process and as a general rule constitute a safer format than the leading question.<sup>4</sup>

Students also learn that there is much more to consider with regard to the client

see" are typical passive listening devices. Both active and passive listening used at the appropriate time can be very useful in the eliciting of information during the interview process and students are taught this by conducting their own interviews.

Also present in interviewing along psychodynamic lines are factors such as sexual and age biases; the phenomenon of transference and counter-transference and, finally, the presence and use of body language. A knowledge of them how they reflect on human behavior enables a lawyer to deal more effectively with the client, while also enabling him to separate the true, relevant facts from the story being related. By being familiar with these facts of interviewing life a student learns to facilitate the fact-gathering process.

According to Dr. Andrew Watson, biases once learned influence every aspect of a person's perception of the world. In short, a client's perceptions as revealed in a typical interview are influenced by his biases. These biases are the product of learned and incorporated value judgments.

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## **In mirroring what he has heard, the lawyer adopts the desirable posture of being non-judgmental and non-moralizing and is assisted in his empathetic understanding.**

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interview than the form of questions. They learn about the ever-present psychodynamics of the interviewing process. To begin with, they become aware of the distinction between active and passive listening, both of which occur within the interview setting. They see that with active listening the lawyer communicates to the client that he has heard what has been said, doing so in a positive and affirmative way. The lawyer, in effect, mirrors what the client has said, thus affirmatively demonstrating understanding. In mirroring what he has heard, the lawyer adopts the desirable posture of being non-judgmental and non-moralizing and is assisted in his empathetic understanding. With passive listening on the other hand, the lawyer simply informs the client that he has heard what has been said. It is a non-explicit form of expression. Silence by the lawyer or his noncommittal acknowledgements such as "oh" or "I

The good interviewer is aware of the fact that the way the client relates to him and to the world is a function of these deeply ingrained response patterns. They are most often viewed by way of their content analysis so that we see them expressed in terms of age, educational variations, differences in socio-economic background, racial/ethnic questions, religious backgrounds, and sexual outlooks. In each area certain client responses and reactions will be the result of these deeply ingrained features.<sup>5</sup> For example, a student can learn through role playing how an older male client being interviewed by a younger female attorney may very well be uncomfortable in the process and therefore less likely to trust the attorney because of built-in biases which tell him that women should be "in the home raising a family." Moreover, the client may be unwilling to communicate certain facts if the subject matter is one which

he feels is "sensitive" and not properly discussed with a woman. In being made aware of this client's biases the student sees how they can affect the story being told, he then can make appropriate allowances for client distortion that may be caused by their presence.

Transference and counter-transference, psychological phenomena that are present in the process of interviewing are also seen in the course. Simply stated, transference is what happens when the client projects his own facts, feelings and ideas and attributes them to the lawyer. It is the phenomenon whereby certain rational and nonrational responses are triggered in the client which may complicate and compound, or clarify and deepen the attorney's understanding of his client. Watson illustrates transference by using the example of a client being interviewed by an attorney who wears eyeglasses. If the client's father also wears eyeglasses this may tend to cause the client to treat the attorney as if he were exactly like his father. If the lawyer is sensitive to this phenomenon it may enable him to see that certain characteristics, attitudes or ideas are being attributed to him that he does not possess. The lawyer then questions why the client is doing this and in so doing he will begin to uncover some significant behavior patterns in the client. Once uncovered, the attorney can deduce that such distortion will be present frequently in the client's perceptions under similar sets of circumstances. This inference may then shed light on the client's behavior outside of the interview setting.<sup>6</sup> This insight can be extremely helpful in aiding the student to learn how to assay the accuracy of a client's recollections.

Counter-transference refers to the same phenomenon but this time with reference to the lawyer. In this situation, the attorney attributes certain ideas, attitudes and characteristics to the client based upon the defense of projection. Emotional bias of the observer influences the data he receives or, put another way, we all hear what we want to hear. Students see that the attorney who is aware of his emotional bias will be sure not to have it get in the way of the fact gathering process.

Students are also made aware of body language as a means of hearing and understanding the client. A knowledge and understanding of this phenomenon is a valuable aid to the attorney in the interview process, since knowing and under-

standing its dynamics enables the attorney to perceive when the client is under stress or anxiety or when he is angry. Understanding the functions of these forms of clean affect display is useful to the student because it may aid him in separating what is truthful and what is not in the client's reportage.<sup>7</sup>

The second phase of the process that the course examines is the function of counseling. This occurs after the attorney has gathered all of the facts and has sifted through them, ascertaining the parameters of what he perceives to be the legal problems.

can be made. Through role play the student learns to talk to the client in a simple and straightforward manner in words that are clearly understandable to the particular client. He takes the lead while making it clear that any decision is to be made by the client himself; for although the lawyer can advise and give opinions, it is the client who should make the decisions.<sup>8</sup>

As an example of the counseling function, the class considers the problem of a real estate broker-client who has just related a story about the failure of his client, a seller of a business, to pay him an

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Through readings and role play the students are shown that in this part of the lawyer-client meeting the lawyer's mode of activity shifts from a more passive to a more active one. During the interviewing phase the lawyer is, for the most part, a passive listener. During the counseling phase he becomes an active and direct intervenor. The psychodynamics described earlier are also considered in this phase of the process since they contribute to the effectiveness of the lawyer's role.

The effective counselor who has come to know his client through the interviewing process must now communicate all the legal alternatives and their consequences to the client so that an informed decision

agreed upon commission. Such a client can be informed about several alternatives. He can (1) institute a lawsuit, (2) negotiate a settlement, or (3) forget the entire matter. The consequences of these courses of action might be as follows: (1) Suing potentially involves the expenditure of significant sums of money and any such recovery that might be had must be considered in light of the expenses incurred. (2) Negotiating (through his attorney) saves both time and money, but the money that is saved by not litigating may very well be negotiated away in the process. Moreover, there is consideration of the fact that in negotiating he may encourage others not to live up to



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agreements to pay commissions in the expectation that there will be a settlement by him for less. (3) Forgetting about the entire matter means that the client is not only out of his commission, but also that once it becomes known in the community what has transpired others may be encouraged to act in a similar fashion. Students learn that the most effective counselor informs the client not only of the legal alternatives available but their consequences as well, and what the client does or does not do is his choice to make. They also observe that in a situation like the one just illustrated where the question is whether to sue or not, it is very helpful to the client if the lawyer could tell him what he sees is the possibility of success if a suit were maintained. A statement such as "I think there is a 60-40 chance of success if we go to court" is clearly understandable to the average client and goes a long way toward helping him come to a decision. Naturally, such an estimate is difficult at best, and is one that is made only after a complete analysis of the client's situation. The estimate includes the lawyer's feelings concerning multiple factors such as the court, potential credibility and availability of witnesses, and the inherent strengths and weaknesses in the type of case presented, to mention a few.

Moreover, the students learn that throughout the counseling process the lawyer should solicit client opinions. Clients should be asked if they see any other alternatives. They should be

asked if they foresee any other consequences. Questions like "What would the effect on your family be if we went to court?" or "How long can you wait for a result?" are most appropriate and encourage a very good working attorney-client relationship.

There is much more that is covered in the course which, because of the limitations of this piece, can only be mentioned. For example, the class also explores factors such as whether an attorney (or client) should take notes during the process; how to deal with specific types of clients, the hostile, reluctant, or deceptive client to name a few; and how to deal with fees. The equally important matter of knowing when and how to refer the client to a mental health professional is discussed. Students learn that a referral may be appropriate where there is either some question about the client's mental and emotional functioning, or, when, totally unrelated to the legal issue of mental competence, the attorney perceives in the client that the client is unable to make basic decisions about a number of issues related to the case as well as cope with matters involving the client's day to day living. Also considered is how far the lawyer himself should go to aid the client in relieving stress and resolving various problems. To be sure, the authorities are divided, with some like Watson advocating a more active role for the lawyer in this process,<sup>9</sup> while those like Binder and Price a less active one.<sup>10</sup>

A true advancement in legal education is

taking place in law schools offering interviewing and counseling courses. Through these courses students are learning effective skills that will help them in their practice of law. In the process, they are being taught to respond to their clients not just as legal problems but as human beings who have legal problems. Finally, through extensive discussion and interaction, they are learning a great deal about themselves, which is most appropriate and helpful, since we feel that in order to truly understand and deal with others, we must, above all, know and understand ourselves.

### Notes

- 1 Thomas L. Shaffer, *Legal Interviewing and Counseling*, West Publishing Co., St. Paul, Minnesota (1976), at 2.
- 2 Andrew S. Watson, M.D., *The Lawyer in the Interviewing and Counseling Process*, The Bobbs-Merrill Company, Inc., Indianapolis, Indiana (1976), at 1.
- 3 Watson, *Ibid.*
- 4 For a fuller discussion of these forms of questions see: David A. Binder, Susan C. Price, *Legal Interviewing and Counseling: A Client Centered Approach*, West Publishing Co., St. Paul, Minnesota (1977), at 43-46.
- 5 Watson, *op. cit. supra*, n. 2 at 43-48.
- 6 Watson, *Id.* at 23-26.
- 7 Watson, *Id.* at 53-69.
- 8 ABA Code of Professional Responsibility EC 7-8.
- 9 See generally, Watson, *op. cit. supra*, n. 2.
- 10 Binder & Price, *op. cit. supra*, n. 4 Chapter 11.

# Contracts: The Private to Public Conversion

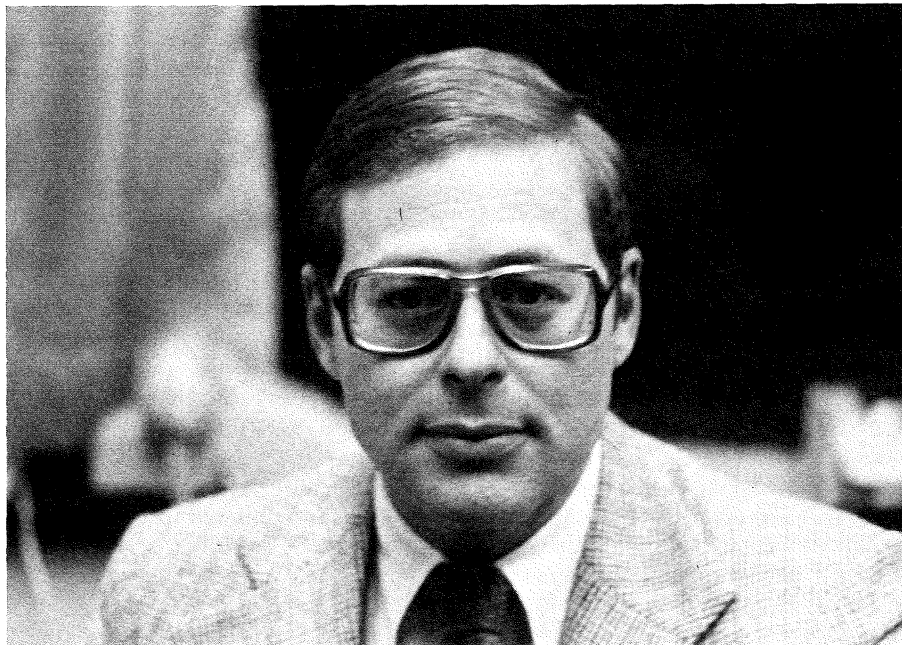
## I.

The shift of legal education from apprenticeships in private law offices to organized curriculum in academic institutions during the last few decades of the 19th century<sup>1</sup> touched off a period of intense intellectualization about all aspects of law, including the law governing private agreement. In 1906 Suffolk Law School was born into a legal world in which the conceptualization or formalization of the civil law, especially in contracts, had reached a pinnacle from which it was soon to begin a dizzy descent.

Consider the following excerpt from Gleason Archer's contracts teaching materials:

The author's custom is to call upon the students in turn to read from the book, and at the end of *each proposition* to emphasize orally *the important points* . . . No advance reading in the book is assigned; the students being held responsible for what has been covered in class . . . At each succeeding lecture the work of previous lectures is reviewed by questions, such as are now included at the end of each chapter. Used in this manner, the book becomes a very effective agency in driving home *the important principles of contracts*. (Emphasis added).

Although Dean Archer's approach to the study of contracts (and other subjects) was through the use of expository materials at a time when the case method of study had just become the vogue through the publication by Langdell of the first case-book,<sup>3</sup> his conceptualization of the subject was very much in the formalist mainstream of the day. The italicized phrases in the passage quoted above are both intentional and revealing. Archer, along with the other legal scholars of his era, was passionately committed to the legal positivism of the 19th century and to the notion of the mystical absolute: the belief that there existed a general theory of contracts from which the ground rules for decision making were to be deduced.<sup>4</sup> Doctrine was carefully structured around several "inherent abstractions that were considered to be fundamental to the private agreement process. The apotheosis of legal reasoning was generally presumed to be disciplined,



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dispassionate and impersonal analytic deduction from broad premises, free of social, moral or ethical values. The doctrinal method resulted in a gratifying sense of symmetry and even-handedness, which was mirrored in the orderly organization of the study of the subject in a straightforward, chronological way. Thus, Archer's text presented the material in the order in which events occur in the "typical" construction of a contractual relationship: offer and acceptance, consideration, statute of frauds, all the way through breach and remedies.

A brief review of the philosophical foundations of the formalist conception of contracts law indicated that by 1906 the forces that would result in its dismantling later in the century were already at work. Formalism was the reflection of the belief that the private agreement process was the enlightened approach to organization of a free enterprise, capitalistic (marketplace) economy and society.<sup>5</sup> Necessarily, the sanctity of contract and its freedom from untoward judicial intervention was the cardinal tenet. Laissez-faire had been elevated to dogma and the influence of the determinist philosophy of Social Darwinists like Herbert Spencer and William Graham Sumner<sup>6</sup> was pervasive in courtrooms and throughout society. In response to the development of the organized labor movement, courts postulated a theoretical liberty of contract in "the right of a person to sell his labor upon such terms as he deems proper."<sup>7</sup> Indeed, the pious devotion to these precepts became so extreme that Justice Holmes, portending the legal realist movement with which he has been closely identified, felt constrained to dissent in another labor case in order to remind his brethren that *Social Statistics*, Herbert Spencer's principal expostulation of Social Darwinism, had not been embodied by the founding fathers in the United States Constitution.<sup>8</sup>

Ironically, laissez-faire as a social and economic doctrine was, in the early years of this century, reaching its logical development in American courts just as it was beginning to collapse as a social structure before the forces of functionalism and progressive politics. The flourishing of American commerce in the post-Civil War era had extracted a toll, and there was a growing sense that something of value had gone out of American life. While most Americans continued to believe in free enterprise and private ownership, many were deeply troubled by

the surrender of traditional American ideals. Perhaps this was a result of the increasing corruption of the "free" markets, which culminated in the eruption of the Great Depression and comprehensive regulatory intervention schemes of the New Deal era. Certainly the economic upheavals caused by the panics of 1893 and 1907 played an important role in forming such perceptions. Traditional American ideals seemed feeble and irrelevant in a world in which the individual was increasingly subordinated to larger and larger organizations in business and government. The aspiration of equality for all seemed to be a mockery in a society in which the divisions between rich and poor were sharply drawn. The law itself, and particularly the great abstract of freedom of contract, was seen as a contrivance for the protection of privilege. Revolt against formalism and positivism spread through all areas of society.

In the law, courts, scholars and law-makers, influenced by the pragmatic, utilitarian philosophy of people like John Dewey and William James,<sup>9</sup> abruptly adjusted to a new era of realism. The great economists of the day, men such as Herbert Croly and Thorstein Veblen<sup>10</sup> launched a frontal assault of laissez-faire under the banner of realism and stressed concern with the practical purposes of economic doctrine, rather than its abstractions. An epochal event in the law was the 1913 publication of Charles A. Beard's *An Economic Interpretation of the Constitution*, which characterized the Constitution, (and by inference, other classical legal dogma), as an instrument to secure certain defined political and economic goals, and not an immutable source of truth. In law, as in other intellectual disciplines, ideas that had long been devoutly accepted were tested by their consequences rather than their logical symmetry, and social theories were weighed for their "purposive value."

The legal realists were free of program

dogma and were enemies of excessive deference to precedent. The leaders of the realist movement in the law, Justices Holmes<sup>11</sup> and Cardozo being the most prominent, recognized that the formalist tradition of American law was at variance with the cultural and social pluralism of the nation and that it ignored the complexities of human affairs in its devotion to orderly decision making. By pointing out the failure of the laws to create the ideal American society, the realists transformed the law of the classroom and the courtroom. Deduction from "natural laws" and broad generalities was replaced in contracts with a more flexible and discretionary approach, described by Lon Fuller as "a shift from a doctrinal to a utilitarian method."<sup>12</sup> In the functional approach of legal realism and post-realism, it is understood that contract is a process, a social institution without meaning out of context. Relativism replaced positivism; immutable doctrine became dynamic reflection of societal values in an era of increased moral sensitivity. The neat categories of Dean Archer's text have been replaced by new organizing precepts revolving around economic, historical, ethical and egalitarian themes, just as the drill and review approach to pedagogy Archer described in his preface has given way, in the "New Education" of John Dewey, to give and take, collective groping for answers.

Perhaps the most far reaching characteristic of the theory of contract as social institution<sup>13</sup> is that what once was exclusively private is now increasingly public. Much of the development of contract law in this century can be viewed as a struggle to frame a theory of private law in a world in which private law is becoming obsolete and inappropriate. This century's conversion of private law questions to public law questions in contracts was pre-empted in the speech of a prominent lawyer, delivered contemporaneously with the founding of Suffolk Law School:<sup>14</sup>

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**"Perhaps the most far-reaching characteristic of the theory of contract as social institution is that what once was exclusively private is now increasingly public."**

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The real difficulty appears to be that the new conditions . . . are continuously demanding the readjustment of the relations between great bodies of men and the establishment of new legal rights and obligations not contemplated [before] . . . . In place of the old individual independence of life in which every intelligent and healthy citizen was competent to take care of himself and his family, we have come to high degree of interdependence . . . . And in many directions the intervention of that organized control which we call government seems necessary to produce the same result of justice and right conduct which obtained though the attrition of individuals before the new conditions arose.

## II.

The private to public conversion of contract law — a process of socialization and humanization and retreat from 19th century positivism and conceptualism — is mirrored in the momentous events in contracts of this century: publication of the first Restatement of Contracts in 1932, the second Restatement in 1980, and the drafting and near universal enactment of the Uniform Commercial Code. These constructs in turn reflect the emergence of the now dominant themes of reliance protection and imposition of the duty of faith,<sup>15</sup> and the decline of sanctity of contract as a rationale for decisions. Most disputes involving the private agreement process are now resolved by findings of fact, rather than conclusions of law, with a corresponding diminution of the high degree of predictability and bargain stability that marked the earlier law. The riot of disorder that has resulted can be seen in the wide disparity between tables of contents of the modern case-books; there is no consensus even in the pedagogic approach to the subject.

This section will touch on four areas in which the question-of-law-to-question-of-fact-metamorphosis has taken place: the expansion of promissory liability far beyond the constraints of the consideration doctrine, the pervasive reference to good faith determinations to decide many cases, the breakdown of absolute liability theory and the reconceptualization of the process by which the fabled “meeting of the minds” is reached.

The consideration doctrine, a relatively late invention of Anglo-American law

when the need to give enforcement to informal (unsealed) promises became too compelling to ignore any longer,<sup>16</sup> nurtured the cause of positivism and orderliness of decision making in pre-20th century law. Buttressed by the axiom that courts would consider only the existence of consideration but never the adequacy of consideration, it reduced most promissory liability issues to pure questions of law, enabling courts to guarantee consistent and predictable results in diverse situations. No longer does consideration serve this function, or, in the opinion of some observers, play any meaningful role.<sup>17</sup> The taking of the inventory of the existing common law of contracts by the drafters of the first Restatements revealed an unwillingness of courts to ignore the predicaments of detriment sufferers whose detriment had not been “bargained for.”<sup>18</sup> Thus, almost as an afterthought,<sup>19</sup> the celebrated Section 90 was included in the first Restatement, an event which legitimized the retreat from the liability limiting effect of the rigid application of pure consideration doctrine and fueled the “explosion of liability” in contracts.<sup>20</sup> The birth and maturation of reliance as an independent doctrinal basis for liability is a landmark event in modern contracts history. It created what some believe is the monster that may devour contracts. It opened the floodgates through which a torrent of cases of liability without consideration has rampaged and laid the welcome mat down at the door to the courtroom for arguments based on moral values.<sup>21</sup> While the study of consideration is still a part of contracts courses and has not yet been transferred to the legal history curriculum, it is revealing to note that by the time of the second Restatement, the drafters were able to treat consideration in 11 sections,<sup>22</sup> but needed 13<sup>23</sup> to deal with “Contracts without Consideration.”

What is included under that rubric, in addition to Section 90, would astonish 1906 students. For example, section 83 deals with promises to pay debts discharged in bankruptcy, section 85 with promises to perform voidable duties and section 87 with irrevocable offers, a matter treated with some hostility by pre-20th century law based on the authority, among others, of Langdell.<sup>24</sup> The firm offer is, of course, no longer treated as a freak; indeed it is welcomed and “discovered” in a variety of formation

situations. Under the Restatement (2d), an offer may become irrevocable if it recites a purported consideration, (even if the consideration is never actually exchanged), if, in the event of an offer which is to be accepted by performance rather than promise, the act of performance commences, or if it is relied upon.<sup>25</sup> (In this regard it is noteworthy that early attempts to limit application of reliance doctrine in both offer and liability-imposition to non-commercial cases were a complete failure).<sup>26</sup> Under U.C.C. Section 2-305, an offer will be irrevocable simply because the offeror says it will be, without regard to consideration. This is a long way from the Langdell position.

Witness also expansion of quasi-contract theory to cover a variety of situations in which the earlier law would have found no liability. Undoubtedly, 1906 students regarded with regret what they were told was the proper, well-disciplined decision of *Mills v. Wyman*,<sup>27</sup> a Massachusetts case which dealt with a father's promise to reimburse a good samaritan for expenses incurred, before the promise was made, in caring for the promisor's ailing son. The court overcame its charitable instincts and, in a burst of doctrinal rectitude, found only moral consideration, which would not suffice to hold the villainous father liable on his promise. Section 86 of the new Restatement, under the heading “Promise for Benefit Received”, apparently endorses a contrary result, following the equally well-known later case, *Webb v. McGowin*.<sup>28</sup> There have been many attempts to harmonize these two celebrated cases, and most reach the apex of pedantry. It is submitted that the only basis for distinguishing these cases is the dates when they were decided.

While not all courts have been willing to take the Restatement's position in benefit received situations,<sup>29</sup> the Restatement's amorphous quasi-contract for vastly expanded notions of unjust enrichment is asserted in several other contexts,<sup>30</sup> even on behalf of defaulting parties.<sup>31</sup> For example, in construction cases, courts seem a great deal more receptive to substantial performance arguments. The line between recovery on the contract and in restitution in many of the recent cases is so blurred as to be imperceptible.<sup>32</sup> The point is that one way or another, there is liability for promise today in a great many more cases. The same phenomenon can be observed in the sale of goods

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## **“The line between recovery on the contract and in restitution in many of the recent cases is so blurred as to be imperceptible.”**

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formation of substantial performance; the perfect tender rule has been effectively dismembered under U.C.C. Sec. 2-601.

The foremost illustration of what classicists would perceive as the total collapse of the rule of law in decision making is the application of a good faith standard to dispose of a diversity of cases. Indeed, the study of good faith in a multiplicity of situations may ultimately replace the consideration chapter in contracts casebooks. The number of contexts in which courts have figuratively shrugged their shoulders and abdicated decision making to the fact finder through enunciation of a good faith standard are too numerous to chronicle fully here. Several examples suffice to demonstrate that the good faith duty is pervasive.<sup>33</sup> In the early part of the century, merchants began contracting to buy all of their requirements from a single seller or sell their total output to a single buyer as an efficient business practice. The courts were perplexed by these agreements and frequently concluded that a promise to buy requirements or sell output was illusory since it was not inescapably binding on the promisor and, therefore, was not good consideration.<sup>34</sup> The designation was “a lack of mutuality of obligation”, a primary corollary to the consideration doctrine. Today courts are untroubled by such exchanges. The cases and the U.C.C. agree that as long as the parties deal with each other in good faith and do not take unfair advantage of the arrangement, (for example by disproportionately increasing output or requirements under a fixed price contract, thereby undermining the reasonable expectations of the parties), the contract is enforceable.<sup>35</sup> Even when courts are unwilling to disregard a total lack of mutuality, they often manage to follow the evasive course set out by Cardozo and force a holding of liability into the consideration mold by implying a duty of best efforts.<sup>36</sup> The attack on consideration has come from the outside and from within the doctrine itself, through tenuous findings of consideration in many cases.

As an additional example, earlier cases framed the questions of claim settlement and accord and satisfaction as calling for simple application of the consideration construct. Only if the claim would have been adjudged meritorious was there benefit to the promisor and detriment to the promisee in surrendering it. Most jurisdictions and both Restatements now take the subjective position and hold that if the forbearing party believes that the claim may fairly be determined to be valid there is consideration.<sup>37</sup> Fairness, another manifestation of the good faith test, is the safeguard against extortion. Of course, giving up a worthless claim isn't in any real sense a detriment. What we are really saying is that consideration is not the issue and that the fact finding will dispose of the case.

The same phenomenon has taken place in the related area of contract modification. While the courts were never willing to enforce modifications that were the product of oppressive bargaining, the issue was often obscured by the belief that such cases raised pre-existing duty problems. Thus, a modification was enforceable only if each party undertook some new duty. This clumsy machinery was fairly effective in avoiding coerced modifications, with the notable exception of the “sue or be damned” line of cases which followed the authority of Justice Cooley in *Goebel v. Linn*,<sup>38</sup> (enforcement of a modification of the agreed price for ice while buyer's inventory of beer was rapidly spoiling). Perception of these cases is no longer clouded by the pre-existing duty rule and modifications are enforceable if they are the product of untainted bargains, notwithstanding lack of consideration.<sup>39</sup> The consideration chapter of casebooks has shrunk and the duress, undue influence,

coercion and unconscionability sections have ballooned.

The rule of good faith may achieve total dominance through the concept of unconscionability, a notion that converts every contracts question into one of public conscience. The unconscionability section of the U.C.C., 2-302, may be an annexation of almost imperial power to interfere with the private agreement process and to undermine stability of transaction by reference to the elusive, uncontrollable and totally subjective fact issues of fairness and justice.<sup>40</sup> This is especially so in light of cases which extend the notion of unconscionability to contract formation by imposing a duty to negotiate in good faith, giving rise to liability for incomplete bargains that would previously have been dismissed as unenforceable agreements to agree.<sup>41</sup>

It may seem paradoxical that the same forces that have resulted in the explosion of liability have also brought about a retreat from the extremes of absolute liability through liberalization of mistake and excuse doctrines. It should be noted at the outset that despite some early indications to the contrary,<sup>42</sup> the polar position of absolute liability for promise was never reached in Anglo-American law. It has long been held that a condition of performance is excused when there is objective impossibility of performance. However, these absolute concepts have now been supplanted by relative ones. Almost at the same time as the founding of Suffolk, the axiom of frustration of purpose was added to justifiable excuse doctrine by the cases dealing with the coronation of King Edward VII.<sup>43</sup> With minimal opposition, this has become orthodox decisional doctrine. The U.C.C. has gone a step further and added commercial impractical-

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## **“The rule of good faith may achieve total dominance through the concept of unconscionability . . . .”**

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ity to the excuse constellation (sec. 2-615), although it has been applied infrequently and reluctantly thus far.<sup>44</sup>

Mistake cases are now seen as raising the same sort of problems before contract formation that excuse through change of circumstances raise after, and are treated consistently. The distinction between mutual and unilateral mistake is less sharply drawn and the trend is to relieve parties from their bargains when their basic contractual assumptions are thwarted for one reason or another and things turn out differently than they had anticipated. Thus, the transaction will be arrested and reversed unless the non-mistaken party has changed position in reliance on the contract.<sup>45</sup>

Questions of mental capacity to contract increasingly have been merged into excuse doctrine, resulting in a greater inclination to give relief from bargains that would not have been made but for the emotional disorder or psychological pathology afflicting one of the parties. The enhanced sophistication in dealing with such issues is a direct product of the socializing and humanizing intellectual currents of the late 19th and early 20th centuries and the simultaneous advances in the natural sciences.<sup>46</sup> The unresolved tensions between the defenders of the stability of transaction and the psychological humanists are likely to remain for some time in the future, but the cases pre-empt expansion of excuse doctrine in this area as well.<sup>47</sup>

Substantial changes in the way courts address mutual assent problems and the formation of a meeting of the minds have resulted both from the movement from formalism to functionalism and the way parties, especially businessmen, conduct their affairs. The greater frequency with which "pad" or standard form contracts are used for implementing a multiplicity of exchange transactions provides a prime example.<sup>48</sup> The root causes for this development are simple enough: vast increases in transactional costs of individually negotiated agreements and efforts of large scale merchants to effectively legislate privately the law governing their transactions, thereby reducing the risk of erratic judicial treatment and the unpredictability of modern contract law. However, such agreements intensify the dangers inherent in bargaining power superiority and easily can become tools of oppression in the bargaining process.

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## **"Questions of mental capacity to contract increasingly have been merged into excuse doctrine . . . ."**

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The climate for contracts of adhesion is ideal. One response is the expanded application of the unconscionability doctrine. Another is to evaluate private agreements in light of public policy concerns. Courts have more and more set parameters around the contracting process by delineating areas into which the private bargain of parties will not be allowed, regardless of the fairness of the bargaining process itself.<sup>49</sup> Even courts that are hesitant to annex quasi-legislative power are more likely to find a lack of mutual assent under circumstances in which earlier courts would have had no trouble finding a meeting of the minds. Whether this is accomplished by application of "fine print" analysis,<sup>50</sup> by questioning the objectivity of the parties' manifestations of assent<sup>51</sup> or by direct protection from the sneak attack of inclusion of exotic terms in form contracts under U.C.C. Section 2-207, it is clear that courts will reject distasteful meetings of the minds with relative freedom. In fact, there are instances in which a party is better off for not having bothered to read a written contract at all.

### III

Retrospection is always easier than prediction. Mirrors reflect, not refract. In contracts, the conclusion that the upheavals of the past 75 years have produced a plateau of stability that will last for the

next 75 years is a beguiling one. Regardless of limited vision of the future, however, we know intuitively that what is avant-garde in 1981 will be orthodox and perhaps even outmoded in 2056.

Professor Gilmore has portended a new first year course in "Contorts: a fusing of contract and tort in a unified theory of civil obligation."<sup>52</sup> Others have predicted the demise of the case method of instruction and its replacement in the first year curriculum by a combination of socio-theoretic training, stressing diverse modes of political analysis, and argument and intensive skill training through simulated or actual practical experience.<sup>53</sup>

There are several things about the next 75 years of which we may be certain. Resolution of the tension between the private and public interests in contracts is likely to continue as unfinished business. Almost surely, we will not return to the teaching methods of Dean Archer or to an orderly and liability-limiting perception of the subject. Rather, diffusion, pluralism and fragmentation will continue. Finally, we probably may rely on the synthesizing proclivities of lawyers and law teachers. The effort, perhaps already begun in the Restatement (2d), to construct a new syllogism for the subject and to use the threads of the new themes of reliance, good faith and socialization to stitch together the patches into a new quilt, will challenge scholars and jurists alike.

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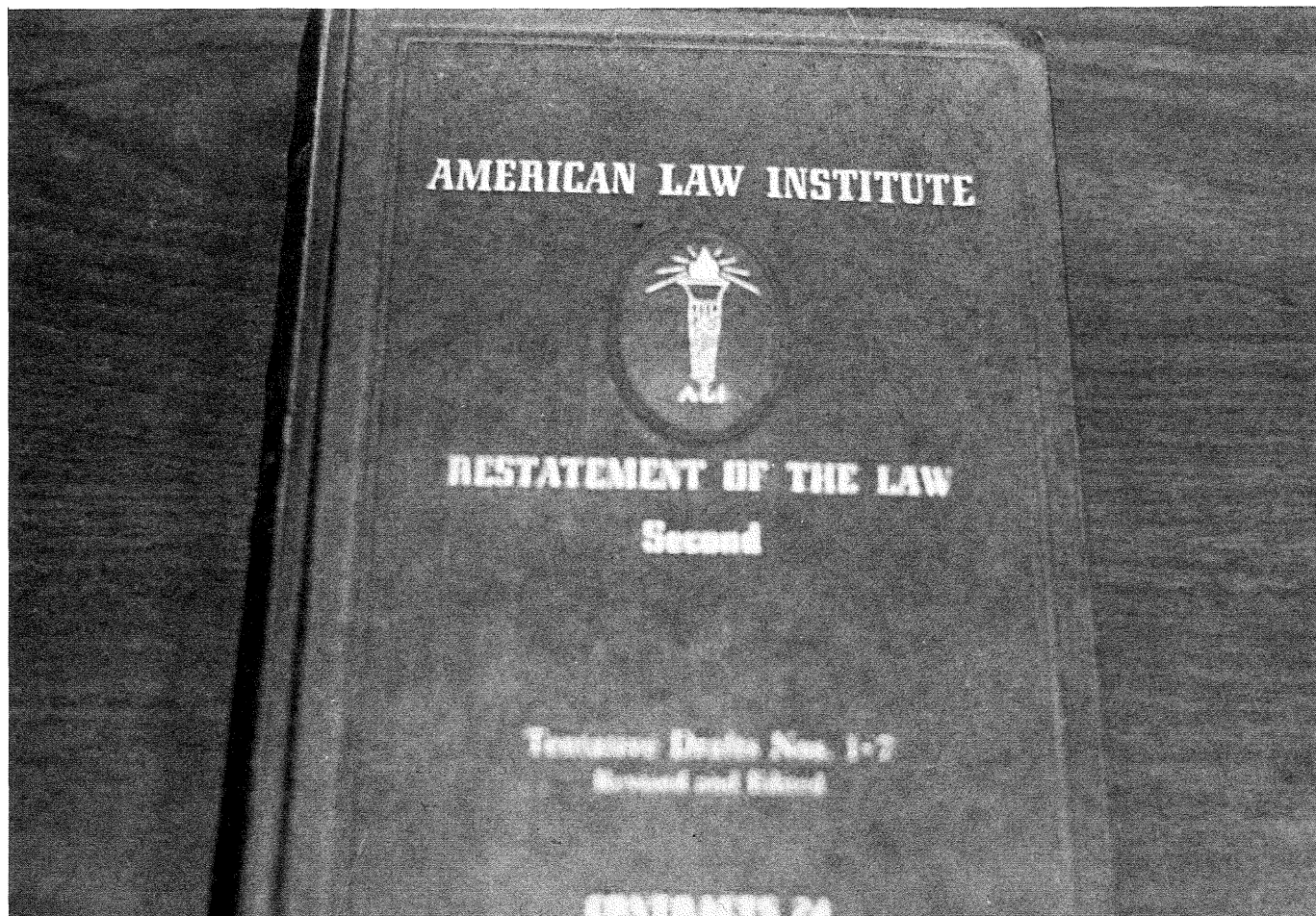
## **"Professor Gilmore has portended a new first year course in 'Contorts; a fusing of contract and tort in a unified theory of civil obligation.' "**

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## Notes

1. "The changeover to institutional education took place only after the longhand copying work that an apprentice could do was eliminated by the typewriter, and when part-time law schools could be run at night after the invention of the electric light bulb." K. Tierney, *Darrow: A Biography* 22 (1979).
2. Archer, *The Law of Contracts* (2d ed. 1920). Archer's text was published by Suffolk Law Press.
3. Langdell, *A Selection of Cases on the Law of Contracts* (1871).
4. Fuller, *Basic Contract Law* 522-23 (1947); Friedman, *Contract Law in America* 20-22 (1930); Gilmore, *The Ages of American Law* (1977).
5. See Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 *Colum.L.Rev.* 629 (1943).
6. S. E. Morison, *The Oxford History of the American People* 770 ff. (1965) contains an excellent discussion of these men and their disciples.
7. Justice Harlan in *Addair v. United States*, 208 U.S. 161 (1907).
8. *Lochner v. New York*, 198 U.S. 45, 75 (1904).
9. See Schneider, *A History of American Philosophy* (1946).
10. See Croly, *The Promise of American Life* (1909); Veblen, *The Theory of the Leisure Class* (1899).
11. While Justice Holmes is usually thought of as "the great dissenter" and iconoclast, Gilmore credits him as the principal architect of "the great theory of contract." Gilmore, *The Death of Contract* (1974).
12. Fuller, *Basic Contract Law* 520 (1947). See also Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Colum.L.Rev.* 809 (1935).
13. See Kessler & Gilmore, *Contracts: Cases and Materials* 1-15 (2d ed. 1970); Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 *N.Y.U.L.Rev.* 876, 887 (1979).
14. Presidential address of Elihu Root before the New York State Bar Association in 1912.
15. See Kessler & Fine, *Culpa in Contahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 *Harv.L.Rev.* 401 (1964).
16. See Horwitz, *The Transformation of American Law*, Chapter VI, "The Triumph of Contract", (1977).
17. "The requirement of an 'exchange' may have seemed indispensable to eighteenth and nineteenth century lawyers . . . Twentieth century lawyers seem less inclined to ideological dogmatism of any school and more inclined to ask whether the community conscience would deem a particular promise worthy of enforcement." Calamari & Perillo, *The Law of Contracts* Sec. 4-2 (2 ed. 1977).
18. Boyer, *Promissory Estoppel: Principle for Precedents*, 50 *Mich.L.Rev.* 639, 644 (1952). One such case that has long troubled students is *Kirksey v. Kirksey*, 8 Ala. 131 (1845).
19. Gilmore, *The Death of Contract* 60-65(1974).
20. *Id.* at 74-76.
21. Promissory estoppel has been characterized as "an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings." *Peoples Nat'l Bank of Little Rock v. Linebarger Constr. Co.*, 219 Ark 11, 17, 240 S.W.2d 12 16 (1951).



22. Sections 71-81.
23. Sections 82-94.
24. "[I]t is indispensable to the making of a contract that the wills of the contracting parties do, in legal contemplation, concur at the moment of making it. An offer, therefore, which the party making it has not power to revoke, is a legal impossibility." Langdell, *Law of Contracts* Sec. 178 (2d ed. 1880).
25. Sections 87(1)(a); 45; and 87(2), respectively.
26. For an interesting illustration of this, compare Judge Learned Hand's opinion in *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933) with the recent Massachusetts construction case, *Loranger Const. Corp. v. E. F. Hauserman Co.*, \_\_\_ Mass. \_\_\_, 384 N.E.2d 176 (1978).
27. 3 Pick. 207 (Mass. 1825).
28. 27 Ala. App. 82, 168 So. 196 (1935).
29. *Harrington v. Taylor*, 225 N.C. 690, 36 S.E.2d 227 (1945).
30. In *In re Voss' Estate*, 29 Wis.2d 238, 121 N.W.2d 744 (1963), a claim in quantum meruit for household services is raised.
31. See *Freedman v. Rector, Wardens and Vestrymen of St. Mathias Parish*, 37 Cal.2d 16, 230 P.2d 629, 31 A.L.R.2d 1 (1951).
32. *Jacobs & Young v. Kent*, 230 N.Y. 239, 129 N.E. 889 (1921); *Plante v. Jacobs*, 10 Wis.2d 567, 103 N.W.2d 296 (1960). The cases collected in Closen, Ferber, Perlmutter & Wittenberg, *Contracts: Contemporary Cases and Materials*, Chapter 13(B), "The Adequacy of Imperfection" 1980, provide additional illustrations.
33. "Good faith and fair dealing between parties are pervasive requirements in our law; it can be said fairly, that parties to contracts or commercial transactions are bound by this standard." *Fortune v. National Cash Register Co.*, 373 Mass. 96, 102, 364 N.E.2d 1251, 1256 (1977).
34. *Oscar Schlegel Manufacturing Co. v. Peter Cooper's Glue Factory*, 231 N.Y. 459, 132 N.E. 148, 24 A.L.R. 1348 (1921).
35. U.C.C. Sec. 2-306 and Comments 2 and 5; *Laclede Gas Co. v. Amoco Oil Co.*, 522 F.2d 33 (8th Cir. 1975); *McMichael v. Price*, 177 Okla. 186, 58 P.2d 549 (1936).
36. See U.C.C. Sec. 2-306(2); *Wood v. Lucy, Lady Duff Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917); *Bonner v. Westbound Records, Inc.*, 76 Ill.App. 3d 736, 394 N.E.2d 1303 (1979); Gilmore, *The Death of Contract* 77 (1974).
37. Restatement, *Contracts*, Sec. 76(b); Restatement (2d), *Contracts*, Sec. 74(1); *Fiege v. Boehm*, 210 Md. 352, 123 A.2d 316 (1956).
38. 47 Mich. 489, 11 N.W. 284 (1882).
39. Compare the courts' analyses in reaching the same result in *Angel v. Murray*, 113 R.I. 482, 322 A.2d 630 (1974) and *Alaska Packers' Ass'n v. Domenico*, 117 F. 99 (9th Cir. 1902). See also U.C.C. Sec. 2-209(1); *Watkins & Son, Inc. v. Carrig*, 91 N.H. 459, 21 A.2d 591 (1941); *Cohen v. Sabin*, 452 Pa. 447, 307 A.2d 845 (1973).
40. Leff, *Unconscionability and the Code — The Emperor's New Clause*, 115 U.Pa.L.Rev. 485 (1967).
41. *Hoffman v. Red Owl Stores, Inc.*, 26 Wis.2d 683, 133 N.W.2d 267 (1965); *Wheeler v. White*, 398 S.W.2d 93 (Tex. 1965).
42. *Blanford v. Andrews*, Cro.Eliz. 694, 78 Eng.Rep.R. 930 (K.B. 1599); *Paradine v. Jane*, Ayley 26, 82 Eng.Rep. 897 (K.B. 1647); *Adams v. Nichols*, 19 Pick. 275 (Mass. 1837).
43. *Krell v. Henry*, 2 K.B. 740 (Ct.App. 1903); *Chandler v. Webster*, 1 K.B. 493 (1904).
44. See the cases collected in "Comment: Impracticability Under the Uniform Commercial Code". Closen, Ferber, Perlmutter & Wittenberg, *Contracts: Contemporary Cases and Materials* 740-42 (1980).
45. Restatement (2d), *Contracts*, Sec. 153; *Wil-Fred's Inc. v. Metropolitan Sanitary Dist. of Greater Chicago*, 57 Ill.App.3d 16, 372 N.E.2d 946 (1978).
46. William James' *The Principles of Psychology* (1890) was particularly influential.
47. *Faber v. Sweet Style Mfg. Corp.*, 40 Misc.2d 212, 242 N.Y.S.2d 763 (1963); *Ortelere v. Teachers' Retirement Board*, 25 N.Y.2d 196, 303 N.Y.S.2d 362, 250 N.E.2d 460 (1969); *Knighten v. Davis*, 358 So.2d 1022 (Ala. 1978).
48. See Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 Colum.L.Rev. 629 (1943).
49. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).
50. *International Transportation Ass'n v. Bylenga*, 254 Mich. 236, 236 N.W. 771 (1931).
51. *Agricultural Ins. Co. v. Constantine*, 144 Ohio St. 275, 58 N.E.2d 658 (1944); *Massachusetts General Laws Annotated*, C-231, Section 85M.
52. Gilmore, *The Death of Contract* 90 (1974).
53. Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 N.Y.U.L.Rev. 876, 895, 898 (1979); Note, *Legal Theory and Legal Education*, 79 Yale L.J. 1153 (1970).

# Condominiumizing the American Dream: Why You Can't Go Home Again

A funny thing seems to have happened on the way to the American dream. It is not that the dream has become smaller; rather, it has become subdivided and compartmentalized. From the seventeenth century to the present day, a consistent and dominant theme moving the waves of immigrants to these shores has been not simply the notion that the streets are paved with bricks of gold, but, rather, for each there is the possibility of owning a piece of this American earth without the impediments commonly associated with property ownership in Europe and other parts of the world. Whether it be the absence of the feudal strictures of villinage, services and incidents, or simply the availability of easy and often unregulated credit to elements of the society that had heretofore been burdened by class distinctions, the possibility of obtaining a piece of the earth, a farm, a home, a building, a store or a factory, "free and clear" was the shining beacon lighting up all other possible standards of success that might await the displaced millions who came to these shores.

So important was this concept that early on it became engrained in our social and cultural myth and exalted by our literature on through the decades to its presence even in our electronic media. When Robert Young or Ozzie Nelson made their entrances, it was inevitably with greeting, "Hey honey, I'm home;" and they were in fact "home" to the sanctified retreat that was still the mythical bulwark of a postagrarian society. In fact, our literature and media suggest a not so subtle discontent in homes that were in fact not houses, but small and cramped apartments which somehow indicated that the occupants were perhaps still upwardly mobile or, worse, shortchanged by the American dream.<sup>1</sup>

But we travel too quickly. It is necessary to view the changes in our world view with some perspective, particularly over the last three-quarters of this century, in order to understand how the American myth of individual homeownership has



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## It is in fact the integration of our social philosophy and myth . . . which moves and shapes our property law . . .

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changed and how our property law had adapted itself to coincide with the economic realities of a postagrarian and postindustrial society.

One need not be an economic determinist to agree that "the economic perspective can provide a basis for understanding the role doctrine plays in defining power relationships in a society based upon private property."<sup>2</sup> That is to say, more than in other areas of the law, the legal basis that actuates our national myths driving us to possess, occupy and transfer pieces of our world are, out of necessity, entirely reflective of those economic relationships which Marx would have called "substructural" and which we tend to view as an integration of a market economy with the historical perspectives of the common law.<sup>3</sup> It is in fact the integration of our social philosophy and myth, particularly with regard to the acquisition of the family home, which moves and shapes our property law and has done so dramatically within the last three quarters of the century.

Some will question whether the immigrant detained or quarantined on Thompson's Island in Boston Harbour seventy-five years ago could ever have entertained the notion of a three bedroom colonial in Quincy or Newton or Andover. Yet it is arguable that, regardless of the particular state of mind of a particular immigrant, our property laws were already being subjected to social forces which would serve to reinforce the myth of individual homeownership and preserve that myth at least through the decade following the Second World War.

In the urbanized centers of the East and Midwest, state legislatures, during the first decades of this century, were responding to native constituents by adopting comprehensive tenant housing acts known at the time as tenement statutes.<sup>4</sup> Many commentators have suggested that the impetus for the adoption of these statutes establishing comprehensive building and health codes and requirements for

improved fire protection and sanitation, were motivated by the fears of the indigenous population that the newcomers would live permanently in squalid surroundings, spreading disease and the potential for social disruption growing out of their status as a permanent underclass in this society.<sup>5</sup> The concept of fear as a primary motivating factor does not discount, however, the presence of the social belief that the status of this new segment of the population in slums and tenements should in fact be a temporary condition from which the immigrant population would move on to a better life in an individually owned single family home.

Ironically, then, the first steps taken to preserve the social myth of individual homeownership were actually statutory limitations on the rights of an owner of property to build and operate the building upon *his* land in a manner in which he saw fit. The tenement acts had both the effect of improving the lot of the immigrants and signalling one of the first substantial intrusions into the rights of owners of private property. The pressures of a rapidly industrializing society, requiring large numbers of workers at low wages, conflicted with a social conscience that held that, regardless of other economic pressures, the lowest segment of the population should be educated to expect a decent standard of living, and the owners of tenement properties should be compelled to create conditions which implied the existence of a higher standard of living. It would take decades before this society awoke entirely to the intolerable living conditions with respect to its farm laborers and urban blacks;<sup>6</sup> but the pattern nevertheless became consistent: social legislation regulating and restricting the rights of a lessor and at the same time broadening the base of the rights of tenants and occupants, consistent with the uniquely American belief that one occupying as a tenant is merely in a transitional stage toward what should be the ultimate

goal of private homeownership.

The upheavals of the Great Depression notwithstanding, the myth remained intact through the Second World War and into the decade of the 1950's. Even though loan-to-value ratios on home mortgages rarely exceeded 50 or 60% prior to the Second World War, the introduction of government programs and low interest rates coupled with the availability of mortgage money reinforced the continuing belief that private homeownership was within the grasp of every hardworking American regardless of economic station. The bricklayer and assembly line worker could just as well obtain the picket fence, the yard, the driveway and three bedrooms as his wealthy professional counterpart in the society.

Even though we are not unacquainted with shocks to our social system in this country, the change in perspective concerning homeownership has been rapid and disconcerting. We have felt such shocks before, for example, in the closing of the frontier, only to have the frontier survive in tent shows and darkened movie theatres. Now it would seem that we are facing another serious schematic shift akin to the suffering of the Great Depression when we found that we could not feed, clothe, and house our population totally without governmental intervention and regulation. Now, there is the growing sense that the average American will not have the ability to own a home of his own.

It is, of course, arguable that the myth never approached reality. Those subscribing to the Hohfeldian theory of property interests would argue that for the bulk of those who considered themselves homeowners the doctrine of "relativity of title" would suggest otherwise.<sup>7</sup> The bank, the finance company, the town through its taxes, the utility companies and a host of others had substantial interests in the American home and limited the interest of the "owner" to mere possession and occupancy, rather than "seisin" or complete and perfect title. Yet the myth



prevailed until the economics of a nation short of oil began to influence the ability of the average American to acquire even that small interest which suggested that he had fulfilled at least one aspect of the American dream.

If, however, economic factors have conspired against the ability of many Americans to acquire their own home, we have not been lacking in the ingenuity to suggest a substitute for the dream and, in fact, incorporate aspects of that substituted myth into our property law.

It is certainly beyond the scope of this discussion to consider the process by which social and economic attitudes are incorporated into legislation and legal theory. Suffice it to say that faced with the narrowing of the ability of every American to purchase a homestead, we nevertheless begin gradually to accept the heretofore foreign notion that one's home might be incorporated with the home of others, physically and legally bound, in a kind of communal context that was contrary to our earlier notions of independence and self-sufficiency. Rather than divest ourselves of the American ideal of individual homeownership, we have miniaturized it and compartmentalized it so that the myth remains, albeit in altered form.

The most noticeable legal manifestations of this change of attitude are presently incorporated in the laws of the various states dealing with the establishment of condominiums and time sharing of fee interests.

Although the condominium form of ownership can be traced back to the era of the Roman Empire,<sup>8</sup> its acceptance in America was clearly delayed by the belief that owning a part of the whole was not the same as owning the whole itself. There was no sense that owning a unit in a building, subject to a master deed, regulations and bylaws was at all as attractive as owning a free standing structure without the need to accommodate one's desires or thinking to the other occupants of the premises. To be sure, in cities like New York and Chicago, the cooperative form of ownership had, since the 1920's, achieved a certain popularity. But the cooperative with its basic corporate organization, the sale of shares to the individual participants and an occupancy defined by a lease rather than a fee interest, parallels the growth of the corporate entity in this country, rather than a refinement in property law and the consciousness of the population concerning homeownership.<sup>9</sup>

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Although the ability to establish concurrent ownership with others in the form of a condominium appears to be firmly grounded in the common law, most states have chosen to adopt comprehensive statutes defining the manner in which the condominium is to be established, the unit owners organized, and the day-to-day management effected. The concept, as expressed in the so-called second generation of condominium statutes (following the first attempts made by the states in the late 1950's and 1960's) and represented most prominently by the Uniform Condominium Act,<sup>10</sup> are microcosmic examples of the American town meeting philosophy imposed upon a European form of common ownership. This notion can be seen most obviously in the structuring of the association of unit owners where one vote is provided to each unit owner regardless of the size or cost of a particular unit. Each owner participates equally in the decisions governing the management and maintenance of the multi-family structure. In fact, in the second generation of statutes, the developer clearly takes a back seat to the unit owners and their association in the governance of the project.

Under the Uniform Condominium Act, the developer is responsible for not

only providing a detailed public offering statement to each purchaser before conveyance of a unit, but also may not record the condominium declaration itself until "all structural components and mechanical systems of all buildings containing or comprising any units thereby created are substantially completed."<sup>11</sup> The Unit Owners' Association may terminate without penalty (1) any management contract, employment contract or lease of recreational or parking areas, (2) any other contract or lease to which the declarant or any affiliate of the declarant was a party, and (3) any other contract or lease which was unconscionable as to the unit owners at the time the contract or lease was made.<sup>12</sup> The maximum developer control period under the Uniform Condominium Act is three years following the first conveyance of a unit, and the Uniform Condominium Act also mandates a phasing out of declarant control at specified points in the sales process. Under the Act, unit owners have the right to elect 25 percent of the executive board following the conveyance of at least 25 percent of the units and 33 percent of the executive board following the conveyance of at least 50 percent of the units.<sup>13</sup> Declarant control automatically terminates, and the unit owners may elect the entire

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**. . . the second generation of condominium statutes . . . are microcosmic examples of the American town meeting philosophy imposed upon a European form of common ownership. . . .**

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executive board of the association, following the conveyance of 75 percent of the units, unless the three year period expires first.<sup>14</sup>

Most interestingly, the Uniform Condominium Act creates both express and implied warranties of quality for condominium purchases.<sup>15</sup> Although a developer may specifically disclaim certain warranties, the use of the term "as is" is not effective as to a unit which may be occupied for residential use under the Uniform Condominium Act. In the residential situation, the declarant may disclaim liability for an implied warranty with respect to a specific defect or a specified failure to comply with applicable law only by means of an instrument signed by the purchaser.<sup>16</sup>

As more and more states incorporate the concepts of the Uniform Condominium Act into their condominium statutes, it becomes clear that if there is a trend in the law, it is toward democratizing the condominium; that is, if we have finally acknowledged that the detached single family home may not be within the reach of most Americans, we nevertheless demand that our state legislators preserve the participatory rights of each individual unit purchaser. What is more, we, through our legislatures, preserve the fiction that the unit owner, the possessor of space up to the studs in the walls of the structure in which he lives, is a holder in fee of all the right, title and interest defined within that space. Rather than describe some new property interest created by the establishment of the condominium concept, we apparently prefer to maintain the notion that this unit owner is the direct descendent of the feudal fee holder who, by livery of seisin came to possess all the rights that one could possess, in a particular piece of property.

Not all courts are so persuaded by the attempt to apply the notion of the transfer of fee interest to the unit holder of a condominium. In *Centex Home Corp. v. Boag*, 128 N.J. Super 385, 320 A. 2d 194 (1974), the court, (examining the right to specific performance of a plaintiff developer with respect to a defaulting buyer in the purchase of a condominium unit), suggests that the time has perhaps come to recognize that the nature of the interest acquired by such a buyer is something other than one which would support a remedy in specific performance in the event of the buyer's default. Centex tried to persuade the court that "since the subject matter of the contract [was] the

transfer of a fee interest in real estate, the remedy of specific performance [should be] available to enforce the agreement under principles of equity which are well established . . ." <sup>17</sup> the court, however, could not logically carry the fiction so far:

Here the subject of the real estate transaction — a condominium apartment unit — has no unique quality but is one of hundreds of virtually identical units being offered by a developer for sale to the public. The units are sold by means of sample, in this case model apartments, in much the same manner as items of personal property are sold in the market place. The sales prices for the units are fixed in accordance with [the] schedule filed by Centex as part of its offering plan, and the only variance as between apartments having the same floor plan (of which six plans are available) is the floor level or the building location within

court may find a damage remedy adequate to make the seller whole and therefore deny specific performance.<sup>19</sup> What is more significant than the court's recognition that specific performance is not an appropriate remedy when a default in the purchase of a condominium occurs, is the court's equating of the characteristics of possession of a condominium unit with those of other items of *personal property* notwithstanding the legislature's emphatic declaration that unit ownership of a condominium shall be the same as fee ownership of other elements of real property.

It is unfair to conceptualize a trend in the law based upon one decision of a state court. Yet the New Jersey opinion does suggest that equating unit ownership with other forms of fee ownership in real property is not entirely proper. Notwithstanding a desire on the part of legislatures and the public generally to preserve a sense of home ownership within the

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**. . . failure of the condominium unit to qualify as "unique" is the basis upon which the court may find a damage remedy adequate . . .**

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the project. In actuality, the condominium apartment units, regardless of their realty label, share the same characteristics as personal property.<sup>18</sup>

The court concludes that the failure of the condominium unit to qualify as "unique" is the basis upon which the

condominium context, such notions may not withstand the historical tests which have been established for divisions of ownership between real and personal property.

Time-sharing, the other area in which the economic realities of the declining

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**. . . the Uniform Condominium Act creates both express and implied warranties of quality for condominium purchases. . . .**

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ability of Americans to afford the traditional fee interest in real property are manifested, is actually an outgrowth of the recent developments in condominium law. By subdividing the cost of fee ownership into time segments, sufficiently priced in the aggregate to recoup the developer's investment, it has been possible to develop a marketing scheme which has enabled purchasers to acquire second homes and vacation homes in the face of rapidly rising costs. Borrowing from the computer industry, this new plan of joint ownership has been named "timesharing" with a purpose of increasing the availability of interim and vacation homes and minimizing the inconvenience of absentee ownership.<sup>20</sup> Although joint ownership of interim and vacation homes, whereby a number of families purchase a house and agree among themselves to share the use of the property, has not been uncommon in past years, a significant shortcoming of this form of ownership was the absence of structured management. Consequently, the new marketing scheme facilitates the joint ownership approach by developing a workable plan and providing the management vehicle to implement it. The objective of timesharing ownership is to permit each participant to become an "owner" of his unit with the exclusive right to use the premises during one or more annual time periods of his choice, to own only what he can use, and to require each owner to pay a fair share of the common expenses.

The problem, of course, arises in attempting to define the nature of the ownership interest acquired by the timesharer. The decided preference of such law as exists in this area appears to be to classify the interest as either an interval estate or as a tenancy in common coupled with an agreement to use the property for only a specific time period.<sup>21</sup> A third classification, that of a vacation license or right-to-use has not been accepted generally by the states adopting timesharing statutes or by the National Conference of Commissioners on Uniform State Laws. From our particular perspective it is, of course, interesting that the emphasis has been to extend the logic of traditional fee ownership into an area that is often considered merely a license to use or similar limited possessory interest. Nevertheless, the marketing of the timesharing notion and the particular attitude of the public eager to purchase such interests appear to require a sense of owning something rather than merely having a



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**. . . this new plan of joint ownership has been named "timesharing" with a purpose of increasing the availability of interim and vacation homes and minimizing the inconveniences of absentee ownership. . . .**

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right to use property as if one were registering in a hotel or resort.

It is possible to consider the timesharer as having no direct interest in the underlying fee. If that is the case the purchaser of such an interest has little protection against improvident actions of the developer or owner of the fee interest. A timeshare license or right-to-use is usually an unrecorded instrument guaranteeing the licensee nothing as far as protection from encumbrances by or creditors of the developer or owner who holds record title. If the agreement is viewed as a retail installment sales contract the buyer may have some statutory protection against fraudulent practices but the contract would then escape most real estate regulations. The advantage to the developer or owner of establishing a non-real estate

interest for the purchaser defined as either a right-to-use or a vacation license is that it provides an easy, quick, and inexpensive start up method with no need to comply with various land sales rules.

It is possible to consider, however, the conveyance of undivided interests in the fee to purchasers of shares as the creation of a tenancy in common coupled with the execution of an agreement between all allocating use to specific time periods. Such time periods are determined by the purchase price, the in-season time periods drawing higher prices than the off-season periods. Unlike the concept of license, the purchaser, as a tenant in common, acquires a fee interest which will devolve through his or her estate. Traditionally, however, a tenancy in common is a concurrent interest in which there is a

unity of possession, but separate and distinct titles. Also included within this concept is the right to partition the property. Under a timesharing estate, these rights to partition and to equal possession are commonly waived in the declaration of covenants, conditions and restrictions signed by the purchaser.<sup>22</sup> It remains unclear whether the declaration, which is in form and substance similar to that of a condominium declaration and sets forth procedures for maintenance of the property, voting rights of the co-owners, management of the property, restrictions on use and occupancy of the property and termination of timesharing, is enforceable as a contract, covenant or servitude. The definitional problem arises because with only one parcel or unit of property, there can logically be no dominant and servient estate.<sup>23</sup>

In an attempt to solve the problems of partition, privity and the nature of the covenant binding the parties, the authors of the Uniform Condominium Act developed the notion of the "interval ownership estate."<sup>24</sup> The purchaser of such an interest acquires an estate for years in a specific, designated recurring parcel of real estate for a designated recurring period of time. It might be said that the acquired interest is equivalent to the common law estate for years. The instrument of conveyance creates a revolving or recurring estate for years, or a series of estates for years with remainders over at a defined future date. At the termination of the revolving estate, the parties, as tenants in common, have the option to either seek partition or to reinstate the previous arrangement. The same interval recurs annually and during this period, the interest is not subject to partition or tax lien on the interest of the other owners. Each estate is separate from the others in the same unit. The remainder over as tenants in common does not occur until a time after the useful life of the unit has been expended. At that point, a vested undivided fee simple is established.

The Uniform Condominium Act, and its offshoot the Uniform Real Estate Timeshare Act (URETSA), require that such an interval arrangement be established on a basis of five years or more. In that event, the timesharer will qualify as a holder of an estate in land, while a term of less than five years will be considered akin to a license or right to use.<sup>26</sup>

Under URETSA, each timeshare estate constitutes for all purposes a separate estate in real property. The Act, which was

promulgated in 1979, contemplates that two or more timeshare estates may be created in a single unit and each such estate is to be recognized by the courts as a separate fee simple estate, with all the usual incidents thereto, regardless of the effect common law doctrines would have on the attempted creation of such estates. URETSA attempts to counter any authority to the contrary that only one fee simple estate could exist with respect to any one parcel of real property. Under the Act, no merger would occur even if two consecutive timesharer estates were acquired by the same person.<sup>27</sup>

A number of states, including Utah, New Hampshire, Florida, and Colorado have either incorporated the concept of timesharing ownership into their con-

cherish, namely, the ability to acquire and possess an interest in land, however small and limited in duration, to the exclusion of all except those who we choose to permit to enter. Such has been the American Dream of many and apparently continues to be recognized as such in the laws which preserve the notion of the home and freehold no matter how much the pressures of the times seem to threaten that goal.

#### Notes

1. One need only consider the image of the cramped tenement in "The Honeymooners" in order to draw the appropriate contrast.
2. See generally, Ackerman, ed., *The Economic Foundation of Property Law*, 1975.

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**. . . "interval ownership estate." . . . The purchaser of such an interest acquires an estate for years in a specific, designated recurring parcel of real estate for a designated recurring period of time. . . .**

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dominium act or adopted a separate timesharing statute. In each instance, the statute appears to establish the ability of a shareholder to obtain an estate in land by virtue of interval ownership.

The unit ownership concept, whether it be achieved through the condominium or timeshare purchase represents a distinct refinement in the American law of property from that which existed seventy-five years ago. They are manifestations of an accommodation made to an era in which increased costs and limited resources have conspired to require the extension of traditional common law concepts of estates and freeholds to what are essentially limited possessory interests. Such refinements are necessary, however, to preserve the myth that we seem to

3. *Id.*
4. See, e.g., Mass.Gen.Laws ch. 144, § 1 *et. seq.*
5. See, Ford, James, *Slums and Housing*, Harvard University Press, 1936; Abbott, Edith, *The Tenements of Chicago*, University of Chicago Press, 1936; Riis, Jacob A., *How The Other Half Lives*, (introduction by Donald N. Bigelow) Sagamore Press, 1957.
6. By the time of the passage of 42 U.S.C. § 3531 *et. seq.* and 42 U.S.C. § 3601 *et. seq.* (The "Fair Housing Act"), our law was moving toward the creation of open housing rather than simply decent housing. Yet the declaration of purpose of the statute establishing the Department of Housing and Urban Development leaves no question as to the belief that our society requires a certain standard of living and shelter for all its inhabitants:



“The congress hereby declares that the general welfare of the Nation and the health and living standards of our people require, as a matter of national purpose, sound development of the Nation’s communities and metropolitan areas in which the vast majority of its people live and work.” 42 USC 3531.

7. Hofeld, *Fundamental Legal Conceptions*, 1923.
8. Berger, *Condominium: Shelter on a Statutory Foundation*, 63 Colum. L. Rev. 987 (1963).
9. Compare, Mass.Gen.Laws ch. 157 § 1 *et. seq.* with Mass.Gen.Laws ch. 183a § 1 *et. seq.* See also, Berger, *Land Ownership and Use*, 174-175 (2nd ed. 1975).
10. The Uniform Condominium Act was approved by the National Conference of Commissioners on Uniform Laws in 1977.
11. Uniform Condominium Act (UCA) § 2-101 (b).
12. UCA § 3-105.
13. UCA § 3-103 (d).
14. UCA § 3-103 (c).
15. UCA §§ 4-111 and 4-112.
16. UCA § 113.
17. 320 A.2d 196 (1974).
18. 320 A.2d 198 (1974).
19. *Id.*
20. See, Bureck, *Timesharing: The Pie in the Sky*, *The Guarantor*, July, 1979; Davis, *Time-Sharing Ownership-Legal and Practical Problems*, 48 St. John’s L. Rev. 1183 (1974).
21. *Id.*
22. *Id.* See also, Roodhouse, *Fractional Time Period Ownership of Recreational Condominiums*, 4 Real Estate L.J. 35 (1975).
23. *Id.*; *op. cit.* 20.
24. UCA § 4-102.
25. UCA § 4-102(a).
26. Uniform Real Estate Time-Share Act (URETSA) 1979 1-102(14) and (18).
27. URETSA § 1-103(a) (Commissioner’s Comment 2).



**. . . preserve the myth that we seem to cherish, namely, the ability to acquire and possess an interest in land, however small and limited in duration, to the exclusion of all except those who we choose to permit to enter. . . .**

*As the percentage of women enrolled in the law school class has skyrocketed, and increasingly of women pursuing alternative careers, Suffolk Law School's already diverse student body becomes of more interest.*

*The following is an article submitted by one such woman, a second year law student, who now contemplates . . . . .*

## Can a Woman over 35 Find Happiness in Law School?

By Luci Pillsbury

There simply is no way to determine if a woman who has spent most of her adult years reading *The Pokey Little Puppy* to her children, planning dinner parties, baking cookies for the P.T.O., being on the board of nursery schools and the Arts and Sciences, and baking cookies, writing clever consumer letters and baking cookies, driving to the orthodontist and baking cookies, could suddenly pluck her brain from the north country, set it down in law school and expect anything to happen. Perhaps her brain has simply ceased operations, perhaps defaulted somewhere around the 900th game of Candyland. Perhaps there are no longer any goods, *de bonis non*, nothing left over to be administered. The answer to the *d.b.n.* factor is critical, but there is no way to assess that answer prior to actually starting law school. For example, you could apply the community test wherein you look around at all the lawyers you know, make a rough estimate of their mental acuity and figure if they could, you can. But, that won't give you much.

A further threshold problem is that of being a forty-ish woman surrounded

by women of twenty-three and twenty-four. This is not really a threshold problem because you don't know how bad it is until October when your tan fades. In September you are almost on an even keel, worn but healthy looking. By October, you are just worn and it is depressing to be pulling your face out of a bottle while they are just waking up with theirs. Of course there are mediating factors: there are many admiring remarks about how "it doesn't seem possible that you could have a daughter in college." But, the implication is clear: they are daughters in college, and you are old enough to be their mother.

In equity though, there is the chenille factor. You have been married twenty years and can come home and know the sweet succor of your chenille robe. They are part of a whole dating, looking scene which takes time and concentration and which doesn't understand chenille. That is part of the gulf between them and me. But, the biggest surprise is that they are not necessarily sharper because they are younger or because they have come straight from undergraduate school. They are lacking in life experiences

which makes them somehow less whole, but more, they are fragmented: they are thinking about their boyfriends and their lovers, their wardrobes and their rent. You of course are fragmented also: are we out of cocoa puffs? what will we use for the guinea pig's coffin? But it is a different degree of fragmentation: it is distinguishable as they say in the law. You do not look forward to Friday night for the beer blasts. You know that Friday night is holy because you don't have to get up in the morning and get the train. You can have the whole day to do the food shopping and the laundry, the cleaning and the studying and you can make cookies.

A final matter is this: query whether this whole ordeal by law is simply a forty-ish, pre-menopausal, last gasp thing. What if it turns out you could have been fulfilled selling cosmetics and not even knowing that anyone knew the difference between a fee simple and a fee tail? Do you dare, do you dare disturb the universe even in your chenille? This last is the ultimate question of the would-be esquirette, *d.b.n.*

# Women Face Problems Being Accepted as Full Members of Law School Faculties ABA Study Says

WASHINGTON, D.C., December 12 — While women appear to be making great strides towards integration into law school faculties, a number of barriers must be removed if they are to become full members of the law school community.

That is the conclusion of a report released by the American Bar Association's Section of Individual Rights and Responsibilities. The study entitled "The Integration of Women Into Law Faculties" was funded by the National Institute of Education and New York Law School. Project members spent a year gathering information from the faculty, administration and students of selected schools.

The attitude of students towards women faculty members is one serious problem facing women law professors. Dr. Elizabeth Ashburn, director of the project, said, "Women tend to be viewed as less competent than their male counterparts." Ashburn pointed out that the students seem more likely to challenge women professors. This, she said, put additional performance pressures on those teachers and often had a "snowball" effect.

For example, Ashburn said, "We found women spent on the average 5 hours more a week in class preparation and 5 hours less per week on research and writing despite similar teaching loads." This becomes important, she said,

when we recognize the increasing importance of publishing to the advancement of a law faculty member.

The study also found that presently most of the women are junior faculty members. According to Ashburn, "We don't know the attrition rate of women — how many are leaving teaching as a result of this performance pressure. But we do know that the integration of women in law school faculties is not a foregone conclusion."

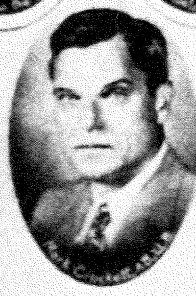
Copies of the study are available from the ABA's Section of Individual Rights and Responsibilities, 1800 M Street, N.W., Washington, D.C. 20036, (202) 331-2279.







Suffolk Law School Faculty  
1926-1937

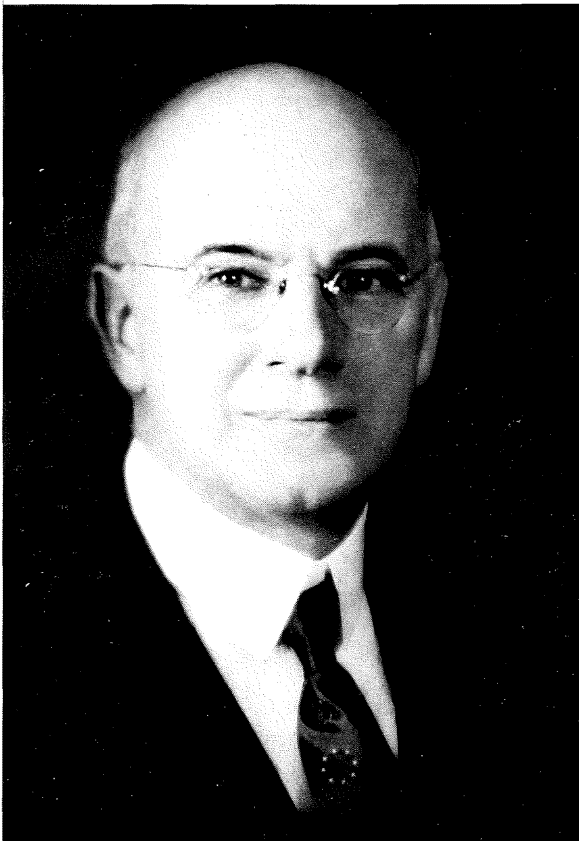


*Printed*

**GLEASON ARCHER**



*1898*  
*At age 18*

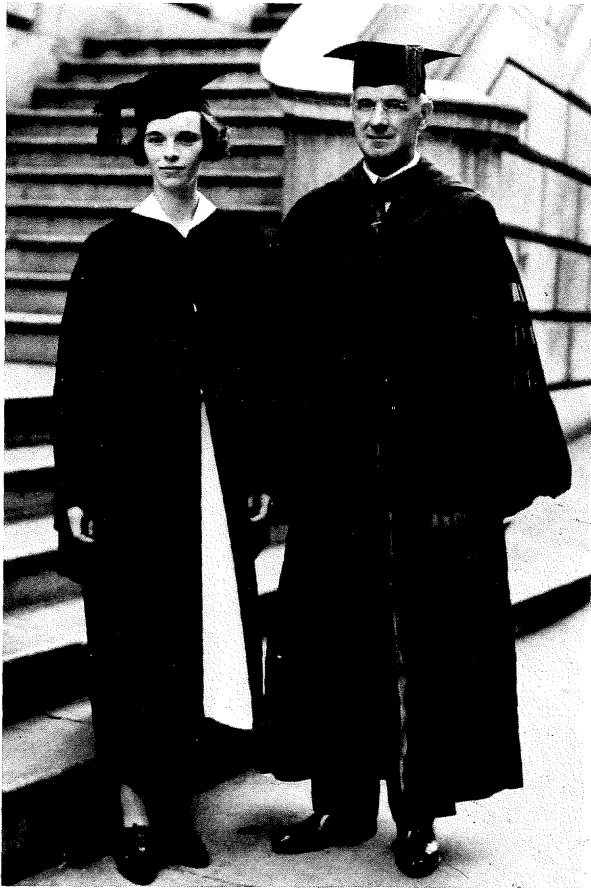


*1940*  
*Dean, Suffolk University Law School*





1926  
*The Archer Family*  
Left to right: Gleason, Marian,  
Gleason, Jr., Mrs. Archer, Alan.



1937  
*Gleason Archer with daughter,  
Marian at her graduation from Suffolk  
University Law School. She was the  
school's first female graduate.*



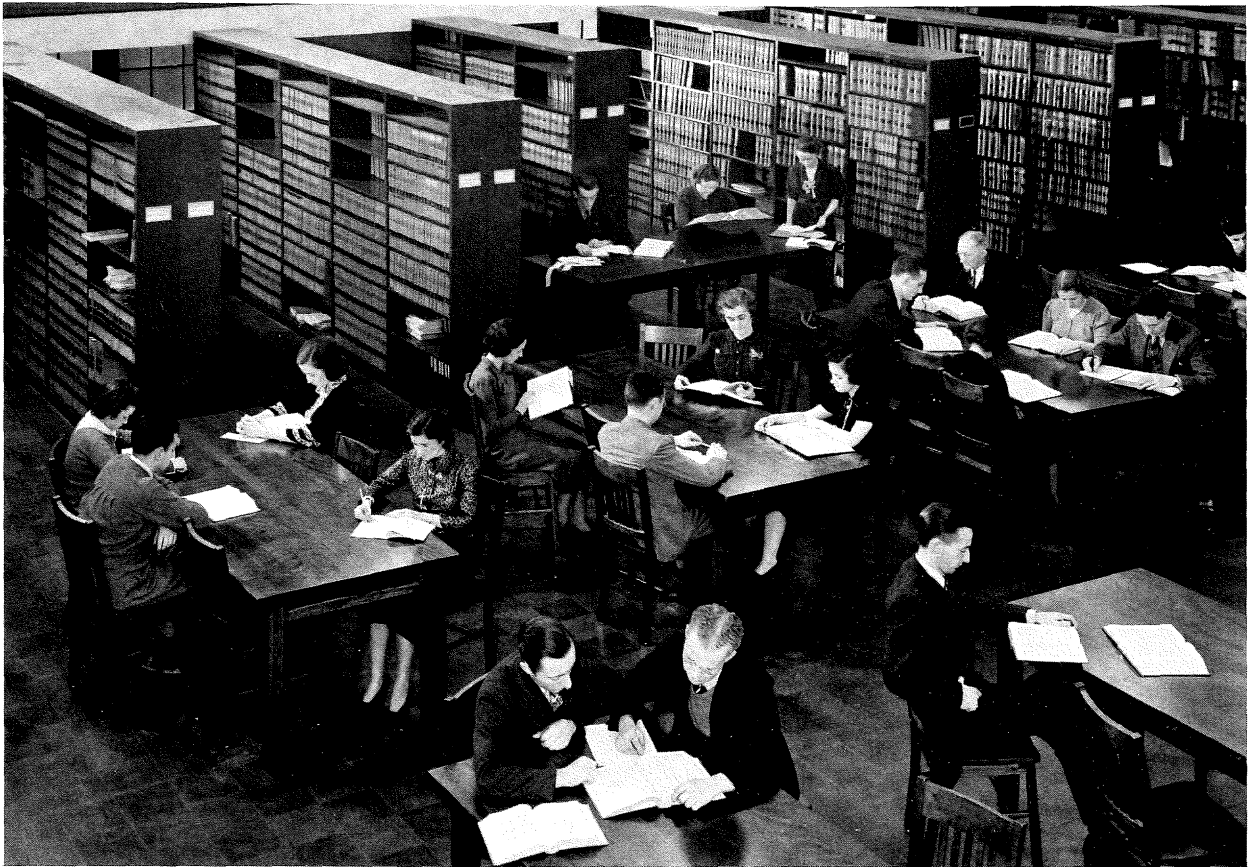
*Hiram J. Archer (Gleason's brother) was the first full-time faculty member, and a life trustee. He served Suffolk until his death in 1966.*



*1911  
A group of evening school freshmen*

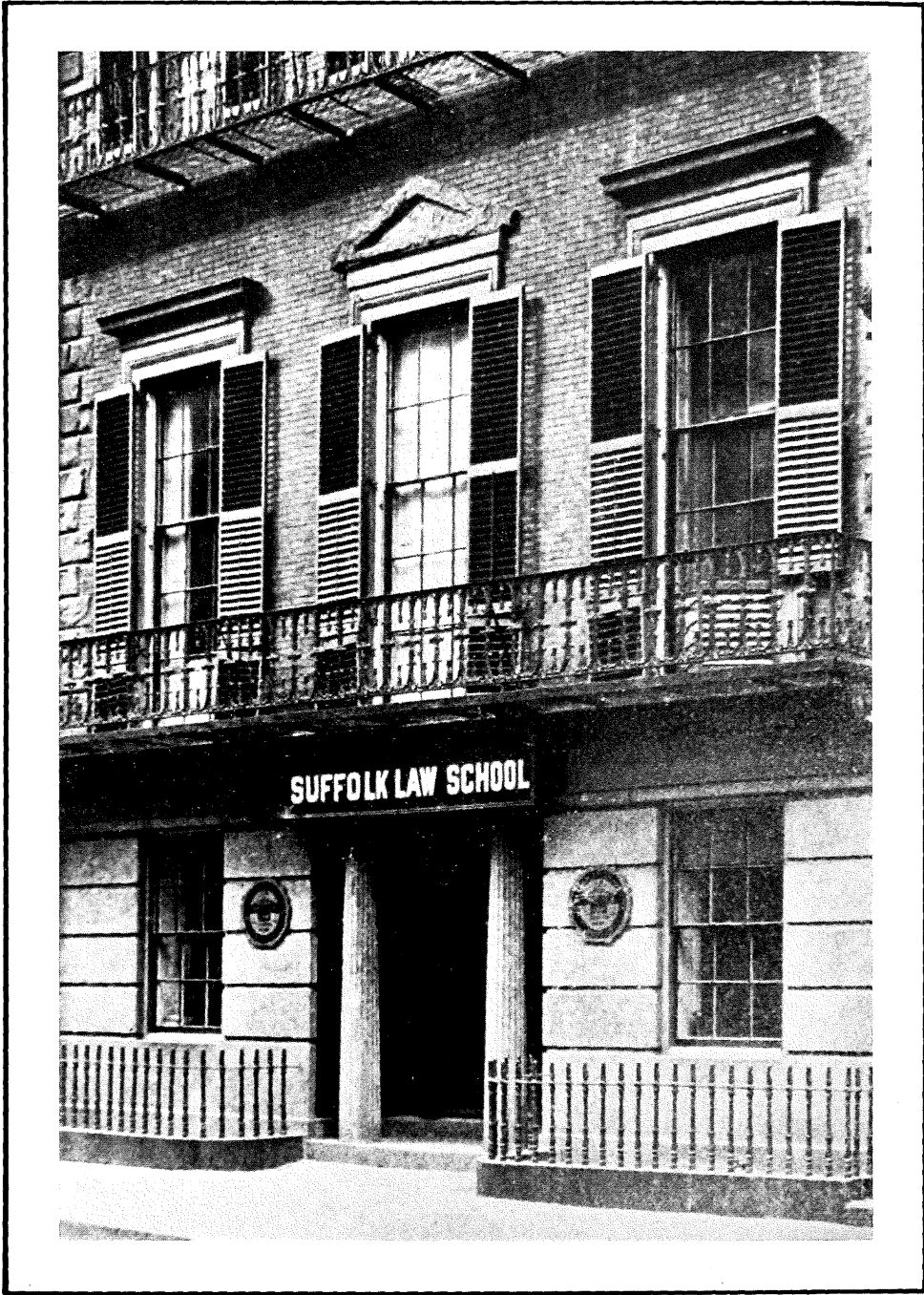


*1938-1939  
Suffolk University Tennis Team —  
all law students*



*1940  
Suffolk University Library —  
Law Area*

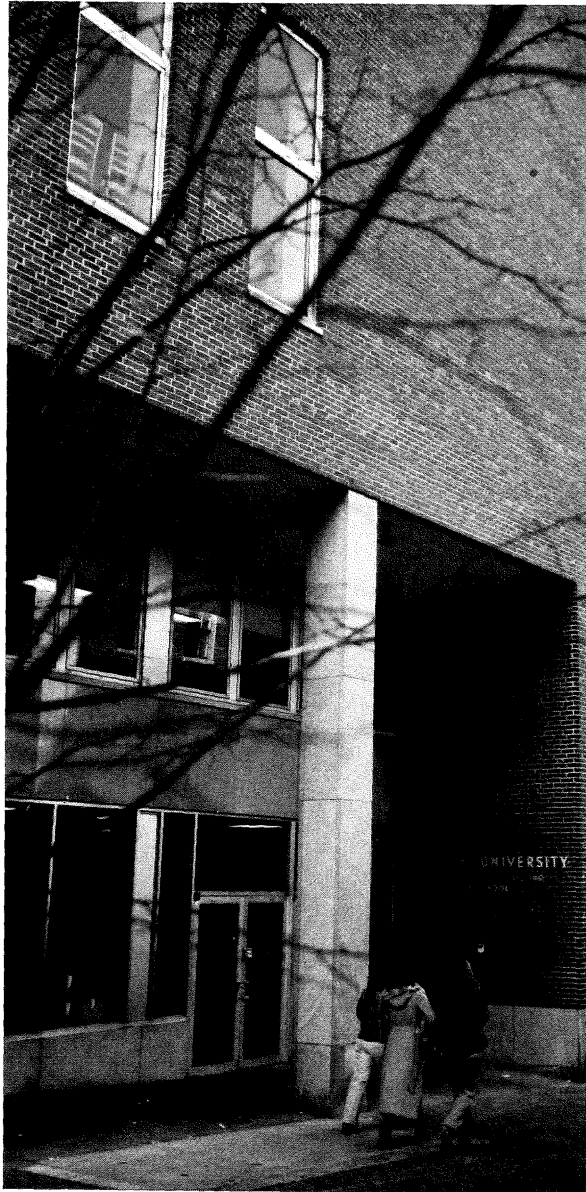




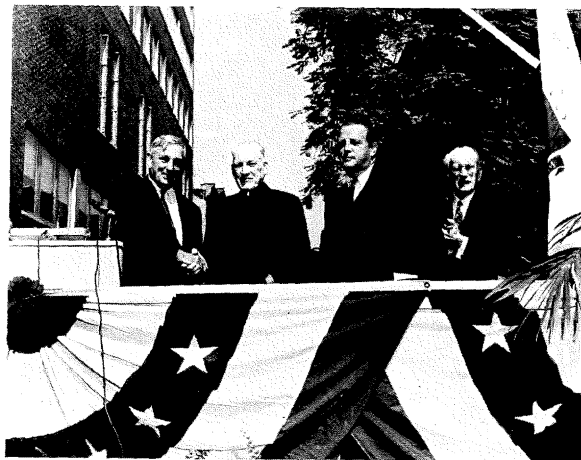
*1914-1921  
45 Mount Vernon Street, Boston  
Fourth home of Suffolk Law School*



*1921  
20 Derne Street, Boston  
Fifth home of the Law School*



*1981  
Temple Street, Boston.*



*September 13, 1966  
Dedication of Donohue building,  
current site of Law School. Left to  
right: John E. Fenton, Cardinal  
Cushing, George Seybolt, John W.  
McCormack*

# The Suffolk Law Student

Vol. 1 MARCH, 1915 No. 1

## THE PROSPECTS OF THE EVENING TRAINED LAWYER

GLEASON L. ARCHER, LL. B., Dean of the Suffolk School of Law.

In comparing the prospects of the evening trained lawyer with the lawyer who has obtained his legal education in the day law schools we must first consider how a legal practice is acquired.

Many young men fancy that clients are attracted by a lawyer's size. To their minds it is a question of sitting in one's office and waiting for strange and costly legal inquiries to wander in. In a small community there is doubtless a possibility of one's practice being increased in this way, but in a large city the percentage of stray clients is exceedingly small.

Practically every prospective client who sets out for the city, with his thousands of law offices, seeking legal advice has some particular lawyer in mind. Perhaps a friend has given him the name of a lawyer who can be trusted for business, or he has an immediate suspicion of lawyers in general that they are adverse to employing one that is not recommended by some friend or acquaintance.

The first requisite in establishing a legal practice in a community is to possess friends or acquaintances in the community. The second requisite is to so conduct oneself that these friends or acquaintances may not be repaid for one's integrity as a lawyer either because clients themselves or send others who are in need of legal services. The third requisite is to serve one's clients so faithfully and well that they in turn will send others and thus render the circle of clients and an ever widening one.

Turning now to the question of the relative prospects of the day trained and the evening trained lawyers. The typical day trained lawyer is a mere youth at the beginning of his legal career. He has been in schools all his life and his business acquaintances are practically all. He must therefore live an extended period of "lead-

days" as a lawyer and business man before he can begin to prosper.

The typical evening trained lawyer is a man well along toward thirty, who has been breaking plow with the world for ten years or so. If he is a salesman, for instance, he has an extensive business acquaintance. Or he may have previously worked in a store, factory, shop or office. Wherever he has labored it has been with fellow laborers, and each one of these may be a potential client or a client.

The average evening trained lawyer has, therefore, a great advantage over the average day trained lawyer at the very beginning of practice. How they will compare in after years depends of course upon the individual.

### A Day Law School

The students will no doubt be pleased to learn that plans are now well under way for the formation of a day law school as an integral part of the Suffolk School of Law. It will doubtless be started next Fall.

The methods of instruction in the day school will differ somewhat from those of the evening school, because of the additional time for study possessed by day students. No pains will be spared to make the day school an inviolable success. The school already possesses the facilities for accommodating a day school. Offices, library and lecture rooms, used now chiefly evenings, will then be properly utilized. The two departments will so assist one another that tuition can remain permanently at a very moderate figure in each department. The institution will retain its present name.

The Suffolk School of Law—and will consist of two departments—a day law school with a three-year course of instruction, and an evening law school as at present with a four-year course of instruction. Each department will have its own faculty, but the two departments will be moved under the supervision of Dean Archer and a Board of Trustees.

## ADVANTAGES OF TODAY

MICHAEL REANE '13.

Formerly workmen were deterred from the pursuit of legal knowledge, not through any incapacity, but by force of circumstances. Necessity taught some that they could not afford time to study law, while others who had time lacked the opportunity. Hence professional life, with its remuneration, was monopolized by men who devoted their peculiar advantages to legal professional training; and the result was as much the product of these advantages as the mental element supplied by the students in their progressive and intelligent application.

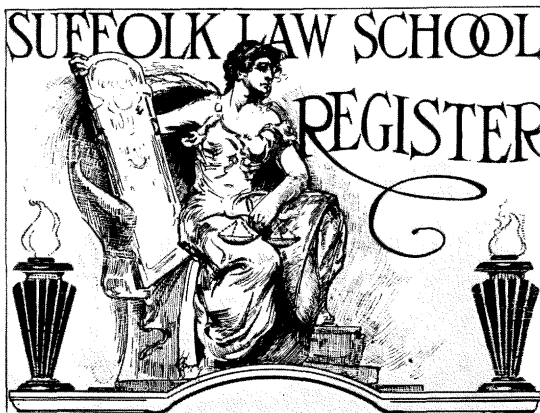
The fitness energy of the worker was confined to the field of physical endeavor, his surplus brain power was devoted to conservation of labor, and while the superior exercise of his mental powers was somewhat remunerated, inventions and applied mechanics was their limitation. But with the use of steam and electricity the advancement of improved machinery, there resulted a curtailment of the hours of labor, and a disengagement of the mind for other useful purposes.

Conditions were changing, men had more time for recreation, and finally a long felt want became apparent, that in a place where they could develop and exercise their mental faculties.

This want to some extent has been supplied by evening law schools, and other institutions, but with the former we are most concerned.

Apart from any personal benefit to the individual, a diffusion of knowledge of the general principles of the law cannot be over-estimated. The independence of the nation, for instance, had its inception in the legal concept. While it is true that the colonies would not submit to taxation without representation and clinging tenaciously to a representative form of government, it remained for the legal minds (continued on Page 2)

The Suffolk Law Student was the first student publication. Volume I was published in December, 1910.



Volume 1 BOSTON, MASS., 1915 Number 1

Read "Lawyers and Social Service" on page 11 of this issue

First Installment of Dean Archer's Interesting History of the School

"Developing the Judicial Mind," An Able, Timely Dissertation, By Prof. A. Chesley York, page 10

OCTOBER

Suffolk Law School's first student magazine. Volume I, Number 1 appeared in October, 1915.



# The Briefcase

SUFFOLK UNIVERSITY LAW SCHOOL



DECEMBER, 1967

20 DERNE STREET, BOSTON, MASSACHUSETTS 02114

VOL. 7, NO. 1

*From textbooks to courtroom*

## Students work in courts, offices

*By Charles Williamson*

Two programs to allow law students to apply their textbook knowledge to the pragmatic world of the practicing attorney are expanding at Suffolk Law school.

The Law Clerk and Legal Intern programs, initiated for the first time on a large scale last year, are having an enthusiastic response from students and from the offices in which they serve.

The Law Clerk program has students serving in nine District Courts throughout

Eastern Massachusetts, an increase of two courts over last year.

Students in the program gain experience in legal research and writing and view first hand the practical aspects of the administration of the law. They consider the factors affecting a Judge's decision, are exposed to courtroom procedure and have the opportunity to meet court personnel and make other contacts which will be helpful when opening a practice in this area.

District Court Judges have found the

law clerks helpful in alleviating the Court's increased workload resulting at least in part from the recent United States Supreme Court decisions concerning the protection of the rights of the criminal defendant. These decisions have required a great deal more research at the District Court level, much of which has been handled by the students involved.

The Legal Intern program offers participants experience in preparing pleadings and trial briefs and in analyzing pleadings of the opposition. Students also research and write legal memoranda.

This year's Legal Interns have been assigned to the offices of five District Attorneys, the Office of the Attorney General of Massachusetts, the Corporation Counsel of the City of Boston and two Legal Aid Services.

One significant change this year in the Intern program is the possibility of prosecution of criminal cases. A recent change in the rules of the Supreme Judicial Court allows students in their final year of law school this opportunity. This will make it possible for students to take a case from the library to the courtroom.

Experience in dealing with a variety of governmental problems in civil and criminal areas will be gained by students in the office of the Corporation Counsel of the City of Boston and in the office of the Attorney General. Last year students in the Attorney General's office were involved in the preparation of trial and appellate briefs and the drafting of legislation in areas as diverse as taxation, consumer protection and mental health.

The directing committee is Professor Brian T. Callahan, chairman, and Professors Charles Garabedian, Clifford Elias and Richard Pizzano.

### BEGINS SECOND YEAR

## Law Review plans two issues

*By Joseph DeGuglielmo*

Suffolk University Law School added a necessary ingredient, the *stare qua non*, in the prescription for national prominence with its establishment of a law review last year. Increasing enrollments, talent, and ambition, together with newly acquired facilities, virtually dictated that Suffolk have a forum from which to further its national reputation.

The first issue of the Law Review, published last spring, concerned itself entirely with criminal law. Several considerations lead to such a choice: The fertility of the subject matter (pollinated by recent U.S. Supreme Court decisions); the comparative dearth of law review material on criminal law; and the certain merchandising effect inherent in any spectacular topic. Judging by the critical acclaim afforded the law review by its subscribers the choice was a sound one.

This year's first issue, which has a tentative completion date of December 16, will also concentrate on criminal law with special emphasis on constitutional problems concerning the administration of justice. Noted judges and lawyers have been solicited to write articles and the response has been very favorable. The demanding job of screening and selecting the finest and most relevant of the material submitted is now facing the law review staff.

The second issue of the 1967-68 Law Review has a completion date of April 15 and will represent a departure from prior issues. It will take a broad, universal look covering any contemporary legal problem where comment or elucidation seem relevant. In subsequent issues this policy of a consideration of many and varied topics will continue.

The law review is comprised of students from second and third year day and third and fourth year evening divisions. Selection of students is made solely by academic standing. The law review is independently run by the staff with advisory help from the entire faculty and administration with special help from Professors Brian Callahan, Clifford Elias, John Fenton, Herbert Lemelman, Alfred Maleson and Richard Pizzano.

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Russell Gaudreau Jr.  
... Law Review Head

### PROGRAM EXPANDING

## Students defend indigents

*By Charles Williamson*

The Indigent Defendant program, begun last year at the Law School, is planning to expand this year to include 30 to 40 students. This will be an increase of one-third more students than participated last year.

The program, made possible by a recent change in the rules of the Supreme Judicial Court, allows qualified third year students, certified by Dean Simpson, to appear on behalf of indigent defendants. Superior second year students are permitted to assist in their defense on an associate basis.

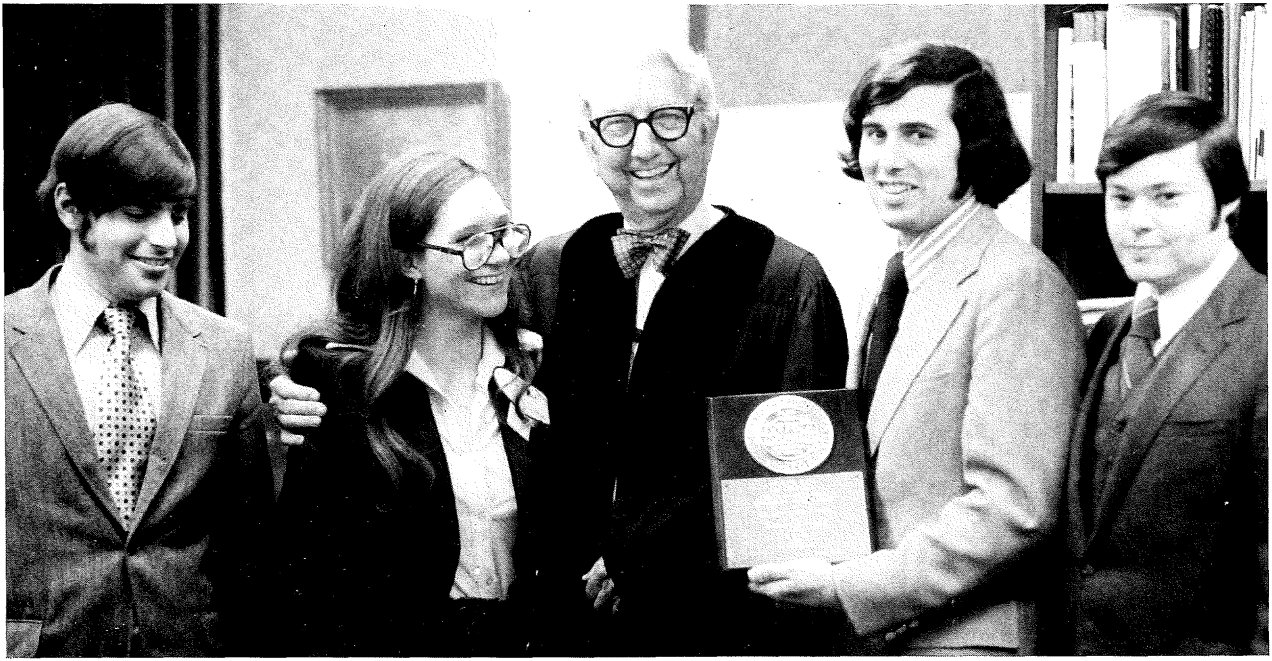
Once a defendant has been deemed an indigent, a team of students is assigned to him to conduct his defense. The students interview witnesses, visit the locus of the

alleged offense, research the appropriate law and argue the case in court. A faculty committee provides any necessary assistance or supervision.

The program was inaugurated in the Somerville District Court under the auspices of Justice Michael DeMarco. One of its purposes is to help ease the shortage of competent trial advocates. Justice DeMarco, the faculty and participating students, and the defendants represented are enthusiastic about the program. Some defendants say they believe they receive a better defense under the program than they might otherwise be afforded because of the great personal interest the students have in their cases.

*The Briefcase*  
*Forerunner to the Advocate*

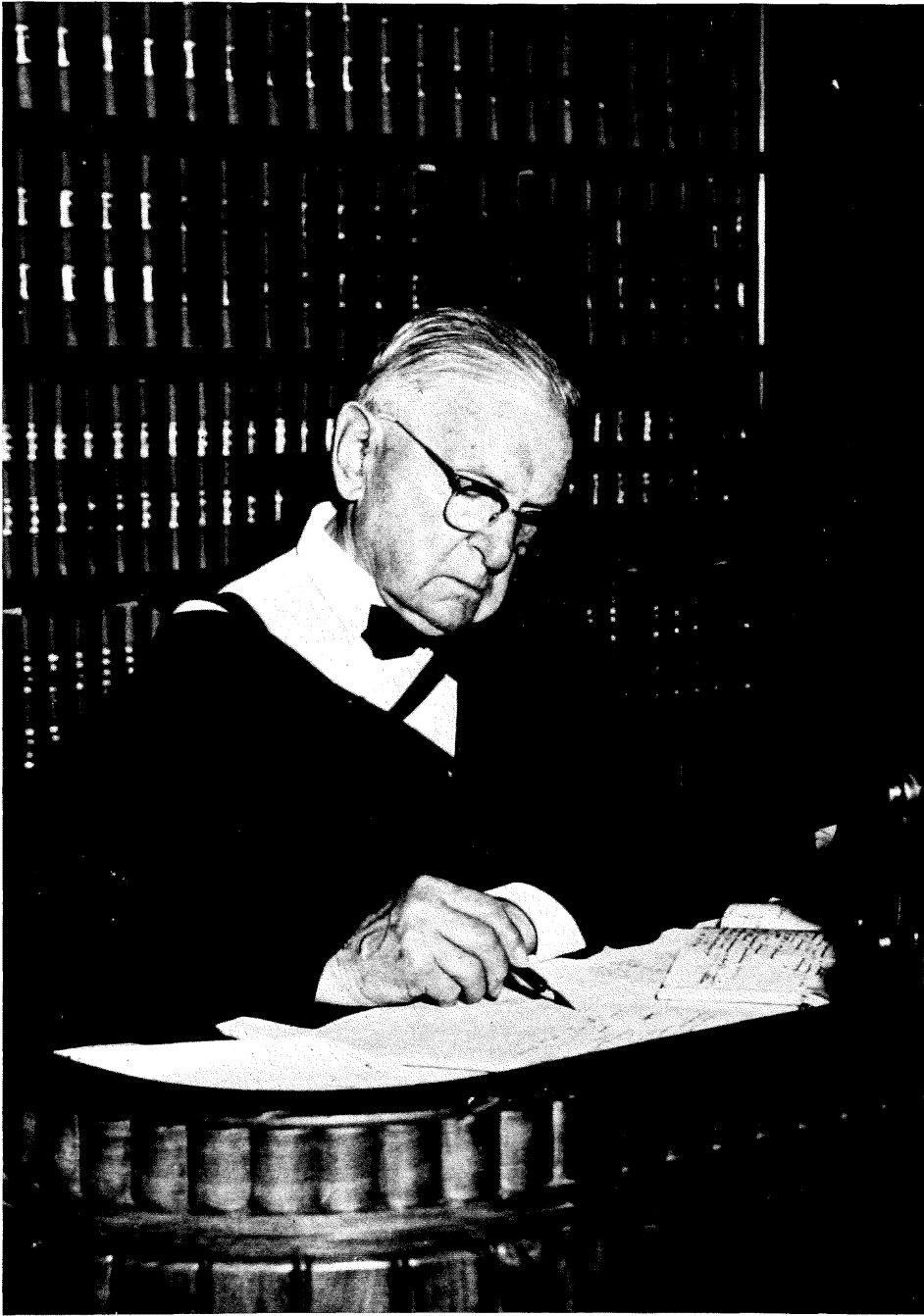




*United States Supreme Court Justice Clark with winners of the Moot Court competition named after him.*



*Suffolk Law School Moot Court  
Activities, Late 1940's.  
Profesor Charles B. Garabedian is  
seated in the clerk's chair.*



*Judge Frank Donohue  
Third Chairman of the Board of  
Trustees, 1946-48. Judge Donohue  
was also a life trustee, and served as  
University Treasurer from 1949 until  
1969.*



*Suffolk University Law School's  
graduation ceremonies June 13, 1937.*



Sturbovic Aent