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HIGHLIGHTS OF THIS ISSUE:

* LEGAL EDUCATION in the urban setting is the focus of articles by Soia Mentschikoff, Dean of the University of Miami Law School, (p.20) and Wade J. Henderson, Chief Legislative Counsel to the American Civil Liberties Union (p.12).

* HAZARDOUS WASTE DISPOSAL is the subject of two articles (pgs. 3 and 7), while a occupational safety and health is also examined (p.9).

* PROFESSIONAL RESPONSIBILITY OF THE LAWYER is subject to a thoughtful analysis in which two authors call into doubt the role of the adversary process in our legal system (p.33 and 39).

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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.

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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.

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The Siting Dilemma: Proper Hazardous Waste Disposal

Jeremy Silverfine and Teresa M. Spina

"Everybody wants to talk about hazardous waste," bemoans Michael Ventresca facetiously, "... doesn't anybody want to write about dolphins ... or whales anymore?"

Although the preservation of both dolphins and whales is an important issue, the consequences of improper hazardous waste management and disposal are a matter of life and death.

The Environmental Protection Agency (EPA) defines hazardous waste as a waste that may cause or significantly contribute to serious illness or death, or which poses a substantial threat to human health or the environment when improperly managed. It should be noted that nuclear and radioactive wastes are not defined as hazardous waste.

According to a recent EPA study, approximately 1.1 million wet metric tons of hazardous waste are produced in New England each year. New England has the capacity to treat only 218,000 tons of this waste. The problem is more acute in Massachusetts.

While there are no accurate reports (the latest EPA study is two years old) on hazardous waste generation in Massachusetts, it is estimated that 250,000 to 400,000 tons are produced annually in the Commonwealth alone. The EPA has estimated that as much as 80% of the hazardous waste produced in Massachusetts is improperly disposed of in "midnight" or illegal dumpings.

The potential adverse effects of illegal dumping is extremely serious. They include the poisoning of underground water supplies and the release of toxic vapors into the air. "Twenty-nine community wells have already been shut down," states Greg Wilson, a Suffolk evening law student and the press secretary for John Bewick — the Secretary of the Executive Office of Environmental Affairs. "In fact," Wilson adds, "the government (Massachusetts) is looking at 143 additional sites where there is the possibility that hazardous wastes were not properly disposed."

Yet there are no licensed commercial facilities in New England for the disposal of hazardous waste.

Extreme care must be taken in handling hazardous waste. Even greater caution must be exercised when disposing of this waste. Sited disposal facilities in New England may prevent improper disposal since these wastes are often indiscriminately dumped into sewers, in incinerators not designed to burn chemicals and solvents, in open or unsecure evaporation ponds or land fills, or in trucks that never reach their destination.

Solvents and lubricating oils from cars, trucks and industrial machines comprise a major portion of hazardous waste in New England. Other generators (producers) include leather and leather tanning establishments, textile companies, jewelry and electronic equipment manufacturers, dry cleaners and universities. The list is long. Publishing companies, such as the one which printed this issue of The Advocate, generate 18.6% of the hazardous waste in New England.

The federal and state governments have responded to the increasing dangers of...
hazardous waste mismanagement by promulgating a complex series of rules and regulations which are designed to monitor the life-cycle of the waste. The expectation is that stringent control will alleviate, if not eradicate, the perils to the health, safety, and welfare of all communities.

Specifically, the United States Resource Conservation and Recovery Act (RCRA) and the EPA regulations implementing RCRA establish: 1) a manifest system for tracking all hazardous waste from "cradle to grave.", 2) standards for proper handling and disposal of wastes which must be met by generators, and 3) a permit system for review and approval or denial of all treatment, storage, and disposal facilities.

In Massachusetts, these federal laws and regulations are supplemented by two state laws. The Massachusetts Hazardous Waste Management Act is the state version of RCRA. The Massachusetts Hazardous Waste Facility Siting Act, adopted pursuant to Chapter 21D of the Massachusetts General Laws (MGL), is a direct response to the urgent need for hazardous waste disposal. The Act contains a unique siting process that requires direct negotiations between communities and developers. The Siting Act stipulates protective measures that must be taken in order to reduce potential environmental impacts to acceptable levels. It also provides for community compensation to offset any remaining impacts. (An example of a compensation package resulted from negotiations between the Wes-Con Company and a host community in Idaho. Wes-Con donated salvage from its site to the town, loaned mechanical equipment to local farmers, gave the town its own fire engine, ran first aid classes for local doctors and residents, and finally, created a local corporation with local owners to operate Wes-Con.)

But, in fact, it is the "remaining impacts" that have the public laden with fear. After the horrors of Love Canal and a series of similar incidents across the nation, the public is bitterly opposed to the siting of facilities in their communities. "We've never gone beyond the emotional stage," admits Wilson.

Michael Ventresca, staff counsel for the Associated Industries of Massachusetts (A.I.M.) — a segment of the Coalition for Safe Waste Management, understands why people do not want hazardous waste facilities in their hometowns. He stresses that facilities must be sited, built, and maintained properly. If a facility was "well-planned, well-placed, and well-built" he would not be adverse to hosting a facility in his own town. Ventresca lives in Boston.

"The debate comes down to two viewpoints," Robert Ruddock, the New England Legal Foundation's Director of the Government Regulation Unit, avers. "On one hand, any facility is better than no facility. Alternatively, only a good facility, properly sited, with enormous environmental controls should be built. Somewhere between these two viewpoints," he continues, "is the position that a site must be found in New England, accessible to New England. It must be sited quickly enough to begin the collection process" for a large part of the region. The approval and construction of a new facility takes three to five years.

The technologies already exist and are being used in Europe and other parts of the United States to safely manage hazardous waste. The problem is that hazardous wastes are as varied as the products that generate them. There is no single technology or process that can be used to handle every type of waste.

According to Ruddock, New England manufacturers are faced with two choices. One alternative is that they can store the waste on-site. Both federal and state laws and regulations impose strict operational and financial requirements upon generators that plan to house the waste on-site. In order to achieve the capacity to store hazardous waste, a manufacturer would have to completely renovate his present process and staff. In addition, since most state regulations require that a potential hazardous waste storer or disposer notify the host community of his plans, the possibility for local opposition is great.

The second alternative is to transport the waste to a licensed disposal facility. The facilities that service the region are located in upstate New York, Alabama, Ohio, and North Carolina. Long-distance transport is dangerous because it increases the risk of accidents and spills. Both options are very costly.

Wilson indicates that Massachusetts' industries pay "four to five times the national average cost of treatment." This leads to illegal dumping. This is burdensome to the government and taxpayer as well. Wilson calculates that "the Commonwealth has already spent $5.1 million cleaning up improperly disposed hazardous waste. It is conservatively estimated that the final cleanup bill will be in excess of $25 million."
Ruddock is concerned that as the laws force the hazardous waste "now illegally disposed of into legal channels," the generator is left with the most costly choices. "The companies that have to produce these wastes," he summarizes, "will make various employment and plant decisions as a result."

"We are taking the chance," Ruddock notes, "that companies will move out of New England especially when North Carolina or the Midwest is more attuned to the manufacturing process." Without adequate and legal means to dispose of these wastes, the manufacturing process begins to back up. Manufacturers in this region are already burdened by the higher cost of energy. As operating costs escalate, their products become uncompetitive. "If the companies begin to migrate," Ruddock warns, "this will have an adverse effect on New England's economy."

he suggests that under the present administration "the monies have probably dried up." He says, however, that opportunities for "creative financing" exist. Ruddock cites the Massachusetts Industrial Finance Agency as an example. This public sector institution floats bonds for industrial expansion. "The Agency would probably be able to bond a hazardous waste facility," he explains, "and this would mean a slightly lower interest rate for the companies involved."

Conversely, Ventresca feels there is no need for government bonding. "Industry has the money."

It may be feasible for particular industries which manufacture the same or similar products to jointly invest in a disposal facility. There is a proposal in Rhode Island for a processing facility for jewelry manufacturers. The hazardous waste produced is derived from various metals.

Ventresca, on the other hand, believes giant corporations can still effectively market their products and earn a profit. He is more troubled about the small "mom and pop" stores (for example, beauty parlors and gas stations). Ventresca fears the death of these small businesses.

Many of these small entrepeneurs are not aware of the hazardous waste regulations. Many of them are ignorant that the laws pertain to them and the "garbage" they throw away (often in their own backyards). Yet, even with a working knowledge of these responsibilities, they could never afford the cost of long-distance transport. In fact, most transporters will not accept small loads of waste at any fee. Ventresca believes it is the duty of the larger industries and the state to offer a disposal solution.

While Ruddock thinks federal grants are theoretically available for siting proposals, "we do get a couple of smaller facilities accepted (by the communities)." Like the specialized plants, "then we might see the larger companies accepted."

The future is uncertain. "The jury is still out," concludes Ventresca. The state may decide to place a site by eminent domain or place one on state land.

In any event, the siting process will take time. United States District Court Judge Stanley Brozman, who recently presided over a case involving an incident similar to Love Canal which occurred outside Atlantic City, New Jersey, warns:

"The lesson to be learned from this situation and others like it is a simple one. If we brush our problems under the carpet or bury them under the earth, they are not solved. We only postpone dealing with them."

"The miraculous achievements of modern technology have led to many advances in our standard of living and our way of life. Among the by-products of modern technology, however, are materials that pose a grave threat to the environment and, indeed, to our continued existence. It is, after all, simply human to avoid problems, rather than deal with them whenever we can. The instant situation is the direct result of such an atavistic approach to the problems posed by modern technology."

"We hope that this case and similar ones will teach all concerned that short term solutions to the problem of hazardous waste disposal are no longer a viable approach, nor do they remedy the problems posed by past thoughtlessness."9

"According to a recent EPA study, approximately 1.1 million wet metric tons of hazardous waste are produced in New England each year. New England has the capacity to treat only 218,000 tons of this waste."
Notes


2. *Id.* at §1.3, p. 3.


5. *Id.* at §1.1, p. 1.


7. Manifest system is the federal or state procedure for tracking hazardous waste from original generator, through any intermediary storer or transporter, to the point of ultimate disposal. A type of shipping document must be signed by each waste handler in the chain and then filed with the proper regulatory authority. *Id.* at p. F-5.

8. *Id.* at p. 1-7.

"Hazardous waste is the single most important environmental crisis facing this country," states William Tripp, legal counsel for Jet-Line Services, Inc. — a company which has been cleaning-up, handling and transporting hazardous waste for the past ten years.

Tripp, a 1976 graduate of Suffolk Law School and a commissioned officer in the United States Coast Guard Reserve, spent five years with the Environmental Protection Agency in Washington D.C. before working for Jet-Line.

He realizes that the recent discoveries of illegal toxic waste dump sites across the country have prompted public outrage resulting in increased governmental regulation of the hazardous waste industry. Yet Tripp is quick to admit that companies like Jet-Line are aided by such public pressure and increased regulation because it forces the industry to purge itself of those companies which place more emphasis on cost effectiveness than public health and safety.

Jet-Line is certainly no stranger to governmental regulation for it is regulated by a host of agencies. These include the Department of Transportation (DOT), the Environmental Protection Agency (EPA), the Interstate Commerce Commission (ICC), and the Department of Environmental Quality Engineering (DEQE). The company is also regulated by the respective agencies of each state in which its vehicles travel. Each Jet-Line truck which transports potentially hazardous material must have a hazardous waste transporter number, an ICC permit number, a DOT permit number and a permit number from the EPA printed on the outside of the vehicles.

Exactly why is the public so outraged and fearful of the hazardous waste industry? Tripp cites two reasons: 1) past mismanagement of hazardous waste, and 2) recent advances in technology.

Tripp explains that years ago it was considered acceptable to dump waste in the local sanitary landfill, river or pond. Since there was little incentive to do anything else, there existed a lack of foresight and sensitivity to the large-scale and significant environmental effects this treatment of hazardous waste would have on future generations.

In what Tripp calls a "quantum leap" in technology, it is now possible to detect foreign substances in minute quantities in the air, soil, water and food chain. Since these materials have only recently been detected due to the increased sophistication of technology, the public perception is that these substances have also only recently been introduced into the environment. That is not always the case.

Thus, past mismanagement of hazardous waste coupled with the recent advances in technology have created more public awareness of the dangers of hazardous waste. The result is public fear, outrage and what Tripp calls "hazardous waste hysteria."

This so-called hysteria has been a double-edged sword. Although it has made the hazardous waste industry more accountable for its actions, it has also caused public confusion and suspicion of the hazardous waste industry. It has created what Tripp refers to as a "tremendous void of ignorance" within the public as to what the real situation is in terms of properly disposing and treating hazardous waste.
Jet-Line, a company which cleans up rather than creates hazardous waste, has experienced its share of public suspicion. Located 20 miles south of Boston in the town of Stoughton, Jet-Line is primarily responsible for handling and responding to emergency situations — oil spills, chemical spills and hazardous waste dump site clean-ups. The company is also involved in industrial maintenance work including the cleaning of gas and oil storage tanks. "Because of the type of work the company is engaged in," Tripp states, "the immediate neighborhood is extremely suspicious of us."

Tripp asserts Jet-Line is the largest company of its type in the Northeast. It has exigency contracts with the states of Massachusetts, Rhode Island and Maine, the United States Environmental Protection Agency and the United States Coast Guard. Thus, if there is an emergency situation, nine out of ten times Jet-Line will be called in to handle it. Since Jet-Line is involved in major clean-up operations, it has been exposed to television news coverage that has not always helped the company's image.

"People watch the television news and see Jet-Line vacuum trucks, equipment and work crews. Thus, people associate what we do with hazardous waste dumping or storage," Tripp explains. The storage tanks on the Jet-Line premises do little to dispel neighbors' suspicions. Tripp explains that the storage tanks are only for storing industrial waste oil and oil collected from oil spills, not toxic chemicals. (Jet-Line was involved in the clean-up operation of the celebrated Argo Merchant oil spill during the Blizzard of '78.)

The Jet-Line attorney acknowledged that it is difficult to reassure people that his company is not in the business of storing hazardous waste on its premises.

"Chemical waste is not being brought back into the neighborhood," he emphasizes, "But people's confusion and fear are understandable."

The Stoughton Town Selectmen, Tripp relates have visited and inspected the facility and are satisfied with its operation. "Once people visit Jet-Line and see for themselves what is here, they become a little more at ease," he says.

What can be done to fill the public "void of ignorance?" Tripp believes it is the duty of government and in part, industry to educate and inform the public. He feels people must be made aware of the fact that illegal dumping is not synonymous with waste disposal and treatment facilities, or in the case of Jet-Line — clean-up operations.

Although the public perception of companies like Jet-Line is not always favorable, Tripp perceives the role of his company as "a business making the best of a bad situation."

"We clean-up the environment and allow people to return to their homes," Tripp states proudly.

In a less idealistic tone, Tripp notes that Jet-Line does not do it, "because we are good guys, but because it is a business and there is a market for our services."

"Someone has to do it and we do the lion's share," he concluded.

The Coalition for Safe Waste Management is a unique, not-for-profit corporation designed specifically to develop public support for the responsible siting of a safe waste disposal facility in Massachusetts. The members of the Coalition include representatives from industry, research and medical institutions, environmentalist groups, labor associations and various government factions. Since no one group alone has sufficient credibility with the public to advocate prompt facility siting, it is hoped that this consensus leadership will allay public suspicion.

The Coalition's objectives are to undertake the public education and to obtain community approval and endorsement of safe sites for non-nuclear waste facilities. The Coalition's activities are based upon two principles: any newly established facility must operate to standards that guarantee the public's health and safety; and, all new facilities must be located on sites that secure the protection of people, clean water supplies and other natural resources.

To secure citizen support, the Coalition focuses on local and statewide educational programs. Within a particular community, the strategy is to outreach local opinion leaders and industry representatives; establish local steering committees; conduct briefings and disseminate technical information for the media and public at large. On the state level, the Coalition plans media briefings, talk show appearances, speeches and news articles.

Waste management has become the problem that everybody wants someone else to solve. The Coalition's answer to the problem is that everyone must solve it together.

from Joseph Baerlain Staff, Coalition for Safe Waste Management
The Decline of OSHA Preemption Theory: Some Implications for Massachusetts

Craig T. Spratt

Section 18(a) of the Occupational Safety and Health Act of 1970 states, "Nothing in this Act shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 6." Section 6 of the OSH Act confers authority on the Secretary of Labor to "promulgate, modify or revoke" occupational safety and health standards.1

Before the OSH Act became effective in 1971, enforcement of occupational safety and health laws pertaining to most private sector employment2 had been conducted by state agencies operating under the authority of each state's "police power."3

After the passage of the OSH Act and its creation of the Occupational Safety and Health Administration (OSHA) as the nation's foremost occupational safety and health enforcement agency, it was widely believed by state and Federal officials and many other observers that state enforcement agencies could no longer enforce occupational safety and health laws aimed at private sector employment because authority to do so had been pre-empted by the new Federal agency. There was even a Federal court decision4 that was often interpreted as an endorsement of the notion of complete OSHA pre-emption of state occupational safety and health enforcement authority with respect to private sector employers.

Recently, however, appellate court rulings in Vermont and the District of Columbia5 have recognized the power of individual states,6 acting under state law, to set and enforce occupational safety and health regulations on matters not covered by OSHA standards promulgated under § 6 of the Act.

Section 18(b) of the OSH Act provides that states can assume responsibility for the development and enforcement of occupational safety and health standards relating to any safety or health issue with respect to which a Federal standard has been promulgated under § 6. To do so a state must set up a "State Plan" for such enforcement which becomes effective once it gains OSHA approval. The Secretary of Labor is empowered to reject any "State Plan" which, in the view of OSHA, will not be as fully effective as would OSHA's own enforcement. Twenty-two states presently have 18(b)-type state enforcement.6 The Federal Government provides 50% funding for such programs.

An 18(b) State may enforce safety and health standards which exceed the requirements of OSHA's standards. Such a state may also enforce standards for which there are no Federal counterparts. For example, Arizona enforces elevator and boiler pressure vessel standards which are not enforced by Federal OSHA.7 California, another 18(b) State, enforces a standard that requires labelling of hazardous materials used in workplaces.8 OSHA presently has no comparable standard.

States without 18(b) enforcement structures, however, cannot conduct enforcement activities with respect to occupational safety and health issues for which there is a Federal standard under § 6. Massachusetts is such a state. The occupational safety and health enforcement power in Massachusetts relative to § 6 standards belongs to Federal OSHA. Nevertheless, Massachusetts could today be conducting enforcement activities which it in fact does not conduct, by acting under the power reserved to states under § 18(a) of the OSH Act, i.e., by enforcing with respect to safety and health issues for which there are no OSHA-promulgated standards under § 6 of the Act.

New York, like Massachusetts, does not operate under an OSHA-approved 18(b) state enforcement system. Yet New York now enforces (since December, 1980) a law requiring employers to provide employees with information regarding the chemical name, trade name, nature, effects, symptoms of effects, potential for flammability and other crucial facts regarding any toxic materials employees may be required to handle in the workplace.9 This New York law fills the same gap in the Federal OSHA standards as is filled by the California Hazardous Substances Information and Training Act, enforced as part of California's 18(b) system.

Ronald Reagan's bias against Federal enforcement activity, when such is directed against business, and his ideological affection for "states rights" are now in the process of re-shaping the enforcement role of OSHA, and consequently, changing the nature and potential of state enforcement activity.

Reagan's FY 82 budget proposal for OSHA cuts the agency's budget to about 200 million dollars, 43 million less than the last Carter Administration proposal.10 This is in addition to FY 81 cutbacks effected since the advent of the new Administration. The element of OSHA hit hardest by the cutbacks is funding for salaries of enforcement personnel. State
consultation programs, which provide safety and health advice to employers, issue no penalties, and enter workplaces not on employee complaints but only at the invitation of employers, are slated to receive an increase of 3.75 million dollars in Reagan's proposed FY 82 budget.\(^{11}\)

On March 13, 1981, OSHA advised its regional administrators, via OSHA Instruction STP 2-1.10A, that states without approved 18(b) plans, and subject to federal pre-emption on matters covered by standards promulgated under § 6 of the OSH Act, should "tailor programs to those activities not affected by pre-emption." State enforcement jurisdiction was said to be retained for hazards for which no Federal standards are in effect. This OSHA instruction also declared the Federal intention not to initiate legal action against non-18(b) states conducting enforcement activities actually pre-empted by § 6 standards. States were warned, however, that such pre-empted enforcement activity would be subject to challenge on appeal by employers.

Since the advent of Reagan and the new Assistant Secretary for OSHA, Thorne Auchter, OSHA has, in addition to the budget cuts:
- withdrawn the Carter Administration's proposed standard for labelling hazardous materials in the workplace
- scrapped the Carter proposal to end approval of the weak Indiana state 18(b) plan
- postponed three times the effective date of the Hearing Conservation Amendment to the noise standard, some provisions of which remain under administrative stay
- petitioned the Supreme Court to defer deciding the cotton dust standard case in favor of remanding the standard to OSHA for cost-benefit analysis and probable revision
- petitioned the Supreme Court to vacate a Federal Circuit Court ruling upholding in part the lead standard and requesting remand to OSHA for cost-benefit analysis and probable revision

Where OSHA revises one of its standards in the direction of providing less or weaker worker protection, a state without an 18(b) plan cannot enforce a stricter standard of its own in the area covered by the revised standard, because such states are pre-empted from enforcing with respect to issues for which there is an existing Federal standard promulgated under § 6. An 18(b) state could continue to enforce the standard in its form before revision.

State 18(b) plan enforcement must be, according to § 18(c) 2 of the Act, "at least as effective" as enforcement based on standards Federally promulgated under § 6. There is no requirement in the OSH Act that state 18(b) plan standards cannot be more effective than OSHA's own standards.

Should OSHA revoke one of its standards, both 18(b) states and non-18(b) states may enforce either the revoked standard or another one which addresses the same issue as the revoked standard. Such enforcement activity would be based on the reserved state enforcement power declared in § 18(a) of the OSHA Act for a state without an 18(b) plan, and could be based on either § 18(a) or § 18(b) for a state with an 18(b) plan.

Reagan's cost-benefit approach to OSHA standards was dealt a blow on June 17, 1981, when the Supreme Court struck down the textile industry's cost-benefit-based challenge to OSHA's cotton dust standard. Although the court upheld the standard, Massachusetts' 4,000 workers in occupations which gain increased protection from the standard\(^{12}\) may ultimately end up without these levels of protection, because OSHA can still administratively revise the standard through the agency's rulemaking procedure. However, it should be more difficult now for OSHA to utilize an approach to standard-making and revising which is pre-eminently based on cost-benefit analysis.\(^{13}\) If promulgated, the Reagan Administration's revised and weakened cotton dust standard will apply in Massachusetts unless the state develops and adopts an 18(b) plan.

The same is true for any other occupational safety and health issue with respect to which there is or will be an OSHA standard of whatever quality promulgated under § 6 of the OSH Act.

When there is no § 6 standard which covers a particular hazard, OSHA enforcement personnel cite employers under the "general duty clause," § 5(a)1, of the OSH Act. That section's coverage only extends to "recognized hazards" causing or likely to cause death or serious physical harm. OSHA Instruction STP 2-1.10A, issued March 13, 1981, states the agency's opinion that there can be permissible enforcement by a non-18(b) state under state "general duty clauses" as long as such enforcement relates to hazards not covered by Federal § 6 standards.

Further state enforcement under § 18(a) may be conducted, according to OSHA Instruction STP 2-1.10A, in cases where the state standards are "predominately for the purpose of protecting a class of persons larger than employees . . . . when enforced for such purpose." Examples are state public safety and fire marshal activities which may affect employees.

The following\(^{14}\) are occupational safety and health issues with respect to which no OSHA § 6 standard is in place, but which constitute substantial workplace hazards in Massachusetts:
1. exposure to Trimellitic Anhydride (a dust used as an activator in epoxy processes; much used in Massachusetts and a strong lung irritant)
2. heat stress (e.g., in commercial laundries)
3. exposure to laser beams (used in chip manufacture in high tech industries; also used for surveying in the construction industry)
4. inhalation of wood dust (affects probably ¼ of the production force of the wood furniture making industry in the state)

A study group of hygienists and safety engineers could fairly easily develop a list of hazards to which there is significant...
employee exposure in Massachusetts and with respect to which there is no OSHA standard under § 6. Substances on the American Conference of Government Industrial Hygienists Threshold Limit Value list, but for which there are no § 6 OSHA standards, should be considered as subjects for possible state standards to be issued under the reserved state power declared in § 18(a).

According to the language of § 18(a) of the OSH Act, a state may enforce occupational safety and health standards of its own with respect to occupational safety and health issues for which there is no OSHA standard promulgated under § 6 of the Act. The trend of recent court decisions is to uphold this state authority under § 18(a), rather than to emphasize the pre-emption of state authority by the Federal agency, as the earlier decisions did. Courts are moving away from the pre-eminence of pre-emption theory in their treatment of the OSH Act on grounds other than § 18(a) as well. Section 4(b) 4 of the Act states that nothing in the Act should be construed to supersede or affect any workmen’s compensation law or to enlarge or diminish any common law or statutory rights, duties or liabilities relating to employee injury or death arising out of, or in the course of employment. State power under § 4(b) 4 has been upheld recently in Ohio and New Jersey decisions in the face of challenges based on the theory of OSHA’s pre-emption of the states. 15

A recent District of Columbia case held that OSHA’s pre-emption power is restricted to issues covered by standards promulgated under § 6 of the Act and does not apply to the District of Columbia’s injury reporting requirements, because OSHA’s reporting requirements are set forth in § 8(c) and § 24 of the OSH Act, and not by standards promulgated under § 6.

If a state chooses to enforce its own standard where Federal OSHA has none, it is subject to OSHA pre-emption if the Federal agency subsequently promulgates a weaker standard covering the subject matter covered by the state standard — unless the state has an 18(b) structure of enforcement. A case in point is the issue of the labelling of hazardous materials used in the workplace or the provision of substantial identifying information to employees regarding such materials. OSHA has withdrawn the hazardous substances-in-the-workplace labelling standard developed by the agency during the Carter Administration. California, an 18(b) state, and New York, which does not have an 18(b) state plan, each have comprehensive statutes on the matter of workplace hazardous materials identification. OSHA is forecasting a November, 1981 date for agency completion of re-study and revision of the labelling standard, which under Reagan Administration procedures must be approved by the Office of Management and Budget. Should OSHA then promulgate a weak labelling standard, California will still be able to enforce its stronger standard under its 18(b) plan. New York’s law, however, will be pre-empted by OSHA’s labelling standard.

Massachusetts should begin to promulgate state standards under § 18(a) to provide coverage of employees with respect to this state’s workplace hazards for which there are no OSHA § 6 standards. Additionally, the Commonwealth’s plan to become an 18(b) enforcement state should be revived. The most expedient approach would be to adopt the present OSHA standards in toto rather than attempt a plethora of piecemeal alterations to Chapter 149, M.G.L. Also, the Commonwealth should plan to enforce beyond the scope of OSHA’s § 6 standards, as in the previously-mentioned cases of the 18(b) plans of Arizona and California.

Notes

2. Authority over occupational safety and health rules pertaining to some kinds of employment historically has been, and continues to be, exercised by other Federal agencies, such as the Federal Aviation Administration and the Federal Railway Administration.
10. 10 OCCUP. SAFE. & HEALTH REP. (BNA) 1321, 3-12-81.
11. 10 OCCUP. SAFE. & HEALTH REP. (BNA) 419, 10-29-81.
12. 10 OCCUP. SAFE. & HEALTH REP. (BNA) 1537, 5-14-81.
13. 10 OCCUP. SAFE. & HEALTH REP. (BNA) 420, 10-29-81.
14. Identification and evaluation of these hazards was obtained in an interview with a New England regional officer of the Amalgamated Clothing and Textile Workers Union.
Law School Training, The Urban Lawyer and the Needs of the Public: America's Unfinished Agenda *reprinted in part

Wade J. Henderson

In response to Suffolk University Law School's 75th Anniversary Colloquium on the Urban Law School and the Urban Lawyer, Wade J. Henderson delivered the following remarks:

America's Unfinished Agenda and the Minority Lawyer
I have been asked to address the topic of "Law School Training, the Urban Lawyer and the Needs of the Public"; this is indeed a broad topic. I have chosen to frame the issue within the context of America's unfinished agenda regarding the political and economic status of this country's racial minorities. A brief explanation of this approach is perhaps appropriate.

As a former Executive Director of the Council on Legal Education Opportunity (CLEO), I have enjoyed a professional involvement in expanding opportunities for law study for economically disadvantaged minority group students; I believe that I appreciate the inherent value of this effort. To the extent that the CLEO experience, and what it has come to symbolize, has impacted the process by which lawyers are trained in this country, it has direct bearing on the topic under consideration.

As a black attorney, one of only a relative handful of my race and social group practicing law and as one, who himself, matriculated at Rutgers Law School (Newark) via an innovative and courageous affirmative admissions effort, I assert that my perspective on today's topic could not help but be affected by the often turbulent events of the past two decades. I am the progeny, as are we all, of the pressures for expanded opportunities and the quest for quality.

As an attorney, devoid of racial considerations, I appreciate and welcome the unique roles that lawyers play in American public affairs. Within the processes of government, we lawyers are a significant

*Mr. Henderson is Chief Legislative Counsel to the American Civil Liberties Union. He was the Executive Director of the Council on Legal Education Opportunity until this year.*

“I do not intend to imply that lawyers are some monolithic or ominous political force, but we are, nonetheless, the products of our training and the sum of our jurisprudential traditions.”
political and technical force. We comprise almost exclusively the judiciary, and at the federal level we represent substantial percentages of the key posts within the executive and legislative branches. Our litigation, legislation and lobbying have become critical to the success of government.

I do not intend to imply that lawyers are some monolithic or ominous political force, but we are, nonetheless, the products of our training and the sum of our jurisprudential traditions. We remain skilful at giving voice to conflict and then offering to resolve it . . . often for a lofty price. We lawyers are perhaps one of America’s most important national resources, although it has been said that we have “image” problems with the public. To some degree perhaps it’s we who misperceive our public image, as well as the public interest which we serve.

All lawyers bear the general professional responsibility of serving in the public interest as broadly defined. The attorney from a racial group which suffered governmentally-sanctioned discrimination based on race, assumes a special, additional responsibility upon entering the profession. It is not always a responsibility which is voluntarily assumed. Nevertheless, current political realities, the economic conditions of our peoples, and lastly, our general scarcity in numbers, vests each of us with an inescapable mandate.

This mandate requires that we employ the totality of our skills in furtherance of the constitutional rights of all citizens; and especially as these rights pertain to the equal protection of laws and national social policy, the full implementation of the “Wartime Amendments”1 to the Constitution and the protection of First Amendment guarantees. The “Wartime Amendments”2 school of jurisprudence, named for legal giant Charles Hamilton Houston, former Dean of Howard University Law School and principal architect of the successful legal strategy of the NAACP to overturn the doctrine of “separate but equal,”3 most readily exemplifies this mandate.

The additional public interest mandate of the minority attorney requires no particular or special career pursuit, nor does it require forbearance on the collection of fees, nor any other example of superficial or sacrificial piety. However, it does require, where possible, the articulation of the legitimate concerns and interests of society’s powerless and most severely dis-advantaged. Most often in the urban setting, these individuals are represented overwhelmingly by members of racial minority groups.

Today’s forum provides me an opportunity to reflect on the role of legal training and the special mission of the urban law school in resolving the particular concerns of racial minority groups. Total law school enrollment is graphically indicated below.

Interestingly, 21,788 women had come to represent 19.7% of the total enrollment figure by that time, a numerical increase of 17,073 students and a percentage increase of 362.1%. By 1978 when the Court had rendered its opinion in Bakke v. Regents of the University of California,8 total law school enrollment had expanded to 121,606 students, an increase over the ’74 figures of 19,893 or 9.8%. Women, on the other hand, had far out-stripped this growth for the same period, from 21,788 to 36,808, an increase of 15,020 students or 68.9%.

Both black and Mexican-American enrollment for the 1974–78 period remained relatively constant: the former rose from 4,995 to 5,350, a net increase of 355 students (7.1%) and the latter increased from 1,357 to 1,462, representing an overall increase of 105 students (7.7%). Of all groups examined, only total male enrollment for the intervening years between DeFunis and Bakke actually decreased in number from 88,925 in 1974 to 84,798, a drop of 4.6%. It is important to note that the decline in male enrollment occurred at a time when total law school enrollment expanded considerably.

Although covering only one discipline, the foregoing statistics seem at substantial variance with the general public perception regarding the actual numerical impact of race-conscious affirmative admissions programs on total law school enrollments. Beginning ostensibly with DeFunis, the sensationalist response of the media and political action groups’ notions of “reverse discrimination” have helped create an impression among the public that race-conscious admissions of blacks and other minorities served to bar “legitimate” and merit-based enrollment of white males. Often it was implied, and widely believed, that but for the existence of an affirmative action program, a denial of admission to a seemingly qualified white male would never have occurred.

In reality, minority enrollment programs in law schools were never a significant factor in the continued declining enrollment of the seemingly threatened white male. From 1974–79 the black student enrollment average was 4.6% over the five-year period; it has yet to exceed the high percentage achievement of 1976 when blacks constituted 4.69% of total enrollments and Chicano enrollment rose to 1.27% of the total. And although the other minority groups experienced some increases, the overall enrollment for all but one of these groups has remained under or close to 5.0% of the total law school enrollment. As noted earlier, legal education underwent considerable expansion of available seats to accommodate increased interest. However, such an expansion could not keep pace in maintaining the status quo (in terms of the 1974 ratio of men to women) with the new applicant pool of highly qualified women.

Note further, that although opportunities broadened through the establishment of more law school seats, not one new school accredited by the ABA between 1968 and 1979 was affiliated with a predominantly black institution. Of the 173 schools presently approved by the ABA only four (4) are affiliated with historically or predominantly black schools (Howard University, Texas Southern University, North Carolina Central University, and Southern University).

In the final analysis, it appears that race-conscious affirmative admission in law schools has “taken the fall” in a misperceived conflict for public support pitting

<table>
<thead>
<tr>
<th>Enrollment</th>
<th>% of Increase</th>
<th>% of Total Enrollment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mexican-Americans</td>
<td>1,357</td>
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</tr>
<tr>
<td>Puerto Ricans</td>
<td>263</td>
<td>331.2%</td>
</tr>
<tr>
<td>Asian/Pacific Islanders</td>
<td>1,063</td>
<td>121.5%</td>
</tr>
<tr>
<td>Other Hispanics</td>
<td>387</td>
<td>416.0%</td>
</tr>
<tr>
<td>Amer. Indians/Alaskan Native</td>
<td>265</td>
<td>268.1%</td>
</tr>
</tbody>
</table>
the rights of the individual against the interests of minority groups. The apparent tightening of the enrollment of White males occasioned primarily by the expansion of women’s enrollment has received little public attention. The irony, of course, is that increased affirmative recruitment of women for law study was based in part upon the successful political inroads and arguments established by blacks and other racial/ethnic minorities.

The argument that, of necessity, affirmative admissions undermines the maintenance of quality education is the most troubling. The absence of long-term data analysis regarding the performance of minority students matriculating as a result of affirmative admission, has been a critical deficiency in the debate over the viability of the concept. On this point the CLEO experience may prove helpful.

THE CLEO EXPERIENCE: AN ABSTRACT
The Council on Legal Education Opportunity was formed in 1968 as a joint project of the American Bar Association, the National Bar Association, the Association of American Law Schools, and the Law School Admission Council; in 1972, La Raza National Lawyers Association (now known as the Hispanic National Bar Association) became a sponsoring organization as well. CLEO’s programs have been designed specifically to serve those educationally and economically disadvantaged persons who, but for a program such as CLEO, would have little chance to attend an accredited law school because of economic and admission credential limitations. The concerns of 1968 were concrete: less than 1% of the lawyers in this country were Black and in some states there were more than 30,000 black residents for each black lawyer.11

The twelve years of CLEO have witnessed, among other things, a major educational accomplishment. With the gradual proliferation of affirmative action admissions programs has come the increased availability of “performance-related” data concerning the minority group student within affirmative action admissions. Thus, many implicit yet prevailing assumptions on minority group performance within the academic arena may now be examined in ways not previously available to us. This is no small development since many of these programs were based, initially, on untested theories regarding the academic potential of minority group students. Moreover, the opportunity to examine long-term implications and societal effects of these programs vis-a-vis the current career placement of program graduates can now be explored with more than merely theoretical projection.

In view of the upcoming legislative reauthorization of the Higher Education Act of 1965, under which CLEO is funded, the National Office initiated a comprehensive survey in the summer of 1978 to compile relevant data on the performance of the more than 1,410 Program participants during and after their matriculation in law school to assess the Program’s impact. To do so, we have examined for each CLEO Fellow surveyed several significant variables, including quantifiable law school admission credentials; performance within the academic arena of law school; bar performance; and most importantly, the employment achievements of the Program’s graduates.

Scope of the Survey
The survey of CLEO graduates’ academic and bar performance data involved 690 Program Fellows from the entering classes of 1968 through 1975, that is, the law graduates of the classes 1971 through 1978. The survey represented a 48.9% response from the total available pool of 1,410 CLEO law school graduates during the time period covered. It should be noted that at the time the survey was initiated no significant data on bar performance and employment pursuits was yet available from the CLEO entering classes of 1976 through 1979: the 1976 entering classes (i.e., 1979 law graduates) had not yet been fully surveyed; the entering classes of 1977 through 1979 were then enrolled in law school.

Quantifiable Law School Admission Credentials: LSAT and GPA
Of the 664 Fellows for whom we had admission test score data, the mean score of performance on the LSAT was 422 (score range: 200–800); mean UGPA was 2.76 on the scale of 4.00 = A. In the case of both mean UGPA and LSAT of the CLEO Fellows surveyed, it would be improper to project these factors alone as indicative of the potential law school performance projected for this group at-large. This approach would be particularly improper given the weight accorded to non-quantifiable data by most of the law schools which admitted these CLEO students, particularly the CLEO Summer Institute performance evaluation.

However, mean UGPA and LSAT data presents a useful basis for review between CLEO and non-CLEO law school students, particularly when variables of race/ethnicity and law school performance are factored into the analysis. For now, suffice it to say that the mean LSAT performance of CLEO Fellows of 422 was well below the average score achieved by regularly admitted students, i.e., 551.9. Similarly, the cumulative undergraduate academic record of CLEO Fellows surveyed was 2.76 while that of the traditionally accepted law school student approximated 3.02.

“In the final analysis, it appears that race-conscious affirmative admission in law schools has ‘taken the fall’ in a misperceived conflict for public support pitting the rights of the individual against the interests of minority groups.’’
The data on Fellows' academic performance provides a clear picture of the general minority law students' rate of retention in law schools for the time period examined. It can be said that the CLEO experience/ result is measurable better. Moreover, when one considers the "predictive index" used in determining student performance in the first year of law study, the success of the CLEO Fellows looms even greater.

**Law School Performance: Academic Standing**

Preliminarily, it should be noted that the students covered by the survey attended a total of 107 different ABA-approved law schools. However, of the 107 schools attended by the Fellows surveyed, twenty-seven (27) particular schools are associated with a majority of students reporting: 415 of the 682 students (60.8%) for whom data on this factor is available attended one of the 27 highlighted schools. It should be noted as well that the twenty-seven schools present a varied cross-section of institutions currently serving the interests of legal education, including many schools noted nationally for their solid academic programs and rigorously applied academic standards such as the University of California (Los Angeles, Davis, and Berkeley campuses), Harvard University, Georgetown, Columbia, and others. This factor was considered significant because the data on Fellows' academic standing reflects a surprisingly successful record of performance for the period of law school enrollment.

In the first year of law school, 87% of those Fellows surveyed were reported to be in good standing at the conclusion of that period. At the conclusion of the second year of law study the number of students in good standing rose to 94.1%; and in the third year the number rose to a seemingly phenomenal 99.6% in good academic standing.

The results of the survey of CLEO Fellows' bar performance has established that 55.8% or 378 of the 678 graduates responding passed their respective bar examination on the first sitting, and that an additional 18.1% or 123 Fellows passed on the second attempt. A total of 73.9% or 501 of those 678 Fellows who responded had passed their respective bar examination at least by their second attempt.

It is important to note that the bar passage rates were restricted to the first jurisdiction in which a graduate sat for the bar examination; moreover, in those few cases where no specific pass date for an examination was available to discern between a bar pass on the first or second try (e.g., a June 1973 graduate whose only recorded sitting and pass on a bar examination occurred in February 1974), it was assumed for the purpose of this study that the individual first sat for the bar in the same year as his graduation; hence, the February 1974 sitting constituted the second attempt. Where no specific date of bar passage is listed, yet where bar admittance was reported, it is assumed that this admission occurred on a third or subsequent sitting.

Were one to analyze the national bar data during the years covered by the CLEO survey, i.e., 1971-1976, as a total pool, a national bar passage rate of 74% would be derived. The 74% figure compares favorably to the CLEO bar passage rate of 73.9%. Again, given the quantifiable data used in predicting the admission of these students to law school in the first instance, the CLEO Fellows bar performance is indeed significant.

**Bar Performance**

The bar examination performance is viewed by many as an essential factor in determining the viability of affirmative admission programs, the policy rationale for the creation of many of these programs having been the gross underrepresentation of minority group presence in the bar. In an effort to ascertain whether the overall success of CLEO Fellows on the bar examination would remain consistent when analyzed in the context of a particular law school's graduates, an additional cross-tabulation of data was conducted pitting the individual law school attended by CLEO Fellows against the variable of bar performance.

The following listing of schools represents those schools with at least ten graduates responding to the survey. For the purpose of this analysis, bar passage was quantified not by the number of individual pass dates, but rather by a more general category of bar passage, "at any time." In creating the more general category, it was assumed that the ultimate passage of the bar is the more important consideration when compared with whether an applicant passed on the first, second or third attempt; as noted earlier, the substantial majority of CLEO Fellows passed the bar examination on the first or second effort.

A total of twenty-six (26) were involved in this analysis, representing 59.6% of CLEO Fellows surveyed or 401 of 673 valid cases. Of the twenty-six schools represented, fifteen (15) achieved a ninety percent (90%) or better rate of their graduates having successfully negotiated the bar; an additional seven (7) schools' graduates achieved a bar passage rate of eighty percent (80%) or better. The average total rate of bar passage for all CLEO Fellows surveyed was eighty-seven and one-half percent (87.5%) or 589 of the 673 valid cases.

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### Law School Attended/Bar Passage

<table>
<thead>
<tr>
<th>Absolute No.</th>
<th>% Of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>PASS — 1ST ATTEMPT</td>
<td>378</td>
</tr>
<tr>
<td>PASS — 2ND ATTEMPT</td>
<td>123</td>
</tr>
<tr>
<td>PASS — 3RD ATTEMPT OR MORE</td>
<td>81</td>
</tr>
<tr>
<td>FAIL — NO PASS REPORTED</td>
<td>96</td>
</tr>
<tr>
<td>VALID CASES:</td>
<td>678</td>
</tr>
</tbody>
</table>
Several points of interest should be noted when reviewing the following Table: First, the frequency of returns is particularly well distributed, thereby helping to reduce concern regarding a potentially disparate or aberrational sample. Secondly, the law schools involved, and presumably the bar examination as well, reflect a broad geographic range. This factor alone helps to insure the truly national character of the data. Third, in spite of the random nature of the rate of bar passage, given the number of classes involved and the differing jurisdictions in which candidates sat for the examination, the percentage of those individual candidates who passed a bar examination remained remarkably consistent across the individual schools:

<table>
<thead>
<tr>
<th>Law School Attended</th>
<th>No Pass Reported</th>
<th>Passed</th>
<th>Row Total</th>
<th>% of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Absolute No.</td>
<td>%</td>
<td>Absolute No.</td>
<td>%</td>
</tr>
<tr>
<td>U. of Denver</td>
<td>9</td>
<td>28.1</td>
<td>23</td>
<td>71.9</td>
</tr>
<tr>
<td>U. of New Mexico</td>
<td>3</td>
<td>10.7</td>
<td>25</td>
<td>89.3</td>
</tr>
<tr>
<td>UCLA</td>
<td>8</td>
<td>32.0</td>
<td>17</td>
<td>68.0</td>
</tr>
<tr>
<td>U. of Virginia</td>
<td>3</td>
<td>13.0</td>
<td>20</td>
<td>87.0</td>
</tr>
<tr>
<td>U. Calif-Davis</td>
<td>6</td>
<td>28.6</td>
<td>15</td>
<td>71.4</td>
</tr>
<tr>
<td>Wayne State U.</td>
<td>1</td>
<td>4.8</td>
<td>20</td>
<td>95.2</td>
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<tr>
<td>U. of Texas</td>
<td>0</td>
<td>0.0</td>
<td>18</td>
<td>100.0</td>
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<tr>
<td>Howard U.</td>
<td>2</td>
<td>11.8</td>
<td>15</td>
<td>88.2</td>
</tr>
<tr>
<td>U. of Illinois</td>
<td>2</td>
<td>12.5</td>
<td>14</td>
<td>87.5</td>
</tr>
<tr>
<td>Texas Southern U.</td>
<td>1</td>
<td>6.7</td>
<td>14</td>
<td>93.3</td>
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<tr>
<td>Georgetown U.</td>
<td>0</td>
<td>0.0</td>
<td>14</td>
<td>100.0</td>
</tr>
<tr>
<td>George Washington U.</td>
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<td>7.7</td>
<td>12</td>
<td>92.3</td>
</tr>
<tr>
<td>U. of Arizona</td>
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<td>7.7</td>
<td>12</td>
<td>92.3</td>
</tr>
<tr>
<td>U. of Southern Calif.</td>
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<td>15.4</td>
<td>11</td>
<td>84.6</td>
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<td>Temple U.</td>
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<td>12</td>
<td>92.3</td>
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<tr>
<td>Arizona State U.</td>
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<td>25.0</td>
<td>9</td>
<td>75.0</td>
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<tr>
<td>U. Calif-Berkeley</td>
<td>2</td>
<td>16.7</td>
<td>10</td>
<td>83.3</td>
</tr>
<tr>
<td>Columbia U.</td>
<td>1</td>
<td>9.1</td>
<td>10</td>
<td>90.9</td>
</tr>
<tr>
<td>Harvard U.</td>
<td>1</td>
<td>9.1</td>
<td>10</td>
<td>90.0</td>
</tr>
<tr>
<td>U. of Florida-Gainesville</td>
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<td>0.0</td>
<td>11</td>
<td>100.0</td>
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<td>U. of Miami</td>
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<td>0.0</td>
<td>11</td>
<td>100.0</td>
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<tr>
<td>Rutgers U.-Newark</td>
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<td>0.0</td>
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<td>U. of Santa Clara</td>
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<td>80.0</td>
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<td>U. Calif-Hastings</td>
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<td>90.0</td>
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<tr>
<td>U. of Houston</td>
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<td>0.0</td>
<td>10</td>
<td>100.0</td>
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<tr>
<td>U. of Notre Dame</td>
<td>0</td>
<td>0.0</td>
<td>10</td>
<td>100.0</td>
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</table>
Career Patterns
To the extent that the ultimate raison d'être of any affirmative admission program in law schools is to increase access to the decision-making process of both the private and governmental sectors by members of disadvantaged groups, the career patterns of successful graduates of these programs may be the most significant measure of the success of affirmative admissions.

The CLEO survey sought to shed some light on this question. Questionnaire returns provided career patterns data on 305 CLEO Fellows or 21.6 percent of those candidates eligible to respond. Although by no means complete, the career patterns of CLEO Fellows is particularly interesting when viewed in the context that but for CLEO, many of these attorneys would have been denied access to a legal education. It is interesting to note as well that the career activities of CLEO Fellows extend well beyond the exclusive interests (as traditionally defined) of minority communities, reflecting a job dispersal and diversity of interest of considerable breadth.

In the final analysis, the performance of CLEO Fellows speaks for itself. When one considers that the Program consciously services students that the objective predictors showed to be high risk candidates, the CLEO Fellows' academic and post-law school performance successes assume even greater significance.

<p>| | |</p>
<table>
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<tr>
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<tr>
<td><strong>Elected Officials</strong></td>
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<td><strong>Undergraduate Education</strong></td>
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**PUBLIC SECTOR**

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<th>Position</th>
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<tbody>
<tr>
<td>Assistant Prosecutors</td>
<td>3</td>
</tr>
<tr>
<td>City Attorneys</td>
<td>11</td>
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<tr>
<td>State District Attorneys</td>
<td>10</td>
</tr>
<tr>
<td>Federal Agencies, (Administration)</td>
<td>1</td>
</tr>
<tr>
<td>Federal Agencies, (Litigation)</td>
<td>25</td>
</tr>
<tr>
<td>Judge Advocates General Corps (Military)</td>
<td>3</td>
</tr>
<tr>
<td>Judicial Law Clerks</td>
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<tr>
<td>Executive Directors, Legal Services</td>
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<tr>
<td>Managing Attorneys, Legal Services</td>
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<tr>
<td>Staff Attorneys, Legal Services</td>
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<td>Municipal Government (Administration)</td>
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<td>Municipal Government (Litigation)</td>
<td>3</td>
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<tr>
<td>Municipal Government (Executive Director)</td>
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<td>Public Defenders (State &amp; Federal)</td>
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<td>Public Interest Organizations (Administration)</td>
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<td>Public Interest Organizations (Litigation)</td>
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<td>Office of State Attorneys General</td>
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<td>State Government (Administration)</td>
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<td>State Government (Litigation)</td>
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<td>Office of U.S. Attorney</td>
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**PRIVATE SECTOR**

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<td>Congressional Aides (Senate)</td>
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<tr>
<td>Corporate Practice (Litigation)</td>
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</tr>
<tr>
<td>Corporations, Banks, Insurance Companies, Accounting firms, et. al. (Administration)</td>
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<tr>
<td>Entrepreneur (Owner of a Real Estate firm)</td>
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<td>Law Clerk</td>
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<td>Partner in a Law Firm (3 or more partners in firm)</td>
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<tr>
<td>Private Practice (Sole practitioner or partnership)</td>
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<tr>
<td>Staff Attorney in a Law Firm (3 or more partners in firm)</td>
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<tr>
<td>Staff Attorney in a Small Law Firm</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>305</td>
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</tbody>
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LAW SCHOOL TRAINING, THE URBAN LAWYER AND THE NEEDS OF THE PUBLIC

Legal education, generally, and the urban law school, in particular, may play increasingly significant roles in the coming years in shaping the public response to minority concerns. The gradual democratization of the profession and the rapid infusion over the last decade of minority students and women into law study have already helped to transform not only the complexion of the law school community itself, but the broader society as well.

No one will dispute that minimally, this dramatic transformation has served to broaden curricula offerings. The surge in the establishment of viable clinical programs as an alternative educational tool reflects an increased awareness of the need for practical as well as academic legal training. Specialized seminars and classes have been incorporated into the curriculum reflecting the increased sensitivity in the society-at-large for all its citizens. Attendant to these expanded offerings has been the extension of the law school, particularly the urban law school, into the area of increased community service and involvement. These, no doubt, are the results of pressures from both within and without the institution to reorder educational and social priorities.

Yet, the absence of clearly defined institutional goals makes the determination of a consensus philosophy within the institution difficult to achieve. Professor Reich has expressed the same general observation in the following terms:

Many of the ills of legal education are symptomatic of the fact that it is primarily professional in orientation, although it should also be preparing students for lives of public service and scholarship. This confusion of goals is tacitly recognized, and an appearance of unity is maintained by the theory that all three are accomplished by the law school's special way of training the mind. But the unity rings false, and the schools do not accomplish all that they undertake.12

The value of goal setting in the determination of the law school's mission is clear; to the urban law school, its value may well be even more significant. For our purposes, the law school's mission may be defined as its guiding philosophy and sum of its individual achievements in pursuit of a central goal.

To law schools generally, a mission in pursuit of fundamental social justice and a more sophisticated appreciation of the local environment may well be the inescapable mandate of the '80s. The "law school-in-isolation," unaware of and unaffected by the events around it, will not be tolerated. Forces beyond its control will compel it to action.

The demands of our cities for specialized technical support in a time of decreasing revenues and the pressures to resolve long-standing social problems within an accepted legal framework, are shaping the law school's role in clear terms. The call to public service may deserve an even higher appreciation today for the urban law school. This may be true notwithstanding the apparently bleak prospects for public service employment overall.

In more practical terms, enlightened self-interest compels our schools to recognize that their missions are also shaped by the future job prospects of their graduates. While some academicians feign little concern for post-graduation employment opportunities, forces outside the schools are affecting curricula offerings, academic imperatives and the pool from which their applicants are drawn.

A recent New York Times survey reported that while those graduating in the top 15% of their law school classes (or from select national schools) are finding lucrative employment, other graduates are finding it more difficult to secure a first job. The predictions are that 30% of the 1982 class of prospective lawyers will be unable to find jobs in their profession; but, of course, the cutbacks in available federally-funded public interest jobs must be factored into this analysis.

The survey went on to report that many graduates will pursue so-called "nontraditional" practices in legal clinics or as solo practitioners in cooperative surroundings designed to reduce costs. For these lawyers, operating in low financial margins and often in competition for a limited share of the market, survival will be determined by the degree to which the lawyer is a vital, functioning element of the community in which he lives and works. Knowledge of community needs and expectations, and the ability to create viable service to those needs is fundamentally sound business and integral to the law schools' survival. Given the potential decrease in law school applications, coupled with the increased number of law schools now in existence, each institution must seek to establish its own uniqueness or fall to the depths of mediocrity.

On a larger level, however, the imperative of community service and a commitment to excellence rooted in sound academic preparation has a more fundamental basis. The law as an institution exists as a vehicle for social change, a means of structuring and restructuring the social context in which we as a people must function. As such, legal education...
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serves as more than a technical training ground. Indeed, its most valuable contribution to law and society lies in the development of a cadre of graduates fully prepared to meet and resolve the ensuing social conflicts.

Yet, too rarely does the law school provide the forum for examination of the meaning of constitutional democracy, and the responsibilities of leadership; too little attention is paid to the philosophy of jurisprudence and its relationship to today’s needs. Professional responsibility is often taught (if at all) in an almost mechanical fashion, with no time for higher considerations. To the extent that we mechanize our training, we relinquish our responsibility to look beyond technique and into substance.

The call is clear, but only for those prepared to embrace the future.

Notes
1. The phrase, "Wartime Amendments" refers collectively to the Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States which were passed in the immediate aftermath of this nation’s Civil War. The Civil Rights Cases, 109 U.S. 3, (1883) (Harlan, J. dissenting).
3. Plessy v. Ferguson, 163 U.S. 537 (1896). In this case, the Supreme Court gave its imprimatur to a host of initiatives, including Jim Crow laws, which effectively reestablished, in substance, if not in form, the institution of slavery.
4-5. ABA Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States — Fall, 1979 (1980) [hereinafter cited as Legal Education].
7. Legal Education, supra no. 4–5.
The topic that was given to me, and that I think is a very useful topic, was legal education in terms of an urban law school in the kind of world in which we are now living, and in the kind of world which we can reasonably foresee for the future without any commercial impracticability. I was forced to put together a number of strands that I had normally thought about as separate strands, and in putting these together, I arrived at some rather startling possibilities.

I start, of course, with the proposition that legal education must deal with not only substance, but with skills. But, I want to phrase it a little differently this time because I want to say that it has to deal not only with skills, but with substance. When I put it that way, what I am saying is that one of the things that I perceive is that over the last 40 years or so the amount of substance which is given to law students has been declining, and the amount of so-called skill which has been given to students has been increasing.

I want to state as a fundamental premise that it is not possible to have skill without knowledge of substance. I use as my prime illustration that of client counseling. I do not think that holding the hand of a client, or being sweet to a client, or not growling at a client has any particular significance. If I don't know enough about the matter involved to ask the questions that will let me know whether or not the client has a real problem, and what kind of problem it is, I cannot ask the questions which will yield information that is relevant unless I know relevant to what? And in law, things are relevant or not depending upon some legal theory that we have. In simplest terms — what kind of facts do you need to get what kind of relief? That is
a legal theory. The notion that you start with the facts and then apply some law is ludicrous on its face. You start with an initial statement of some facts, then you use your knowledge of the legal possibilities to ask for more facts. You don’t even know whether you’ve got is enough. You may say, “Well, this feels like we have a cause of action.” I am disturbed by this because I see it as an escape valve from actually dealing with coverage of the law. We don’t have to cover anything, do we? All we do is teach and think like a lawyer. Well, how can students think like lawyers? They don’t have anything to think about. It is impossible. I use the phrase “think like a lawyer” because it really started to become popular because of Harvard in the 1940s. If you look at the casebooks, you will find that one of the things that we have started doing, that was not done in the 1920s and 1930s, is to use cases and materials, or sometimes just materials. What are we dealing with? What are we supposed to be doing with these cases and materials? Are we supposed to be teaching a skill, any skill at all in the process? One of the skills that we thought that we were always teaching was legal analysis — putting cases together; taking them apart; trying to decide what could have been done better, what could have been done worse; what you were going to do by way of counseling in the future because of what happened here; how you would set up the next transaction because of what happened there, and so on. And there was enough of the case and the law, statutory or otherwise, printed in the casebook, our crutch, so that we could do this. Now in many casebooks, the crutch isn’t big enough because what we put in is bright sayings by the judges, without any indication really of what the facts are. When I say “bright sayings by judges,” I mean remarks made in their opinions. And remarks made in their opinions may or may not be the things which lead to the decision in the case. We are unable, frequently, to ask the student to give us the holding in the case because there isn’t enough reprinted for us to know what the holding is unless we go back to the original reports. Now, that is fine if you’ve got a library that is big enough, and has enough sets of reporters so that you can send students back all of the time. But, if you don’t, you can’t do that. Then of course, you can always do the materials part of it, and the materials part of it is a result of discussion of “policy.”

When I talk about substance, I mean not only knowledge of the law, I mean knowledge of the underlying life situation which the case represents. Unless you know what the underlying life situation is, you don’t really know what the case represents, what the legal matter represents, or what the statute represents. You don’t know anything about it except that there are a lot of words strung together that may or may not have some meaning. I will not say anymore about the meaning of statutes beyond saying that even words that are crystal clear, as in the Uniform Commercial Code, have sometimes been thought to be ambiguous. As soon as you have ambiguous words, lots of other things enter into the picture. As for cases, I don’t have to say to you that the ruling can be very narrow or very wide, that the future life of a case is not determined on the day it comes down but it is determined over the years in terms of how we use it. When it comes to statutory construction, as you know, there are the two great tenets, the ones that really underlie everything else. One is that every statute in derogation of the common law shall be strictly construed, the other is that every statute that is remedial shall be liberally construed, to effect its purpose. There is no such thing as a statute which is remedial which is not in derogation of the common law. What I am saying is that a good deal of the material which is made available to students is inadequate as to the law, as to the underlying life situation, and as to the arguments that can be made with respect to what I might call the big economic picture, or the big social picture.

We mislead our students as to the importance of the materials, but it’s great fun. You argue on both sides — what difference does it make whether or not it makes any sense? You don’t have to make any sense. You’re just learning how to argue. That is a technique, a skill that you are acquiring, the skill of argument. And you are acquiring the skill of argument without any regard to what you are arguing about, or as to whether you are ever going to come out with anything, or whether you are even responsible for what you are going to come out with. You have lost all sense of responsibility in the game theory. Law is not built for games. It is too important a piece of life. How many angels can dance on the head of a pin? That is a kind of a game. And we’ve used theories on game playing for our casebook materials. I hope that we will start becoming aware of the fact that if we are going to teach skills, if we are going to assume responsibility for making competent practitioners, we had better care about whether what we are dealing with has any relation to the underlying life situation. Does it have any relation to accuracy, as a first and fundamental concern, instead of “how many angels can dance on the head of a pin?” I think that if we start looking at legal education in those terms, we arrive at very interesting conclusions.

Those of you who know me, you know that I believe completely, thoroughly, and as an act of faith, that counseling can be taught, client interviewing can be taught, negotiation can be taught, by inventing or creating a situation, or by setting up a big plan, or by what we used to call in the old days “social engineering.” I am personally all for social engineering in its best sense. It doesn’t mean that you have to cut the bodies into little pieces, it means that you might engineer to give them full play. There are all kinds of engineering — engineering for freedom as well as for limitations. We can teach drafting, not only of contracts which are form contracts but of indivi-

“... you are acquiring the skill of argument without any regard to what you are arguing about, or as to whether you are ever going to come out with anything, or whether you are even responsible for what you are going to come out with.”
When you have recurrent situations the same kind of things come up whether you are talking in the business context, the family context, or any other context. The law is concerned with both the recurrent situations and the oddball situation, but primarily with the former, because it is with these that it is trying to work out some balance as to what ought to be in a particular context. It cannot do this without adequate information. Now, the way in which the law acquires information is if it is a legislature, then it does it by having people come and talk about their special interests. There is absolutely nothing wrong with that. Everybody talks about his or her special interest and somebody is supposed to be bright enough to put it together in terms of what is the underlying notion. How does it really work? The same thing is true in the courtroom. The first time a case comes up, the court doesn't have the picture. How could it? We do it case by case. Now, counsel can get up and tell the court, "In my practice, judge, this is how it is," and a lot of courts will accept that. Counsel can also write articles where he explains how it is and then cite the articles to show that eminent scholars have already found out how it is. And people do that. And then scholars can write eminent articles where they tell the judge what ought to be the law without any knowledge of what the situation is, and they've done that too. In other words, there is an infinite variety of the stuff that can be used and anything that is in print, of course, is usable. Perfectly respectable authority it too, whether it makes any sense or not, whether it has any authenticity or not. If it's in print, there it is, the Brandeis brief. Just think about that for a minute — anything in print. There was a time where if you didn't print much, that may have made sense. But today, every lawyer in the country is screaming, "Give me an article, any old article will do." Lots of things get printed that maybe never should have seen the light of day. And newspapers — you can always cite the New York Times and if you are hard up with the Times, try the Washington Post. Investigative reporting, accurate, filled with knowledge, complete understanding of the situation — so you haven't been reading it recently? Now you think about the situations that you know about that appeared in the press and what you thought of that coverage. Then ask yourselves why you believe the stuff that you don't know about that appears in the press. Did you ever see anything that you know about appear in the press? Now, if you are lucky, it has some resemblance to what actually happened. If you are not lucky, it has none. Everybody except you who were involved believes that that is what happened. I think that is interesting. If it's in print, it's usable, great stuff, and we can then argue for the rest of our lives as to what should or should not be done on the basis of these facts, which may or may not be true. And so we can build all kinds of uncertainty into the picture, because the law deals with life, it does not sit up there like a cloud. That is why we have more than one judge sitting on appeal. It's not because we think that three are brighter than one. Three are frequently more stupid than one. But three will bring a different set of perceptions to the case, and they will bring the perceptions not in the law but in the particular life situation. The same thing is true when we say that we want a lot of different people teaching the same course. Why do we want that? It would be dreadful if they all taught alike. If they all did that, then we would know almost by hypothesis that it's a lousy education, because they would all be coming in with perceptions which are unlikely to be their own.

Here is the first place where an urban law school has an advantage. They say we don't know everything about everything. None of us ever will. But in an urban setting, you have the wherewithal to go out and find out easily what the transaction is, or to bring people in to explain the transaction — not to explain to you what it ought to be or what are the values involved or any of the rest of it. That is the second step. The first step is "what is the transaction; how does the thing go?"

We used to say that in the days of drafting the Commercial Code. This is based on the famous story of the lost donkey in a small town in Italy. The small town in Italy was up on a hill. The donkey was the only means of carrying things other than on your back. So, it was a very important animal to that small town.

One day, the townspeople woke up and the donkey was gone. Everybody went out and looked for the donkey except the village idiot. He just sat on the plaza and didn't do anything. They came back that night without any donkey and said "We must find the donkey. Now tomorrow we will be organized. Everybody has been disorganized today. We are going to go in concentric circles, one sector will look here and another will look there." They had it all organized. As soon as it was light the next day, they all set out; everybody was gone except the village idiot. He got up around 10:00 and wandered off. They came back at dusk.

And there was the village idiot sitting in the square with the donkey. So they said to him, "Did the donkey come in?" And he said "No." And they said, "Well, how did the donkey get here?" And he said, "I thought to myself, if I were a donkey where would I go? I went there, and there it was!" You don't have to be very bright necessarily, but you do have to be willing to ask a question to start. You start with the transaction, a "how does it work" kind of thing.

Now, if you are sitting in a beautiful idyllic setting, and none of us are, and there is nobody around — an ivory tower, in fact — and you can sit and think and you can read books and the Washington Post and the New York Times, you may not be able to find out anything. But if you are living in an urban area, the odds are that almost anything that you want to find out, you can find out. That is an advantage, if you are going to try to teach the skills which are involved, if you are going to try to teach what law is about, what it deals with and how it operates. Then you can afford the luxury of saying how it should operate; at that point your own value structure comes into play and you can do what you like about it. I don't see any objection to that. I know that we are all going to see it differently and people are going to argue about the perception, and gradually you'll see it more and more whole. That is one of the things that we have to teach, and it is very hard for the young to accept. They will never find complete justice, they will never find truth, and the mark of the responsible lawyer is whether he is willing to continue to search, knowing he will never find. That is a very important question when we are talking about professional responsibility, and that is really what we are talking about in part. Are you willing to make the search, knowing that you will never find, or will you turn it into a game? A frolic at a bank? If you are in an urban law school, you won't have to go in for the frolic because you have a whole life outside the door which you can start bringing in.

What, then, are the other things that are...
"I have fought against specialization because I have thought of law as the last of the universal disciplines."

"...and all we really need to do is group legal practice. Clinical means taking interesting cases. Clinical means trying to develop new knowledge, testing out new remedies. Clinical means a lot of things that we don't do now. Now, it used to be that we'd say that the bar would get angry with us, but the bar is doing group legal practice, and all we really need to do is group legal practice, right? You think that they would shut the law schools down. Just think of group legal practice. It's not that it would be secret or that we would be out soliciting or anything like that. Although, its perfectly okay to solicit now isn't it; you just advertise. Suffolk Legal Clinic: small fees. You could start out by saying that we deal with the indigent, but we'd also deal with the middle income group. Middle income is also a very flexible term as you've probably noted in the newspapers recently. Middle income can go way up or way down depending on the way you feel about it and whether it is a grant or something else. If its a grant, it goes way down; if its something else, it goes way up. If you do that, and you select your cases here you've got a whole bar full of people and then it gets to the teaching aspect. Can you really teach, do you want to teach? How do you advise a particular client, not a simulated client, but a particular client about a particular matter? Do you really want to draft a security transaction? Do you want to set it up? Are you going to accept the agreement the bank gives you? Would you be representing the bank? That would be nice, that would be fun to represent a bank wouldn't it? Think of all the things that we could do for the bank. We would give great practice to our kiddies. That is why, after, all, we are here. I suggest to you that you think about this because there is nothing that I see now except the possible screams of the bar that would keep you from doing it. And, in an urban setting, you might even get some of the bar to come and teach. Now, of course, they'll want more money, but then that's just a minor point for negotiation, isn't it? How much? We establish the principle. It's like the diplomat and the lady. They were sitting next to each other at dinner. He said to her, "Madam, would you, for a million dollars?" She looked at him and said, "Well, I guess so." So, after dinner, they were walking out and he said, "How about ten dollars?" And she said, "Sir, who do you think you are talking to?" He said, "We established that a long time ago! Now we are merely discussing the price." It's the same thing. A minor principle gets started early, and then it is just a question of how much. Now, I am setting it up in a sense just like a joke. But it really isn't a joke because it is a definite possibility that it might be happening. The reason it becomes a possibility is because of the indigent requirement which was the sine qua non; the funding by the federal government isn't present when the federal government isn't funded. You are going to get a very interesting question as to whether it will still be an educational gift that will be tax exempt when money is given to you to pay for the office furniture. And, money is put up by the people who are doing the group legal service on precisely the same case. Your response of course will be "Who, me? I don't keep the fee." But what happens in the medical clinic in some of the medical schools is that there is a participation by medics in the fees although a major part of the fees goes to the maintenance of the institution. That is a possibility. I think it would get the bar up in arms, but it would improve the quality of legal education if you didn't have to use the simulated, but the actual. For those of you who have said that you can't really teach by way of simulation, (which I personally don't believe, I believe that you can teach very well by way of simulation), that you have to have the reality because you have to feel it heal, there's the legal clinic for the middle income group. And, why stop there? What's the matter with the bank, and the corporation? We can really have a field day. At places such as Antioch we talked about the law firm approach to legal education. They haven't begun to tap what is in it, if you can get away with it so far as the bar associations are concerned. I give you that for what it's worth.

The final thing that is involved is, if we really are concerned, as I think a law school ought to be, (the private law school has in some ways a more important obligation in this respect), the determination of how to make things a little better. What we are really dealing with is totally interdisciplinary and across the profession. We need input from all of the disciplines. We need not only economics, but input from the people whose line it is to tell us what life is. We need input from the judges to tell us how they perceive things. We need input from legislators and so on. There is no reason why this kind of combined looking at a situation can't exist in what is a non-adversary situation. Because, the final thing I want to say to you is that the law and the setting up of transactions does not have to be adversarial in nature. I'm not just talking about the investigatory parental type of strife that goes on with some of the administrative agencies and executive agencies of government. I am talking about the much more important engineering of
I believe that you can teach very well by way of simulation . . .

private transactions that are not really government transactions, although a lot of the private transactions have a lot of governmental angles, as we see, for example, in the Chrysler loans. It's like a reorganization where not everybody is reaching for the biggest piece of the pie, but they are trying to work out something which will be viable. It may not turn out viable, there was some doubt as to whether Chrysler was viable, but still, Chrysler lasted a couple of months longer than anybody had reason to believe it would when the deal first went through. So it might turn out to be viable. That is a different set of techniques because what it requires is that you understand what everybody's interest is that is involved.

Now, one place we have learned to do this so that we can now say it is or is not impossible is in the labor relations area. There is no way in which you win if you take more than the other side can stand. I don't care how good you are at negotiating, you are a bad negotiator if you end up with a deal that is not liveable for one of the parties. There is no way in which that deal is going to go through, I don't care what the piece of paper said. All you are going to do is have headaches. The labor situation is even more interesting because it involves people who can't get of government intervention and so you are going to have to understand the situation so that we can set them up that way.

I think in all of this an urban law school has an advantage because it is so easy to get to the source of information if you really want to get at them. All you need is the idyllic aspects of life. But then, you can't have everything. The nature of man is that he can't have everything, just that he wants everything. There is no reason why law students should have everything either. Because, although for a moment they are unique, they are living in a kind of sheltered existence, they don't perceive it as sheltered. I think that there are enormous opportunities. I think the opportunity cost is enormous for some of them. In terms of reaction to the bar I think it means a reorientation and a reeducation for the faculties of the nation. I think it means that we have to get out of our ruts and get going on it. But then I rethought a lot of this for a long time. I hadn't put it together in terms of what is going on — the specialization, the group legal practice, the changes and the dynamics so that it isn't all going to be adversary. But it is going to start to be — I really don't know the term I want for it. Something will grow out of it that is more rounded than the adversary system is likely to produce. I think that you are going to have a terribly exciting time, and I expect to sit on a needle from time to time, but not much more than that. Thank you.

Following the presentation of Dean Mentschikoff's paper a panel of commentators provided a discussion of the issues which she raised. The Advocate is publishing selections from this discussion. The commentators were:

Hon. JOSEPH R. NOLAN, Justice of the Supreme Judicial Court of Massachusetts. Judge Nolan has taught at Suffolk Univ. Law School for over a decade, and is the author of many books.

DAVID SARGENT, Dean of Suffolk Univ. Law School.

THOMAS J. WYNN, a graduate of Suffolk Univ. Law School and the President of the Massachusetts Bar Association.

DAVID F. CAVERS, Professor of Law at Harvard Law School. Professor Cavers was the first law teacher selected to receive the Award of the Society of American Law Teachers for significant contributions to legal education.

Professor CHARLES KINDREDAN, Faculty Advisor to The Advocate, served as moderator for the panel discussion.

JUDGE NOLAN: As a judge and law professor I am very interested in your view of judicial opinions in casebooks. No judge thinks when he writes an opinion that law students will read it and discuss it in class. If he tells you that, he is fooling you. But what do you say to us when law students are faced with an abstract of a case which doesn't have in it the things it should have because the author (of the casebook) didn't include (the full opinion)?

DEAN MENTSCHIKOFF: I think that every law teacher should write his own casebook. A teacher will decide that a casebook is inadequate and will start to supplement it with his own materials. Then he puts together a large batch of stuff and suddenly the student can't cover it. Then he starts to cut back. But he says to himself "every case in here I love dearly." He wants to print them in full, but he has to cut. He cuts a little here and a little there and in the process (of cutting) he is putting in his point of view. One really shouldn't cut at all.

JUDGE NOLAN: The moral is that you should write your own casebook.

DEAN SARGENT: Over the last 40 years law schools have devoted more and more time to clinical education. Critics such as Chief Justice Burger say we are not doing enough to train advocates . . . Are we doing something wrong? How can we balance the demands of clinical education with the need to teach substan-
tive law, which in my judgment has suffered in the move toward more and more clinical work?

DEAN MENTSCHIKOFF: I have had this argument with the Chief Justice several times. The quality of the bar has not gone down. The quality of the bar is the same as it always was, in fact it may be a little bit better. The view that most lawyers are not good trial lawyers was true a long time ago and it is still true. ... Yet only a few trial lawyers are really dreadful. That is true in every area (of legal practice). In my area, commercial law, there are some dreadful lawyers ... but they get away with it while making a lot of money being dreadful. They can get away with it because they are not in (the open view of the public) as is true in litigation.

Clinical education is not the best way to teach skills. The best way to teach skills is by simulating trial advocacy; it trains students progressively and gives them a variety of skills. I think the professional responsibility aspect is important, but I doubt that (law school) training in professional responsibility has any serious impact on the quality of legal services ... I think the Chief Justice is wrong when he attacks the present generation ... It is the age-old business. They say "we are so bad, we are going to cure it by keeping the youngsters out." They are going to pick on the new generation. That is why I have been fighting this stuff. They say "let us apprentice them." Apprentice them to whom? To the clods? What is this? The blind leading the blind in order to make them blinder? This is total nonsense. That is the view of the New York Circuit — good old (Judge) Kaufman's committee — headed by Bob Clair, who should have more sense. They are just ridiculous — that is the only way I can describe it.

MR. WYNN: There is a lot of truth in what you say. In my firm of ten lawyers, all of them young lawyers, I have the feeling that (law school graduates) have substantial knowledge of the law. But the clinical skills are lacking. There may be need for further clinical work, but as Dave (Sargent) pointed out, you have to draw some line on clinical work (in the law school). Perhaps this suggests a need for mandatory continuing legal education after law school ... Another factor is that there is de facto specialization today — we don't have many people in the general practice of law today ... At some point the law schools will have to face up to their responsibility to the students as to placement as well as to teaching. The most significant thing the urban law school can do is provide access. For example, if Suffolk's evening program wasn't available I wouldn't be a lawyer today. There was no way I could have gone to law school full time. The evening division gives access to the poor and to minorities. This is just one man's opinion.

PROFESSOR CAVERS: ... I would like to take a half hour off to think about the ideas this lady (Dean Mentschikoff) has been presenting to us before commenting. But since I seem to be closed-in here I will comment ... Since the Second World War we have been trying to relate the law school to the world outside ... However, I am concerned about the lists of lawyer-skills which have been employed in studies of legal education in the recent past. We have lists of lawyer-skills containing 20 or 25 skills developed by various persons interested in legal education. At the top of the list is legal analysis ... then interviewing, negotiating, drafting and so on. We are often left with the feeling that legal analysis is just one more mode of operating, whereas it seems to me that if the problem presented to the interviewer, negotiator, drafter, etc. is to be effectively examined it will have to come from the analysis which (the lawyer) can make as the problem unfolds. The skill of analysis is so fundamental that I do not think we (legal educators) have much to apologize for in this regard, and certainly not to the degree demanded by our critics. Analysis is fundamental. We have seen time pressures develop ... We have tried to cover more and more subjects. This has increased not only the pressures in time, but it has forced us to spread out. Perhaps we should re-examine our course offerings, not with a view of cutting down the hours of instruction, but with the view of organizing the material in a manner which would permit a more
detailed insight into the body of knowledge. I did an analysis of the announcement of this (Suffolk) law school. At Harvard, at my class reunion, people were surprised to learn that . . . we were offering 136 courses, in addition to the traditional first year classes. I would have thought that Suffolk would have restrained itself from this, and that Suffolk would offer the advantage of a more concentrated study. But . . . Suffolk has twelve required courses, and one hundred and eight electives, in addition to four programs of clinical work. I am not sure that in addition to re-examining our casebooks we shouldn't also consider the proposition by which (we offer so many electives). We should reconsider the practice of asking a professor to cover a whole new branch of law in a two hour course taught for one semester. (We need) a more systematic exploration of the case law and the statutory law, but also of the social and economic institutions so as to enable the student to emerge with his analytical skills intact. But he must also emerge from our courses with a sense of those areas in which these skills should be employed . . . I suppose this means that our courses may not be so encyclopedic as our current (courses) are coming to be. We now seem to be losing the sense of progression in legal studies after the first year . . .

DEAN MENTSCHIKOFF: David this is interesting . . . A two hour course seems to me to be absurd. It surely can be linked to something else to make it a three hour course. If you can teach two 2 hour courses today you may get the value of one good 3 hour course.

DEAN SARGENT: Somewhat along the same line, I recently discovered to my horror that we presently teach in the undergraduate law program the entire graduate tax program taught in the graduate tax programs at New York University and Boston University. Some of our (faculty) are talking about the need to consolidate elective courses.

PROFESSOR CAVERS: I would think that if that were done it might be possible to have two people working with the same material in smaller groups, but in greater depth . . . I hope that the kind of concentration I'm talking about can be done without blocking out courses such as legal history or philosophy.

PROFESSOR CELLA (from the audience): I would ask Professor Cavers if he has any reaction to the relaxation of (core-course) requirements in law schools around the country, which has helped create this proliferation of electives . . . I assume that Harvard, which has been the flagship of legal education since Christopher Columbus Langdell . . .

DEAN MENTSCHIKOFF (interrupting the question) No! No! No! Nobody at Columbia, Yale or Chicago cared what Harvard did — ever. Not ever in the history of those law schools! I didn't even know what was going on at Harvard until I got up there!

PROFESSOR CAVERS: With regard to the proliferation of courses, the students elect their own program, but wind up with curricula which are no different from what would be required . . . I am sure that there are faculty who are concerned with the problem of giving greater focus to the (curriculum) without subjecting the students to ironclad requirements . . .

DEAN MENTSCHIKOFF: Do you remember that when we were sitting down reviewing the curriculum (at Harvard) around 1947 or 1948? One of the things that impressed me was that we were saying that we had to be careful because other schools would imitate us. We heard that at least a hundred times in the course of reorganization. So we didn't do that much. The reason I remember that was that at that time many other schools had quite a different program. There really wasn't a sentiment to imitate Harvard at the other schools I mentioned. . . . But Harvard is convinced that it is the best law school.

If you can convince people that they have the best law school, they are going to act that way. Apparently something like this happens at Suffolk, at least in the evening division. That is the way you (Mr. Wynn) feel about it. You feel that you had the best education possible, so Suffolk must be doing something right.
Confronting the Monopoly of Zealous Representation

Gerard J. Clark

Although efficient dispute resolution is a goal which has eluded Americans for many years, today's growing demand for adjudication should prompt a new examination of why — especially as the American Bar Association House of Delegates begins to ponder the fate of the Kutak Commission's new Code of Professional Responsibility for the country's lawyers that was presented at the ABA Convention in August.

The current Code of Professional Responsibility was drafted by a committee of the American Bar Association in 1969 superseding the Canons of Ethics which had been adopted by the same body in 1908. Most of the state supreme courts which ultimately control the profession in the respective states adopted the Code during the 1970s. In 1977 the American Bar Association, in response to criticism from inside and outside the bar, appointed a commission to evaluate the Code and consider the direction of professional reform. The Kutak Commission got to work quickly and produced a first draft in January of 1980.

The first draft was a document which attempted to reorient the lawyer away from absolute loyalty to client goals in favor of third parties and the public interest. However two requirements, one to "render unpaid public interest legal service" and the other, to correct "manifest misapprehensions" of fact by a court caused by the lawyer caused outrage among the organized bar. Indeed, Kutak expressed surprise at the "intensity of reaction" to the first draft. During the seventeen month period between the first and final draft, Kutak and the other members of his Commission traversed the nation discussing the draft and attempting to elicit bar support for its reforms. Apparently the Commission got religion in the seventeen months between drafts. A quick comparison of some of the language and content of the two drafts is instructive. The draft report specifically prohibited the lawyer from seeking client benefit from delay or from intentionally increasing the cost of litigation. A final draft requires only "reasonable effort . . . to expedite litigation."

The draft required promptness "to matters undertaken for a client" and "adequate attention until completed." In spite of a first draft comment warning that "no professional shortcoming is more widely resented than procrastination", the final draft only requires "reasonable promptness and diligence."

Perhaps just as important was the first draft emphasis on the importance of the lawyer's other roles, namely: advisor, negotiator, intermediary between parties and evaluator. The final draft excludes the role of negotiator, perhaps the lawyer's most important role, and gives only grudging approval to the other roles. The lawyer can serve as an evaluator, for instance, by giving opinion letters, only if a written contract concerning disclosure of information is signed and his role will not conflict with his role as advocate. He can be an intermediary, for instance, representing both the buyer and seller in a land transaction, only if he explains the dangers of proceeding without a lawyer advocate. The final draft allows the advisor to consider "moral, economic, social and political factors" that may be relevant to the client's situation, again requiring client orientation and also implying an exclusion of these factors in the lawyer's other roles.

First draft requirements "to be fair to other parties and their counsel" accord
respect the interests of third parties including witnesses, jurors and persons incidentally concerned with the proceeding” did not survive. A draft comment requiring only “persuasive” arguments from advocates was nixed in favor of a “duty to use the legal procedure for the fullest benefit of the client cause” — reminiscent of the current Code requirement, although both drafts purge zealous representation language.

The proposed final draft makes few substantive changes on lawyer conduct. Notwithstanding, the reception given to Kutak and his colleagues at the annual meeting of the American Bar Association was anything but cordial. At a hearing by a committee of the House of Delegates, most of the remaining alterations of the status quo were attacked. The American Trial Lawyers Association, for instance, characterized the duty to testify in response to court subpoena concerning a client’s crimes or frauds “a revocation of the attorney-client privilege.” Accusing the Commission of attempting to be philosopher kings, the general practice section of the ABA attacked a definition of competence which requires “legal knowledge, skill, thoroughness, preparation and efficiency reasonably necessary for representation” as an attack on the general practitioner. Other final draft attempts to prevent lawyer abuses of the fee arrangement and to stop wrongdoing by the corporate client came under attack.

And thus while Justice White again reiterated a constant plea of the Judiciary for the courts for efficiency in resolving disputes and to hearing criminal cases.

Zealous representation, litigant control over the course of adjudication, and the monopoly of the bar over the mechanisms for resolving disputes all deprive the public of efficient dispute resolution. The current Code of Professional Responsibility requires a lawyer to zealously represent his client. This central provision of the Code states that “a lawyer shall not intentionally fail to seek the lawful objectives of his client, through means permitted by law” nor shall he “prejudice his client.” One gets a flavor of the breadth of the prescription from its stated exceptions: courtesy, punctuality, and access to reasonable requests of adversary counsel “which do not prejudice” client rights.

The obligation to seek client advantage affects the lawyer’s approach to the dispute, his adversary, his client, and the court. The dispute is seen, not as a problem that should be resolved, but a confrontational legal free-for-all where the opposing parties are bitter enemies and advocates gain client advantage through litigation tactics.

In advising clients, zealous advocates will tend to draw the worst case scenario arising out of the imputation of suspicion against opponent’s motives and activities. This can stiffen the client’s resolve to get into fighting this one out over the long haul. Clearly dispute avoidance through creative problem solving becomes the exception rather than the rule. The court is the servant of the zealous advocate in gaining technical advantage. It must process his motions, hear his legal arguments and deal with his discovery.

Zealous representation guides an attorney’s communications with adversary counsel, his preparation of his client for the trial, his questioning in discovery, his choice of language in papers he files with the court, and his use of the whole Code of Civil Procedure. That Code allows for motions and discovery which are literally limitless during the five years while the case awaits trial. Parties can become pawns in the hands of more or less skillful attorney-players.

In stockholder or anti-trust actions, large law firms can literally bury an adversary with papers and motions. Such cases can lead to over a thousand paper submissions prepared by lawyers and filed with the court and more often than not, requiring responding papers from adversary counsel and judicial time to mediate.

The “shall not intentionally fail to seek” language has an absoluteness which excludes from the exercise of almost unfettered judgment, questions involving morality, psychological makeup of the parties, costs and often, common sense. Zealous advocates also tend to be pessimistic counsellors whose warnings of the possible legal complications can intimidate all but the most fearless clients. The current Code’s definition of zealous representation excludes the role of mediator, advisor, negotiator, evaluator and implementor. Zealous advocacy can frequently cause a lawyer to be a bull in the china shop in delicate familial situations and immune from considerations of justice, morality or settlement in the most routine cases.

Thus, for instance, counsel for an insurance company in an automobile accident case must make his objective the payment of nothing or as little as possible to an injured party. By merely demanding a jury, counsel places the case on a different trial waiting list which can frequently extend the wait for a trial by as much as three or four years. Invocation of jury trial, therefore, would increase the settlement leverage of an insurance company against a claimant who is in financial difficulty. Zealous representation therefore dictates the demand.

Zealous representation also favors the rich and the unscrupulous. Obviously the most money can buy the best representation in a system where procedural advantage generates substantive advantage. In a large criminal case, a lawyer can spend over $100,000 in psychological and sociological surveys to assist him in choosing a jury most advantageous to his client. Clearly, lawsuits brought out of motives like vengeance can ply zealous representation to the hilt. The zealous advocate is discouraged from judging his client’s rightness or wrongness and becomes hardened to the results of his
tactics. His duty to confidentiality of client communication discourages him from warning third parties and the court concerning the consequences of his client's misfeasance, a duty recently imposed upon psychiatrists by the California Supreme Court. Such insulation can easily produce cooperation in wrongdoing. Indeed, Watergate, an attempted subversion of American government perpetrated almost exclusively by lawyers, can be explained as zealous representation. While the current interpretations of zealous representation do sanction lawyers who do too little, what is fairly clear is that, absent provable fraud or the commission of a crime, it is hard for a lawyer to be overzealous.

**Attorney Control of Judicial Procedures.**
In the American legal system the conduct, the complexity, the speed and the cost of civil litigation is essentially controlled by the attorneys in the case. The court intervenes at the behest of counsel. The manner in which zealous representation manifests itself is through litigation tactics, most often in the Rules of Civil Procedure and the Rules of Evidence. The lawyer, faced with literally an infinite number of options, draws on his experience and knowledge to gain client advantage in pre-trial discovery, motions, trial and appeal.

The two most common forms of discovery are by deposition and interrogatory. In depositions, lawyers get an opportunity to question the parties and their witnesses under oath before court appointed transcribers. In interrogatories, adversaries can require written responses to written questions. The parties can also force extensive document exchange and even mental and physical exams. Every step in the process generates an opportunity for disputes requiring judicial supervision. Just last year, three Justices of the United States Supreme Court criticized the American Bar Association for opposing "significant and substantial reforms" to the "serious and widespread abuse of discovery" in an opinion commenting on discovery reform promulgated by the United States Supreme Court for the lower federal courts.

Independent of discovery, the lawyer has an infinite number of options — motions for extension of time, motions to shorten time, motions attacking pleadings, motions for change of venue. A complaint, for instance, can be attacked because it is too long, too short, not properly drafted, not properly served, or was filed in the wrong court. Procedural law rarely gives a clear-cut answer to any of these questions and thus, the decision to file such a motion is almost at the absolute discretion of opposing counsel.

Of course the opportunity for zealous representation at trial is well known. Many a lawyer has become rich and famous for his ability to badger the sincere witness, to sway the jury, to waylay his adversary, or to force the court into trial error. Usually at least one trial counsel is expending substantial energies to resist an accurate reconstruction of the disputed events. In addition, all of these tactics expand the record of the case and multiply the possibilities of error which can cause reversal on appeal.

**The Monopoly of the Profession.**
The society's demand for civil adjudication appears to be boundless. In 1980, civil filings in the state and federal courts numbered over 10 million. The adjudication before administrative agencies involving workmen's compensation, zoning, civil service and the like may double the number. While 90% of civil cases involve either divorce or automobile accidents, the society continues to foist new problems on the courts involving parental choice and non-marital sexual relationships. The legislatures create new rights for consumers and the disenfranchised and the Supreme Court continues to expand constitutional doctrine. But whether the parties are accident victims, husband and wife, business partners, or parties to a probate dispute, they have no alternative to representation by zealous advocates. Indeed, in many kinds of cases even settlement is impossible. The participation by a court in divorce, probate and bankruptcy, is mandatory in most states. In most other cases, the parties can voluntarily opt out of the system by settlement, only by mutual consent; a lack of consent by only one of the two zealous advocates can block settlement. Zealous advocates, who handle disputes in a manner that exacerbates them and thus increase billable hours, monopolize adjudication.

There are about 600,000 lawyers in the United States, a number that increases by about 30,000 each year. Each bills or costs his client or employer an average of $60,000 per year, about one-half of which pays for overhead such as office space and supplies, secretaries and litigation costs. Since such a small part of the bar actually practices criminal law, over 90% of the resulting bill of 30 billion dollars pays for dispute avoidance or resolution. The cost of local, county, state and federal government support of our judicial system, the cost of educating our current crop of 100,000 law students at over 150 law schools, and the cost of ancillary supporting services add another six or seven billion dollars to the bill, bringing the direct cost of dispute resolution and avoidance to about 35 billion dollars, making the legal industry larger than the American steel industry.

The inefficiency of civil litigation was recognized early on by Congress, but their solution, the administrative agency, is even more dominated by zealous advocates than the courts. A government regulatory battle that lasts for years is common place in the nation's capitol. The expenditure of government resources and fees of Washington law firms for government regulation probably exceeds 2 billion

"... the current Code of Professional Responsibility is a major cause of the inability of the society to rely upon the courts for efficiency in resolving disputes. ..."
dissipate millions spent for state and local regulation.

Indeed, United States corporations spend over 25 billion dollars on legal services, while consuming roughly 30% of the after-tax profits of all corporations. Legal fees are also spiraling. The salary of a law school graduate, at a large New York law firm, is $43,000, up more than 50% in the last three years. Of the nation’s forty-four largest law firms, forty-three expanded last year. For instance, Jones, Day, Reavis, and Pogue of Cleveland, added forty-five lawyers to its two hundred twenty-one; Finley, Kumble of New York, added an incredible one hundred and three lawyers. In May, one hundred corporate general counsels met at a Nadar conference in Washington to learn how to control the fees of outside counsel. All agreed that the norm for large firms was $150 per hour and that many overcharged. A Chicago bank reported that legal fees were increasing at three times the rate of profits.

The indirect costs of inefficient dispute resolution are incalculable but may exceed the direct costs. Every businessman who signs a contract, whether for the sale of goods or services, or a mortgage or loan agreement, or a lease or corporate charter, must understand that regardless of the legal rights and liabilities of the parties, the enforcement of those obligations must await costly litigation. Parties to legal instruments must exercise great caution about who they deal with and what they bargain for since breach cannot efficiently be remedied. The inability to enforce legal obligations requires business to insure against such risks and the frequency of frivolous claims drives the cost of that insurance even higher. Concerning enforcement of those obligations must frequently be the most serious and managed, sometimes requiring hundreds or thousands of hours of staff time to comply with the requirements of litigation. Buying off the frivolous claimant often appears to be like submitting to extortion but frequently is the most sound business decision.

Another hidden cost is the frustration of governmental objectives. Governmental decisions to sanction the actions of water polluters, anti-trust violators, perpetrators of racial discrimination and securities fraud, all pass through civil litigation where zealous advocates represent the regulators and the regulated alike. Any social reform legislation will be blunted by civil litigation. Inefficient civil litigation also requires the court to countenance plea bargaining of criminal cases because to press for trial of the 90% of criminal cases that are settled by plea would further delay the adjudication of civil cases. Thus, guilt and sentencing are dictated by factors which are irrelevant to the society’s and the defendant’s needs. In addition, 90% of civil litigants must settle which usually grants the financially strong and well-represented party with advantages which the substantive law would deny.

Finally, inefficient adjudication has human costs. The need to litigate arises from a personal catastrophe. Serious personal injury or property loss, divorce, bankruptcy, eviction and fraud, can scar a person for life. But to require the victim to keep the catastrophe present for a full four year period and to retell it numerous times, in hostile environments, multiplies the human harm. The courts have no facilities to deal with this fact, and lawyers are not trained or encouraged to empathize with client problems, explaining in part public antipathy of the bar.

The bar’s market position is enhanced by five of the nine Canons of the current Code of Professional Responsibility. The organized bar has also defended minimum fee schedules, bans on lawyer advertising and group legal services until the court ordered otherwise. This monopoly position inhibits incentive to respond to market demand for alternative dispute resolution.

Indeed, the failure of the bar to deliver basic services is no secret among the bar. Prestigious lawyers and judges have decried the inefficiency of the system for over one hundred years. Dean Pound, of Harvard, in a widely-quoted speech in 1906, attacked zealous advocacy as “a curious survival of earlier days” and “disfiguring our administration of justice at every point.” He also cited the public’s “general dislike, if not fear” of adversarial procedures. One of America’s finest judges ever, Learned Hand, admitted that as a litigant he feared a lawsuit “beyond almost anything short of sickness and death.” Judge Marvin Frankel has accused the bar of yielding ethics to gamesmanship. Professional and judicial reform have never come easy. Chief Justice Vanderbilt, of New Jersey, speaking of the difficulties of court reform in New York, advised circumventing the lawyers in appealing to a “direct popular movement of laymen.”

Professor Southard observed:

“One can scarcely imagine a speaker at a meeting of a county medical association discussing the possible elimination of some disease by public health measures, then qualifying his observance by the statement that many practitioners make a living treating the disease in question; and then unless physicians are vigilant to prevent the adoption of such measures, this source of business will be taken away from them. Yet speakers at bar association meetings are frequently heard to make similar observations about the affect of proposed reforms.

The widely recognized failure of the system has generated some reforms. Some states have enacted laws which make attorneys financially liable for filing frivolous claims. Housing courts and small claims courts have encouraged lay advocacy in procedurally simplified systems. In addition, many labor and commercial contracts opt out of adjudication by the inclusion of arbitration clauses. Some courts have established pilot projects in mediation. These arbitrators and mediators are often zealous advocates. However, the public’s desire for adjudication which should rarely last as long as two hours, in an adjudicator’s office, and whose decision would be final and immediate within six months after the source of dispute, goes unmet.

“While the current interpretations of zealous representation do sanction lawyers who do too little, what is fairly clear is that, absent provable fraud or the commission of a crime, it is hard for a lawyer to be overzealous.”
Thoughts on Reform.
John Frank’s remarks, at Berkeley Law School, in 1969 that “there is nothing that the bar is seriously ready to accept right now which will cure the state of disaster” of “the administration of the law business” is truer today than when he spoke. Perhaps one ought not expect effective self-regulation from lawyers any more than one would expect it from doctors, politicians or teachers. Nor have state legislators had a history of success in either court reform or regulation of the profession. While federal legislative power to regulate the profession exists under both the fourteenth amendment and the Commerce Clause, a regulatory agency solution appears inappropriate however, and the mere use of legislation further legalizes a legalistic problem.

However at least two legislative possibilities exist. A consumer statute on behalf of each party to a dispute against all the lawyers representing parties to that dispute requiring the lawyers to justify their tactics in light of the goal of speedy, inexpensive and just resolution of that dispute would wrench from the profession their monopoly over the conduct of litigation. Lawyers would have to justify to each litigant the use of motions and discovery and pay damages if their justifications are insufficient in light of the assumed goal of all, speedy, cheap and just resolution of that dispute. If the statute took hold and was utilized by litigants in state and federal courts, litigation habits of lawyers would change drastically and the cost of civil litigation could be cut. The result in fewer jury demands, motions to supervise discovery and motions for more specific statements would mitigate court delay. Since federal law is supreme, state supreme courts would have to reconsider their Codes of Professional Responsibility, especially the definition of zealous representation. I fear, however, the consequences of trying to cure excessive litigation with litigation. The statute would clearly require endless definition and a hostile bar would be well positioned to undermine its objectives.

Alternatively, Congress could license dispute resolution centers. Plaintiffs could choose any number of these centers to resolve their disputes. Private enterprise would surely develop dispute resolution companies which would be “friendly” or “personal” or “quick” or “cheap.” Some companies would allow the use of lawyers, others would not. Some might guarantee a resolution in accordance with law, others might not. The choice would be in the hands of the consumer. Other particular litigant needs for privacy, for remedies that are less than winner take all, or for supportive procedures could be met. The cost would vary immensely depending upon the market. Courts would continue to resolve the choice of dispute resolution center questions when the parties failed to agree on a particular forum. Legislation would also have to require state enforcement agencies to enforce the judgments of these centers. This proposal however, like most market solutions, discriminates against the poor but perhaps little more than the current system which excludes 70% of American wage earners from official dispute resolution. The savings from this proposal could, in part, subsidize access to adjudication, although the current Republican economic temperament might prefer to plow the savings into heavy industry.

Conclusion.
The court reform debate has ignored attorney practices and the justifications for those practices. However, I fear if the proposals suggested herein were subjected to serious public debate, the bar would characterize them as a regression from constitutional principles and common law tradition. Constitutional principles, however, cover criminal cases where it is clear that the framers, chastened by historical experience in the capricious or political use of the criminal process, sought to require
The inefficiency of civil litigation was recognized early on by Congress, but their solution, the administrative agency, is even more dominated by zealous advocates than the courts.

a right in the accused to a strictly adversarial proceeding before a finding of guilt and punishment. In addition, the fourth, fifth and sixth amendments to the United States Constitution guaranteeing such rights as the right to confront witnesses, the right to question search warrants, the right against self-incrimination, require a high level of adversariness as a protection of civil liberties of the defendant, and ultimately, the society. Indeed, American history is full of famous criminal trials where government wrongdoing was uncovered through strict adversarial genius.

However the expansion of criminal law adversariness into the realm of civil procedure is not required by the Constitution or any other law. Civil adjudication between non-governmental parties almost never presents similar libertarian concerns. The current fourteenth amendment cases leave the state and federal legislatures relatively free in designing civil adjudication systems.

While common law tradition left civil adjudication in the hands of zealous advocates, their barrister’s commitment to client advantage was far weaker than that of today’s American lawyer. Common law tradition does have many articulate but overstated hymns to the adversary system. Lord Broughan’s words are quoted frequently:

An advocate in the discharge of his duties knows but one person in all the world and that person is his client. To save that client by all the means and expediencies and at all the hazards and costs of other persons among them to himself, is his first and only duty; in performing his duty he must not regard with alarm, the torments, the destruction which he may bring upon others. Separating the duty of the patriot and that of the advocate he must go on reckless of the consequences though it should be his unhappy fate to invoke his country into confusion.

The current Code continues to allow the nation’s 600,000 lawyers to advocate zealously regardless of the consequences. The alternative procedures suggested would generate benefits for the American people: a reduction in the cost of many of the things they buy; a reduction in individual legal bills; trial in as little as six months for civil cases; the freeing of judicial effort for serious civil and criminal cases; a reduction in frivolous claims; a right to accessible vindication of substantive rights; and the enforcement of governmental regulations.

One would not expect great sympathy for lawyers from the public, 70% of whom cannot afford his services and the other 30% of whom generally despise his system of dispute resolution. It is doubtful that the United States could ever get along with the 1/50th as many lawyers as does Japan. The law is too much a tool for social engineering and Americans appear litigious by nature. However, if the current trends continue, “we could become a society overrun by hordes of lawyers, hungry as locusts and brigades of judges in numbers never before contemplated,” as Chief Justice Burger warned in 1977.

Since the Katuk Commission recommendation will deliver neither a commitment to client service nor efficient dispute resolution, perhaps Congress should try its hand.

One would not expect great sympathy for lawyers from the public, 70% of whom cannot afford his services and the other 30% of whom generally despise his system of dispute resolution.”
The history of life on earth has been a history of interaction between living things and their surroundings. To a large extent, the physical form and the habits of the earth's vegetation and its animal life have been molded by the environment. Considering the whole span of earthly time, the opposite effect, in which life actually modifies its surroundings, has been relatively slight. Only within the moment of time represented by the present century has one species — man — acquired significant power to alter the nature of his world.

Rachel Carson

The National Environmental Policy Act of 1969, as amended, sets forth a broad statement of policy with respect to the use and preservation of the environment. The stated purposes of the act are, in pertinent part, "to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man..." Under Title I, the act goes on to state that the continuing policy of the federal government be directed at maintaining a harmony between man and nature for the benefit of present and future generations.

Furthermore, according to the act, each generation has a responsibility "as trustee of the environment for succeeding generations." The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment. (emphasis added).

NEPA is a statement of policy. It sets forth the approach to be taken by the federal government, in conjunction with the individual states, in working toward the stated goals. There are no prohibited acts set forth, nor are there any penalties or sanctions imposed for non-compliance with the provisions of the act.

In the light of the purpose of NEPA, one may ask the question: Where does the lawyer's responsibility lie when confronted with the knowledge of a client's violation of environmental statutes or noncompliance with regulations promulgated under these statutes? More specifically, is the corporate attorney more tightly bound to his responsibility to his client than to his responsibility to society as a whole? Is the potential for harm to present and future generations of such magnitude as to override the traditional attorney-client relationship?

It is the purpose of this paper to explore this dilemma.

I. The Statutes

There are in effect a number of statutes directed at preventing environmental damage and the concomitant harm to persons, presently living and yet to be born. These statutes cover the air we breathe and the waters we fish in or sail on; how we shall protect our crops and homes from the incursions of pests; what chemicals may be introduced into the stream of commerce; how we shall dispose of wastes which are defined as hazardous; and how we shall provide for cleaning up the results of an environmental accident, present or future. Though the foregoing statutes differ as to the specific environmental considerations addressed, there exists a common thread which holds the group together. This thread consists of three major filaments:

1. Recognition of present hazards to the environment and the population at large;
2. Recognition of potential hazards to future generations;
3. The intent of the Congress to protect the population at large, primarily by preventing further contamination of the environment.

Two statutes in particular are illustrative of the far-reaching effects of federal environmental legislation. These are: The Toxic Substances Control Act (hereinafter TSCA) and The Resource Conservation and Recovery Act of 1976 (hereinafter RCRA). Enacted within ten days of each other, the two acts regulate the introduction, use, and disposal of chemical substances throughout industry; very literally from the cradle to the grave. Both have requirements for extensive record keeping, reporting, and disclosure of detailed information on materials and practices. The full title of TSCA, "An act to regulate commerce and protect human health and the environment by requiring testing and necessary use restrictions on certain chemical substances, and for..."
other purposes," and the full title of RCRA, "An act to provide technical and financial assistance for the development of management plans and facilities for the recovery of energy and other resources from discarded materials, and to regulate the management of hazardous waste," are indicative of the broad sweep these statutes are intended to have.

A. Toxic Substances Control Act (TSCA)

As expressed in section 217 of TSCA, the policy of the United States requires the development of adequate data on the health and environmental effects of chemical substances by the manufacturers; adequate authority to regulate chemicals which present unreasonable risks and to take action when there is an imminent hazard; and to assure that technology and innovation are not impaired while guarding against unreasonable risks.

Section 418 sets forth, in some detail, when testing is required, who shall be required to test, and who shall set the priorities as to which substances are to be tested first. Section 519 describes in detail the procedure required before a new chemical substance may be manufactured, or an existing chemical substance may be used for a significantly new use. This latter condition is determined by the administrator of the Environmental Protection Agency (hereinafter the Administrator). Section 820 details the information which is to be reported and the records required to be kept. One of the key provisions is the compilation of an inventory,21 by the Administrator, which will trigger section 5 for any chemical substance which is not included in the initial inventory. Furthermore, the Administrator is required to keep this inventory current.

Other sections of the act provide for regulation of chemical substances,22 actions to be taken in the event imminently hazardous materials are discovered in the stream of commerce,23 and protection of employees who give information or commence a proceeding under this act.24 Thus, it is apparent that TSCA requires substantial disclosures of information which can be damaging to a chemical manufacturing or processing company. Substantial penalties, both civil and criminal, can be assessed for engaging in prohibited acts25 which include failure or refusal to comply with the record keeping and disclosure provisions of the act.

Taken as a whole, TSCA is a highly technical and complex statute. Many of the regulations mandated have not yet to be promulgated, though the premanufacturing notification requirements are in place. The disclosure requirements are broad and the potential for litigation is high. As a result, the corporate attorney may find his or her skills as advisor and counselor severely tested.

B. Resource Conservation and Recovery Act (RCRA)

From the stated objectives of this act,27 it is clear that the intent of the Congress was to close the loop on hazardous substances and materials. TSCA is directed at controlling the introduction of hazardous and toxic substances into, as well as their course through, the stream of commerce. RCRA is directed at controlling the disposal of hazardous materials once they have outlived their commercial usefulness and are to be discarded. It is not inapt to apply the phrase, "cradle to grave," as a measure of the scope of TSCA and RCRA taken together.

The definitions of terms28 as used in RCRA, are of critical importance; especially the definitions of hazardous waste,29 and solid waste.30 These two terms are interdependent and provide the starting point for compliance with the act. The heart of RCRA is Subtitle C, Hazardous Waste Management. It is this subtitle which provides the authority to the Administrator to set the criteria for identification and listing of hazardous wastes;31 to set standards applicable to generators of hazardous waste;32 to set standards applicable to transporters of hazardous waste;33 to set standards for treatment, storage, and disposal facilities.34 In addition, Subtitle C provides for the granting and revocation of permits for treatment, storage, and disposal of hazardous waste,35 inspections,36 and substantial penalties, both civil37 and criminal,38 for non-compliance with, or knowing violation of, the provisions of the act.

An interesting feature of RCRA is the provision for the several states to institute programs which will operate in lieu of the federal program,39 provided the requirements of the state program are at least as stringent as those promulgated by the federal government.40 The act requires extensive record keeping and access to and disclosure of these records on request. These provisions are included in the sections of RCRA cited above.

RCRA is at least as complex as TSCA. In contrast to TSCA, however, highly detailed regulations are in place. The main body of these regulations, promulgated on May 19, 1980, occupies over 500 pages in the Federal Register, including the background and interpretative materials essential to even a rudimentary understanding of the regulations. In addition to the welter of detail in the regulations, there are numerous ambiguities. The detail, the ambiguities, and the steady stream of amendments to the regulations may lead to a very strong temptation on the part of the corporation to ignore, or deliberately violate the requirements set forth. It is for this reason that the corporate attorney may find himself or herself in the very uncomfortable position of having to decide whether or not to "blow the whistle," so to speak. What are the consequences the corporate attorney may encounter if such action is taken? What factors must the attorney weigh and balance before taking a step which could be professionally disastrous?

II. The Code of Professional Responsibility

The code of Professional Responsibility (hereinafter the Code) sets forth Canons of Ethics which are goals the attorney is expected to strive for in the practice of his or her profession. The Code also sets forth Disciplinary Rules which are enforceable by a variety of sanctions for violations ranging from private reprimand to disbar-
ment. Particularly pertinent in the context of this discussion are Canons 4, 5, and 7.

Canon 4 states: "A lawyer should preserve the confidences and secrets of a client." Disciplinary Rule 4-101 addresses the preservation of confidences and secrets and defines the distinction between the two terms. DR 4-101(C) (2) states: "A lawyer may reveal confidences or secrets when permitted under Disciplinary Rules or required by law or court order." (emphasis added). Thus, the protection afforded by the attorney-client privilege could be stripped away by law or court order. DR 4-101(C) (3) states: "A lawyer may reveal the intention of his client to commit a crime and the information necessary to prevent the crime." (emphasis added). Section 16(b) of TSCA describes conduct which is subject to criminal penalties. If the corporate attorney is in possession of information, obtained from his client in confidence, that violations of prohibited acts. Similarly, section 3008(d) of RCRA describes conduct which is subject to criminal penalties. If the corporate attorney is in possession of information, obtained from his client in confidence, that violations of either TSCA or RCRA are to be deliberately perpetrated, can he reveal this information?

Canon 5 states: "A lawyer should exercise independent professional judgment on behalf of a client." DR 5-101 addresses refusal of employment when the lawyer's interests may impair his independent professional judgment. DR 5-102 describes the circumstances under which a lawyer should withdraw as counsel. It appears from the text of the disciplinary rules under Canon 5 that the provisions are directed at the attorney engaged in individual, or firm practice, and not at the attorney in the direct employ of a corporation. This raises the question of whether house counsel for a corporation can exercise independent professional judgment, since his own financial and personal interests, as represented by his employment, may have a direct bearing on this judgment. J. Smyser argues very strongly that independent judgment by house counsel, on behalf of the employer-client corporation is rapidly eroding.

Canon 7 states: "A lawyer should represent a client zealously within the bounds of the law." DR 7-102 addresses representation within the bounds of the law. Particularly pertinent are:

DR 7-102 (A): In his representation of a client, a lawyer shall not:

DR 7-102 (A) (3): Conceal or knowingly fail to disclose that which is required by law to reveal.

DR 7-102 (A) (5): Knowingly make a false statement of law or fact.

DR 7-102 (A) (7): Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

III. The Attorney-Client Privilege

The rules of evidentiary privilege have the same net effect as the rules of exclusion. In both instances evidence is prevented from being introduced for consideration by the trier of fact deliberating on the merits of the causes brought before the court by the adversaries in a law suit. There is, however, a critical distinction between the rules of exclusion and the rules of privilege. This distinction is stated by McCormick:

"... the corporate attorney may find himself or herself in the very uncomfortable position of having to decide whether or not to 'blow the whistle' ..."
when either or both may be damaging to his or her client's cause.55

Who are the clients who may avail themselves of the privilege against disclosure? What are the limits of the privilege? That at one extreme the attorney will subject himself or herself to disciplinary action for disclosing information and at the other extreme he or she will be disciplined for non-disclosure?

There seems to be little, if any, doubt that the individual client, particularly the defendant in a criminal action, may use the privilege against disclosure of information given to his or her attorney. The case of People v. Belge53 illustrates this. In Belge a murder defendant disclosed additional murders to his attorney in the course of preparing a defense of insanity. Indictments of the attorney for violation of statutes dealing with decent burial of the dead and reporting the death of a person to the proper authorities were dismissed on the ground that the attorney-client relationship precluded the proper basis for charging the attorney with the offenses in question. In this instance, there appeared to be a passive involvement in the crime committed.

In contrast is In Re Ryder.54 The attorney in Ryder transferred a shotgun and money from his client's safe deposit box to his own, ostensibly for safekeeping. The client was the defendant in an armed robbery prosecution. Ryder was suspended from practice for 18 months on the grounds that he knew the weapon had been used in the course of the theft of the money and intended to prevent their use to establish his client's guilt. The court held that Ryder acted outside the scope of the privilege and became an accessory after the fact.55

Where civil actions are concerned, the privilege also applies, even to the extent that a citation for contempt will be vacated. Illustrative is In the Matter of Cal-lan.56 In this case, attorneys, representing a tenants' association which was withholding rents during a rent strike against a public housing project, did not disclose that the association intended to distribute the money to the tenants in violation of a court order not to withdraw the funds. As a result, the attorneys were held in contempt even though they had strongly counseled against the association's action. The Supreme Court of New Jersey reversed, but commented that the attorneys exercised poor judgment. In his concurring opinion, Judge Mountain concluded by stating, "I concur in the conclusion of the court that the conviction of contempt be set aside. I further state that in my opinion the conduct of the appellants was in no respect improper."57

Can the corporation avail itself of the attorney-client privilege in the same manner as the individual, natural person? It seems logical to assume that as a legal entity a corporation can sue and be sued, can be punished for its crimes, and needs legal advice of its own. These ideas, espoused by David Simon,58 are among the opening statements of an article which reviews the subject in detail, concluding that the privilege does apply to corporations. Judge Wyzanski had stated earlier, in United Shoe,59 that this privilege was to be narrowly construed. It is also well settled that a corporation does not have the same constitutional protection against self-incrimination that is provided the natural person under the fifth amendment.

In 1963, the case of Radiant Burners, Inc. v. American Gas Association60 settled the issue of attorney-client privilege as applied to corporations by reversing a lower court decision to the contrary. In 1974, Burlington Industries v. Exxon Corp.61 applied the attorney-client privilege to patent actions involving corporations, quoting Judge Wyzanski in United Shoe62 and noting that it is the control group of the corporation which must request the legal advice desired. In addition, Judge Miller applied the work product doctrine as stated in Hickman v. Taylor.63 It is noteworthy that house counsel acting as legal advisors are included as within the purview of attorney-client privilege.64 The Supreme Court, in a recent unanimous decision, extended the privilege to corporate employees below the level of the so-called control group.65 Thus, it appears that except for protection from self-incrimination, corporations are generally protected from disclosure of confidences and secrets by the attorney-client privilege to much the same extent as natural persons. How then, does the dilemma of the corporate attorney faced with a violation of TSCA, RCRA, or other environmental statute, differ from that of the lawyer for an individual client in a civil or criminal action, or the corporate attorney when the client corporation is in a similar situation?

IV. The Dimensions of the Dilemma

Prior to the recognition of the potentially far reaching harmful effects of numerous materials of commerce and the ensuing enactment of legislation directed at controlling these materials, the disclosure/non-disclosure dilemma had more manageable dimensions. It could probably be said that if, in a marginal situation, the attorney opted to strongly favor the client's protection over a possible law violation, he or she would more probably than not have had that position supported by the courts or the bar association committees on professional ethics. Flagrant (egregious) conduct, such as that described in Ryder,66 would, however, have been subject to disciplinary action. The adversarial lines were fairly clear. In a civil action the parties were individual persons, natural or corporate. In a criminal action, the defendant was usually an individual. The range of harm resulting from the exclusion of competent testimony or valid evidence was relatively narrow. In addition, an adequate remedy seemed likely to have been available, at law or in equity, to compensate the injured party.

The privilege of non-disclosure began to erode in the early to mid 1970s. The Tarasoff67 case invaded the doctor-patient privilege by holding a psychotherapist to have an obligation to warn a third party of the possibility of serious physical harm by his patient, even though the information was obtained from the patient in the course of the professional relationship between the therapist and the patient. This type of confidential information was usually subject to the doctor-patient privilege. This case seemed to say that under certain circumstances, the doctor-patient privilege would be overridden. Similarly, the National Student Marketing68 case seemed to say that an attorney who did not voluntarily disclose fraudulent information in a transaction governed by

“Can the corporation avail itself of the attorney-client privilege in the same manner as the individual, natural person?”
SEC regulations could be held liable in negligence because he had an affirmative duty to disclose the fraud. The significance of these two cases lies in the fact that disclosure was required, even though the damage was relatively limited. National Student Marketing is of interest here because of the involvement of government regulations and their apparent violation.

Consider now the potential harm that can result if a hazardous substance is introduced into the stream of commerce without compliance by the manufacturer with the pertinent statutes and regulations, is disposed of in an unauthorized manner, or is accidentally released to the environment with no attention paid to the mandated notification and clean-up procedures. A hazardous substance is defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Superfund).69 In addition to specific, descriptive language collected from several other, related acts, the Administrator has the power to designate hazardous substances, by virtue of section 102, and issue regulations accordingly. Among the properties included in the description are the potential to cause serious illness or death to persons exposed to the substance. Kepone and Agent Orange, e.g., are well identified to the lay population as substances capable of inflicting severe, wide-ranging harmful effects on humans. The kind of harm in this instance includes death, serious illness, and genetic effects which inhibit reproduction or cause severe mutations and defects in offspring. The problem is compounded by the fact that the action of many of these substances is insidious. Though the victim has been exposed to the substance, he or she is unaware of the exposure until the effects are observed. By that time, it is often too late to correct or reverse the damage.

Compliance with the appropriate statutes and the regulations promulgated under them requires extensive record keeping, disclosure of the records on request, and maintenance of the records for a prescribed period of time; frequently as long as 30 years. Simple non-compliance is subject to civil penalties. If violation is knowing or willful, criminal penalties can be assessed upon conviction. In both instances, each day of violation is considered to be a separate violation. Thus, if the corporate attorney abides by the privilege not to reveal that the corporate client has stated, in confidence, that the corporation does not intend to comply with the requirements of disclosure, permit application, or record keeping, the attorney could be assisting the client in illegal conduct. This action, or non-action, can be considered a violation of DR 7-102(A)(7) and DR 7-102(A)(3), above, and subject to disciplinary action. Even more uncomfortable for the attorney is the potential for profound conflict between his or her personal sense of ethics, morality, and public responsibility and the commitment to the client's interests. Dean Ehrlich70 alludes to this when he said, "[The] traditional relationship between client and attorney does not fit many lawyering situations today."71

An additional component of the problem is the adequacy of a remedy at law or in equity for the damage done. How can a party be adequately compensated for lingering, painful illness and death, for the loss of the ability to procreate, or the birth of a seriously defective or malformed offspring? The questions and choices are extremely difficult. Guidance from the courts in the form of decisional law is sparse to non-existent. The Code, in its present form, is not designed to come to grips with the problem.

V. Conclusion
An attempt has been made to present, in broad terms, the ethical problem faced by the modern corporate lawyer in an environmentally oriented society when the corporate client confides the intent to violate an environmental statute or regulation. There are no easy or clear answers which will provide guidance to the responsible attorney. One obvious solution is resignation from the employ of the client. This course, however, is really a circumvention of the problem rather than a solution. The client's behavior is not changed, nor is the attorney prevented from incurring the same problem at some future time in the employ of another company or by a client company, if he or she goes into private practice. Some further insight can be obtained from such commentators as Callan and David,72 Simon,73 Ehrlich,74 Smith,75 and Hoffman.76 Their articles address the various facets of this dilemma, from various points of view. One thing seems certain: Curtis' view is untenable today. Perhaps the closing paragraph of the preamble to the discussion draft of ABA Model Rules of Professional Conduct can prove helpful. This states:

In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict in a lawyer's responsibilities, including responsibilities to clients, to the legal system, to the general public, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living. The Rules of Professional Conduct prescribe terms for resolving these conflicts. Nevertheless, many of the difficult choices call for sensitive professional and moral judgment in which lawyers must be guided by the basic principles underlying the Rules of Professional Conduct.77

Notes
3. id. section 2.
4. id. section 101(a).
5. id. section 101(b).
6. id. section 101(c).
13. Note 10, supra.
14. Note 11, supra.
17. 15 U.S.C. at 2601 (b) (1), (2).
(a) Civil . . . an amount not to exceed $25,000 for each such violation. Each day, . . . shall, . . . constitute a separate violation.
(b) Criminal . . . . Any person who knowingly or willfully violates . . . . shall in addition to or in lieu of any civil penalty . . . . be subject, upon conviction, to a fine of not more than $25,000 for each day of violation,
or to imprisonment for not more than one year, or both.


27. 42 U.S.C. at 6902 — sections 1003 (3), (4), (5).


29. 42 U.S.C. at 6903(5) which states in pertinent part:
The term 'hazardous waste' means a solid waste, . . . , which . . . may
(A) cause, or significantly contribute to an increase in serious, irreversible, or
incapacitating reversible illness; or
(B) pose a substantial present or potential hazard to human health or the environ-
ment when improperly treated, stored, transported, or disposed of . . . .

30. 42 U.S.C. at 6903(27) which states in pertinent part:
The term 'solid waste' means any garbage, refuse, sludge . . . and other discarded
material, including solid, liquid, semi-solid,
or contained gaseous material . . . .


32. 42 U.S.C. at 6922.

33. 42 U.S.C. at 6923.

34. 42 U.S.C. at 6924.

35. 42 U.S.C. at 6925.

36. 42 U.S.C. at 6927.

37. 42 U.S.C. at 6928(a),(3): up to $25,000 per
day of non-compliance.

38. 42 U.S.C. at 6928 (d): up to $25,000 for
each day of violation or up to one year
in prison or both on first conviction, double
for second and subsequent convictions.


40. 42 U.S.C. at 6929.


42. DR 4-101(A): 'Confidence' refers to
information protected by the attorney-client
privilege under applicable law, and
'secret' refers to other information gained
in the professional relationship that the
client has requested be held inviolate . . . .

43. 15 U.S.C. at 2615.

44. 42 U.S.C. at 6928.

45. DR 5-101(A).

46. DR 5-102(A).

47. Nader, R. and Green, M., Verdicts on
Lawyers at Section IV (1980).

48. McCormick, Handbook of the Law of

49. Freeman, M., Lawyers' Ethics in an
Adversary System, chapters 1 and 2 (1975).

50. Curtis, The Ethics of Advocacy, 4 Stan.
L. Rev. 3 (Dec. 1951).

51. Drinker, Some Remarks on Mr. Curtis'
'The Ethics of Advocacy,' 4 Stan. L. Rev.
349 (Apr. 1952).

52. Stovall, Aspects of the Advocate's Dual


54. 381 F. 2d. 713 (4th Cir. 1967).

55. id. at 714.


57. id. at 618.

58. Simon, The Attorney-Client Privilege as
Applied to Corporations, 65 Yale L. J. 953
(1956).

59. United States v. United Shoe Machinery

60. 320 F. 2d. 314 (7th Cir. 1963).


62. Note 59, supra.

63. 329 U.S. 495 (1947).

64. Note 61, supra at 36.

65. Upjohn Co. v. United States, 49 U.S.L.W.

66. Notes 54 and 55, supra.


69. Note 12, supra.

70. Ehrlich, Lawyers and Their Public Respon-
sibilities, 46 Tenn. L. Rev. 713 (Summer
1979).

71. id. at 720.

72. Callan, J. M. and David, H., Professional
Responsibility and the Duty of Confidential-
ity: Disclosure of Client Misconduct in an
Adversary System, 29 Rutgers L. Rev.
332 (1976).

73. Note 58, supra.

74. Note 70, supra.

75. Smith, Ethical and Liability Dilemmas of
Environmental Requirements, 14 Real Prop.

76. Hoffman, On Learning of a Corporate
Client's Crime or Fraud — The Lawyer's

77. 26 Crim. L. Rep. No. 20 (BNA 1980)
Survey and Analysis Supplement.
Malpractice and the Lawyer.
A Commentary Based on and Illustrated by Reported Case Law.


Professor Kindregan’s book on legal malpractice makes plentiful use of reported case law to introduce both the student and the practicing attorney to the ramifications of incompetent or unethical conduct. It is an aspect of legal representation that dates back to the 18th century, but has often been a difficult remedy for clients to pursue. The reluctance of attorneys to bring actions against their own kind, the absence of malpractice insurance, and the vague subtleties that frequently lead an attorney to take a certain course of action have all contributed to making malpractice suits both relatively infrequent and ineffectual. Recently, however, the number of claims has increased, and it has become apparent that the legal fraternity can face from becoming too defensive.

Professor Kindregan uses cases to show when liability will be found to exist in specific areas of the law. For instance, in conveyancing, liability may be incurred when an inaccurate determination of a seller’s title is made, while in tort, it may arise from negotiating a settlement without sufficient knowledge of all the facts involved in the case. The negligence in each instance may be the result of a mistake or the careless disregard of established policy. In either case an attorney will be liable, as one must be aware of what constitutes competent representation in a particular instance. In trial situations, both civil and criminal, tactics may come into question, but courts are reluctant to penalize an attorney for using his professional judgment. The issue of competence in this setting is obscured by competing considerations reflected in the choices available to the attorney. In most cases each choice has viable reasons for its selection, and to hold one liable for making one choice over another would paralyze the attorney by making him choose not what is best, but what is safest. The book points out that there is a policy involved that is meant to protect the lawyer against spiteful claims, and to prevent lawyers from becoming too defensive.

Other areas discussed are the proof necessary to establish a claim and the defenses available to an attorney who is faced with a malpractice suit. It represents a handy checklist for those who find themselves past the point of exercising the care needed to avoid a particular situation. The final chapter sets out 42 steps which can be taken to minimize the possibility of a malpractice suit. They reflect the need to adhere to the Code of Professional Responsibility, and range from maintaining a competency in the areas in which you practice to avoiding unethical practices that involve property of the client — items explicitly detailed in the Code. The book is a valuable guide as it serves to spell out, via the use of cases, the skeleton of the Code, and applies the generalities found there to specific situations that are liable to be found in the everyday practice of law. It also provides a comprehensive list of cases and further readings in the malpractice area which may be used by those wanting to research a particular area in depth.

Family Legal Guide.


As the title indicates, this book is written for laypeople, not attorneys. It is not, however, one of the "How To" books that have flooded the market recently, purporting to enable people to circumvent the need to contact an attorney when they are confronted with a legal problem. The publisher makes it clear that the book contains practical information and is in no way "designed to eliminate the need for a lawyer," but is merely an attempt to aid the layperson in understanding his or her legal situation.

This book is in the form of an encyclopedia, A to Z format, and contains charts of each state’s court system as well as charts on each state’s position on individual legal topics. Many major topics in the encyclopedia contain articles by legal scholars which discuss a particular aspect or present an overview of the section being discussed. In the section on divorce, Suffolk professor Marc Perlin has authored an article entitled “When Divorce Looms.” It presents an overview of the area from before suit is filed to the actual courtroom procedures.

Professor Perlin’s article begins by discussing the recent trends in divorce law.
One is the advent of no-fault divorce, which has resulted in a shift from an emphasis on fault grounds to a consideration of the economic problems that accompany a divorce. Another trend is toward equality of the sexes, which is reflected in the awarding of alimony to either spouse (instead of just the wife), rehabilitative alimony rather than punitive, and custody of children going to either spouse. There are also new methods for resolving disputes, mainly mediation, in which alternatives to the traditional process are being examined. These three trends form a background to the present state of divorce law in this country.

The article goes on to discuss the steps that may be taken before filing for divorce, namely marriage counselling and voluntary or judicial separation. Once a divorce is decided upon, there are pitfalls that the average person is susceptible to and from which many of the leading cases in the field have resulted. These include the do-it-yourself divorce, which often leads to more complex and expensive litigatory proceedings down the road. People trying to save money by handling their own divorce often are lured by this device. The "quickie" divorce performed out of state presents another problem, as many times it may not be valid in the home state of the parties. The third area of concern widely seen today is the low-cost divorce, an often misleading advertising ploy that leads potential clients to believe that no matter what problems arise, only the advertised rates will apply. When complications come up, the client soon learns that the prices quoted apply only to the routine filing of papers and court appearances, not to the "extras" that have muddied what otherwise seemed to be clear waters.

From there Professor Perlin outlines the nuts and bolts of divorce law. Preliminary considerations include court orders against abuse or misuse of funds, eviction orders against one of the spouses, child custody and temporary support orders. The divorce process itself comprises the final part of the article, and it discusses the steps each party can expect once the case gets underway. The article, like the book, serves to acquaint the reader with the law, to dispel some of the myths associated with it, and to give them an idea of what their attorney will be doing in the course of his representation.

Notes

Alumni Notes

James P. Cleary III, of Haverhill, Massachusetts, was recently named Clerk-Magistrate in the Amesbury District Court. He was previously an Assistant District Attorney in Essex County.

Donald L. Connors, formerly with Tyler & Reynolds, accepted a partnership with the firm of Choate, Hall & Stewart in Boston. Mr. Connors was formerly town counsel for the town of Reading (1972–1977) and the town of Duxbury (1974–1977).

Kathryn M. Early, has been named Clerk-Magistrate in the Ipswich District Court. Early was formerly an Essex County District Attorney.

Michael J. McCormack, a former assistant attorney general in Massachusetts, was recently elected to the Boston City Council, receiving more votes than any other nonincumbent.

Robert J. Murphy, a U.S. Department of Labor trial attorney, has been chosen president-elect of the Boston chapter of the Federal Bar Association.

Paul R. Tierney was recently elected President of the Suffolk University Law School Alumni Association. He is the Register of Deeds for Suffolk County.

Faculty Notes


Professor Joseph D. Cronin published an article entitled "Women and the Draft" at 9 Massachusetts Lawyers Weekly 1329 (8/31/81).

Professor Bernard V. Keenan during the 1980-81 academic year was the recipient of the Real Property Fellowship awarded by the Graduate Legal Studies Program of Columbia University Law School. He enrolled in the J.S.D. Program and completed his year of residency at Columbia in August of 1981 receiving a Master of Laws degree. At present he is pursuing the dissertation requirements for the J.S.D. degree.

Professor Charles P. Kindregan recently spoke to the North Carolina Bar Association on legal malpractice. The revised edition of his book, Malpractice and the Lawyer, has been published by the National Practice Institute. Professor Kindregan also participated in a conference on continuing legal education at Louisiana State University Law School.

Professor Thomas F. Lambert, Jr. is presently working on the research and writing of a Primer on Misrepresentation. He has also written case comments for the ATLA Law Reporter on various aspects of tort liability and damage awards. Topics of recent speaking engagements included: "Hospital Liability for Supplying Defective Medical Devices" for the American Society of Law and Medicine in Washington, DC and "Constitutional Challenge to So-called Medical Malpractice Reforms" for the first Circuit Seminar of the ATLA in Cambridge, Massachusetts.

Associate Professor Thomas J. McMahon is serving as chairman of the Copyright Committee of the Boston Patent Law Association for 1981–1982. Professor McMahon is also teaching the International Law Course at New England School of Law for the current school year.

Associate Professor Marc G. Perlin appeared in September on "New England Today" on Channel 56 (WLVI-TV) to discuss family law issues in the 1980s. The program will be rebroadcast in January, 1981.
Professor Richard M. Perlmutter delivered an article entitled "Buyer's Remedies under the UCC: Still on Thin Ice" at the Thirty-Sixth Mississippi Law Institute in Jackson, Mississippi on December 3 and 4, 1981. His article will be published as part of the Institute materials focusing this year on Article 2 of the Uniform Commercial Code. Other speakers were Professor William Hawkland of Louisiana State University Law School, Professor Terry Calvani of Vanderbilt Law School, Professor Nathan Levy of University of Connecticut Law School, Professor Jeffrey Wittenberg of University of Mississippi Law School, and Richard Duesenberg, co-author of Bender's UCC Service.

Associate Professor Gerald Solk spoke to the Committee on Legal Education at the ABA Convention in New Orleans in the Summer of 1981 concerning the "Economics of Corporate Governance." Professor Solk also had an article on Chinese comparative law published in the Loyola of Los Angeles International and Comparative Law Annual in October, 1981.

Suffolk University Law School was one of seven law schools nationwide to host a Council of Legal Education Opportunity (CLEO) summer institute for economically and educationally disadvantaged students. Suffolk's program, which ran from June 21 to July 31, 1981 under the direction of Associate Professor Russell G. Murphy, hosted 33 graduating college seniors. The institutes are designed to give selected students a chance to acclimate themselves to the study of law and to improve their prospects for graduation and entry into the profession. Other faculty included Attorney Wayne Budd (past MBA President), Judge Roderick Ireland of Boston Juvenile Court, Suffolk Law Professors Gerard Clark and Richard Perlmutter, and Attorney Leslie S. Espinosa of Cambridge, Massachusetts.

On Founder's Day, September 19, 1981, the new facilities at 8 Ashburton Place were officially opened. The 12-story building, built originally in 1915 for the Boston City Club, was totally rehabilitated by Suffolk University, and will house the School of Management and a number of administrative and faculty departments. The college library will be moved there from its present location, freeing additional space for the Law School library.

Arthur R. Miller, Professor of Law at Harvard Law School, and host of the weekly television show "Miller's Court" gave a lecture and performance of Miller's Court on the topic of "Privacy" in Suffolk's Auditorium on October 22, 1981.

The ABA's Conference of Administrative Law Judges has designed a new program to give law students first-hand knowledge of administrative law proceedings. The Conference will encourage administrative law judges who are members of the ABA to hold actual hearings in the moot court rooms of law schools and to discuss with professors and law students the law involved in the hearings.

The first hearings under this program were conducted in August in the North Carolina Central University School of Law by Judge Glenn Robert Lawrence, Administrative Law Judge for the U.S. Department of Labor and chairman of the Special Committee created to implement this new program. Additional federal administrative law hearings are scheduled to be held in October and November at the West Virginia Law School and the Law School of the University of Chicago.

Law schools and faculty members interested in further information on participating in the program may write to Judge Lawrence at P.O. Box 19149, Washington, D.C. 20036.
Shakespeare and the Law

Jeff Baker

William Shakespeare lived from 1564 to 1616. The span of his life touched the reign of two English monarchs, Elizabeth I and James I. While the reputation of being a great writer afforded Shakespeare many liberties, he was not immune to the common law. During the course of his life, Shakespeare had many intriguing encounters with English law. As a result, he was able to draw on the wide range of his experiences to add to the wealth of characters which he has brought to life on the stage.

Shakespeare's first immediate experience with the law was through his observation of his father. It seems that John Shakespeare was a bit of a rogue, traversing the line of justice many times and setting a rather poor example for his son. At one time, John was considered a prominent citizen of Stratford-Upon-Avon, but his lack of respect for Warwickshire county law caused him to fall from grace. John Shakespeare's offenses ranged from absurd, petty infractions to far more serious breaches. On April 29, 1552, John was fined one shilling for his involvement in "keeping an unlawful dunghill on Henley Street." He appeared frequently before the Queen's Bench for breaches of the peace for which he had to pay the court a surety each time.

Later in life, a civic consciousness arose out of the elder Shakespeare. He served as town constable, juror and assessor of fines. This was short-lived, as John found himself before the court once again. In 1560, John Shakespeare had to answer to a very serious offense. His name appeared on a list of subjects who failed to attend the Church of England on a regular basis. Such an infraction subjected the miscreant to possibilities of fine, imprisonment, or both. The record does not accurately show how John Shakespeare pleaded and to what penalty, if any, he received. "Whether John Shakespeare had or had not returned to the old faith [Catholicism] and risked the consequent civil liabilities has been the subject of much debate and the matter will never be resolved with any finality." It is uncertain precisely what impression John Shakespeare left upon his son. How he shaped William's values and what effect he had on his son's writing is mere speculation. Like his father, William got off on the wrong foot. He was arrested for stealing a deer from a park in Charlecote which was owned by Sir Thomas Lucy. Legend has it that William was severely whipped and imprisoned for his larceny. In retaliation for what he considered an unusually harsh punishment, Shakespeare penned a scathing ballad which effectively ridiculed Sir Thomas. For his efforts, William was again so severely punished that he was forced to flee from Stratford. The veracity of this tale is questionable, as it was passed down by a Cotswald clergyman named Richard Davies, hardly considered a reliable source. Shakespeare further vented his anger toward Sir Thomas Lucy by creating the character of Justice Shallow, who appears in The Merry Wives Of Windsor and Henry IV, Part Two. The name of the character speaks for itself. Shakespeare portrays Justice Shallow as a doddering old fool who surrounds himself with a menagerie of crusty characters, passing the golden years reminiscing in Shallow's garden over the spirited days of frivolous youth, which, unfortunately for them, they never had. Shallow renders himself easy prey for the likes of wily John Falstaff, who befriends the ancient magistrate in order to fleece him of his ale and his money. Of Shallow, Falstaff says:

If I were sawd into quantities, I should make four dozen of such bearded hermit's staves as Master Shallow. It is a wonderful thing to see the semblable coherence of his men's spirits and his. They, by observing of him, do bear themselves like foolish justices; he, by conversing with them, is turned into a justice-like servingman.3

In 1612, Shakespeare once again found himself in the midst of a lawsuit. In Beliot v. Mountjoy, the plaintiff brought charges against the defendant for damages company in the district of Bankside, located on the southern bank of the Thames River. Once a sparsely populated area, Bankside was now blossoming into what was to become the principal theatre district of London.4 In 1595, a gentleman by the name of Francis Langley built two theatres there, The Swan and The Rose. Shakespeare teamed up with Langley to produce his plays there. This partnership was not without its complications, as the two were involved in a legal squabble the following year. Langley had antagonized a Surrey Justice of the Peace named William Gardiner, whose jurisdiction covered the theatre district. Gardiner attempted to drive all of the theatres from Bankside. On November 29, 1596, Langley, fearing bodily harm at the hands of the Justice, demanded sureties of the peace to protect himself from Gardiner. Justice Gardiner retaliated by demanding "sureties against William Shakespeare . . . and Francis Langley for fear of death."5 We do not know any further details concerning this episode. The strength of the London theatres, backed by William Shakespeare's endorsement, was rapidly becoming a moving force in the Elizabethan culture that was not to be trifled with.

In 1612, Shakespeare once again found himself in the midst of a lawsuit. In Beliot v. Mountjoy, the plaintiff brought charges against the defendant for damages...
Shakespeare was called up as Queen’s witness to give testimony. Mountjoy, a Huguenot tiremaker, told his apprentice Bellot that if he would consent to marrying his daughter, he would give the young Bellot a dowry of sixty pounds and an additional bequest of two hundred pounds when Mountjoy died. The lawsuit was removed to the Tribunal of Elders of the Huguenot Church in London. The Tribunal promptly ordered Mountjoy to pay Bellot twenty nobles. In 1620, Mountjoy died without having paid Bellot the money which the court had so ordered, and he left his daughter and son-in-law nothing in his will. The lawsuit between Bellot and Mountjoy is significant inasmuch as it enabled Shakespeare to study the Huguenot culture, a knowledge which the writer quickly put to good use in creating the magnificent and very real French characters in *Henry V*.

In many of his plays, Shakespeare raises philosophical issues of law. In order to fully understand Shakespeare’s relationship with the common law, one need only look to his literary works themselves. In *Measure For Measure*, Shakespeare addresses conflicts between the letter of the law and the spirit of the law. Angelo, a corrupt magistrate, interprets the law of Vienna in its strictest construction, as he says:

> The law hath not been dead, though it hath slept. Those many had not dar’d to do that evil If that the first that did th’edict infringe Had answer’d for his deed. Now ’tis awake, Takes note of what is done, and like a prophet Looks in a glass that shows what future evils— Either new, or by remissness new conceiv’d, And so in progress to be hatch’d and born— Are now to have no successive degrees, But ere they live, to end.  

Shakespeare presents Angelo as hypocritical magistrate, committing the same offenses for which he condemns others. It is clear that Shakespeare is an advocate of the more flexible interpretation of the laws, and opposed the foolish adherence to the exact letter of the law, which the evil Angelo adopts.

Perhaps Shakespeare’s most widely read play dealing with the question of justice is *The Merchant Of Venice*. The play grapples with complex issues concerning the formulation of a contract, the nature of justice and the need for mercy. Shylock, a Jew, has lent Antonio, a Christian, money in return for a bond which Antonio signs. Antonio states that if he should default on the payment within the allotted time, Antonio shall pay the lender a pound of his own flesh. Portia, who would soon become Antonio’s good friend, learns of the trial and disguises herself as the judge who presides over the trial. Judge Portia proves to be the hero of the play, as she quashes Shylock’s motion for justice by calling for a strict (and very clever) observance of the contractual agreement. The judge tells Shylock to take all that is rightfully his: e.g., one pound of flesh. Should he spill one drop of Antonio’s blood, however, Shylock himself will be in violation of the bond. Shylock is crushed, and afterwards, Portia shows the Jew mercy, instead of the harsh justice he clamored moments earlier. Portia gives the opinion at the end of the trial, stating that:

> The quality of mercy is not strain’d; It droppeth as the gentle rain from Heaven Upon the place beneath. It is twice blest— It blesseth him that gives and him that takes . . . It is an attribute to God himself; And Earthly power doth then show likest God’s When mercy seasons justice.  

In *King Lear*, the banished Edgar disguises himself as Tom O’Bedlams, an escaped lunatic, who adjudicates over the mock trial of Lear’s daughters which takes place in the heath. Edgar effectively confronts Lear with the guilt of his two wicked daughters Goneril and Regan, and vindicates the noble Cordelia. He also shows Lear the foolishness of his own behavior. In a soliloquy, Edgar says, “When we our betters see bearing our woes,/We scarcely think our miseries our foes.” Dressed as a madman, Edgar effectively purges Lear of his fears and his sorrows. Traditionally, the figure of Edgar, the fool who shows great reason and logic appears throughout Shakespeare’s plays. In a world where the motley fool shows great insight and perspicacity through his rhymes and reason, what is Shakespeare saying about the imposing figure dressed in robes and a wig of curls who doth profess to have great wisdom?

Shakespeare travelled regularly the highway between Stratford and London. It is believed that a rustic old constable who lived at Grendon in Buckinghamshire who periodically delayed the writer on his journey is the prototype which Shakespeare used to create Dogberry in *Much Ado About Nothing*. Dogberry comes across hilariously, suffering from a slowness in grasping the truth, and speaking with a faulty diction which is replete with broken sequences and malapropisms. In relating the details of a crime to higher authorities, Dogberry gets all worked up and confuses plaintiffs with defendants, perjury with truth and fact with fiction. He explains the sequence of events as such:

> Marry, sir, they [the prisoners] have committed false report; moreover, they have spoken untruths; secondarily, they are slanders; sixth and lastly, they have belied a lady; thirdly, they have verified unjust things; and to conclude, they are lying knaves.
In Shakespeare's last play, *The Tempest*, Prospero, the banished duke of Milan, uses the mystical powers of his servant Ariel, a blithe spirit, to summon the corrupt court of Milan to his island. Acting like a magnanimous judge, he confronts the guilty party with mistakes, purges them and then bestows mercy upon the evildoers. After this final act, Prospero vows to go into retirement, burying his staff and his books, the very objects which caused him to become a weak ruler, and allowing his wicked brother Antonio to steal Prospero’s dukedom. As it is his last play, many believe that *The Tempest* is autobiographical in nature and that the character of Prospero is based on Shakespeare himself in some ways.

Like Prospero, William Shakespeare has proven to be quite a judge: a judge of character, of human emotion, and of the law. His plays approach the complex nature of law from the tragic, the humorous and finally the serious and meditative perspective. Shakespeare applies his great wisdom to some of the issues which arise out of the complexities of constraints the legal system and this understanding is as important to us today as it was to the Elizabethans during Shakespeare’s day.

Notes
6. A tiemaker was a maker of elaborate headaddresses of silver and gold. It is believed that Queen Elizabeth herself was a customer of Mountjoy’s. The theatre did a lot of business with Mountjoy’s shop and it is through this connection that Shakespeare became acquainted with him.
8. Shakespeare actually acted as the emissary, bringing the marriage agreement from Mountjoy to Bellot.

Bibliography

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**QUOD NOTA**

*Thomas Jefferson* once said: “It is the trade of lawyers to question everything, yield nothing and talk by the hour.” In this spirit of respectful acerbity, the Editors and staff are proud to present a new addition to The Advocate. *Quod Nota* is Latin for a reporter’s note in the old books, directing attention to a point or rule. We would like to direct your attention to this compilation of quotes and anecdotes depicting, if not belaboring, the myriad of players embraced by the law.

Lawyers earn a living by the sweat of their browbeating.

—*James G. Haneker*

A verbal contract isn’t worth the paper it’s written on.

—*Samuel Goldwyn*

The sharp always employ the sharp: verily, a man may be known by his attorney.

—*Douglas Jerrold*

No poet ever interpreted nature as freely as a lawyer interprets truth.

—*Jean Giradoux*

When you have no basis for an argument, abuse the plaintiff.

—*Cicero*

Young [people] who feel drawn to the legal profession may rest assured that they will find it an opportunity for success which is probably unequalled elsewhere.

—*Louis D. Brandeis*

Norman and Marilyn White of Libertyville, Ill. are certainly not fans of the hard rock group AC-DC. The title song from the group’s recent album, “Dirty Deeds Done Dirt Cheap,” contains a lyric encouraging listeners to call a certain telephone number.

That number, by strange coincidence, is the White’s home phone number. The couple claims they have been inundated with calls, some obscene, from teenagers. They have filed suit seeking revision of the song’s lyrics and $250,000 in damages.

—*Boston Globe*
In Tulsa, Oklahoma, City Commissioners voted to reimburse police Cpt. Ret N. Berry $49 to replace his pants, damaged when he fell down a flight of stairs. Berry's report stated: "Pants torn while making intelligent, hasty retreat from suspect firing shots in my direction."

—Boston Globe

It is claimed that a lawyer submitted the following brief, quoted in its entirety:

"I really don't see any grounds for reversing this case, but as in the last case I brought to this court, I did not see any grounds for reversing, but the court found a good one. I hope it will do the same in this case."


A woman approached Calvin Coolidge at a very elaborate Capitol ball. "Mr. President," the woman said, "I just bet Mrs. Smith that I could get you to say more than two words to me." Silent Cal, expressionless, turned to her and whispered "You lose."

—22 B.U. Law Rev. 188

As governor of Massachusetts, Calvin Coolidge was approached by a legislator who complained that another legislator had told him to go to hell.

"I've looked up the law," Coolidge said. "You don't have to go."

—Boston Globe

While a Judge on the Supreme Judicial Court, Holmes found a long-winded lawyer especially trying. He advised him gravely to take a course of reading risqué books, that he might learn to say things by innuendo.

—Cong. Rec., March 25, 1959

In Denver, Colorado, a 25-year-old man entered a camera store and told the clerk: "This is a stickup. Give me all your money." Rummaging through his pockets the man stated, "I forgot my gun. I'll be right back." The forgetful robber then left the store and returned with a paper bag.

"Do you have the money yet?" he asked. "No, I don't!" the clerk replied, whereupon the robber left. He was later arrested by police.

Quite pontifically a young lawyer stated: "If your Honors please; this case involves a contract; a contract requires an offer and acceptance, consideration and a lawful object . . . ."

He got about that far when I interrupted him and stated: "Counsel, don't you think you can assume that the judges of this court know the elements of a contract?"

"Heck no," replied the lawyer, "that's the mistake I made in the lower court!"

Professor Freund recalls the occasion when Justice Holmes complimented a Solicitor General on his candor. As the gentleman began to preen himself, Justice Holmes added: "You know, candor is one of the most effective instruments of deception."

Consent Warrant: "That's when two policemen go to a house. One of them goes to the front door and knocks on it and the other one runs around to the back door and yells 'Come In.'"

—Jimmy Carter, May 4, 1974
New Statesman, Jan. 1977

Lawyer — A person who helps you get what's coming to him.

—Fountein, Wit of Wig

Doctors bury their mistakes while lawyers write theirs down and follow them as precedent.

—Anonymous

In law there is nothing certain but the expense.

—Anonymous

It was an unusually hot spring day in the large contracts class of a well known law school. The mysteries of accord and satisfaction were being fried from an apparently drowsy and none-too-responsive young man. The professor, trying to make his point by drawing out a comparison in two cases, was becoming more and more nettled at his failure to elicit the desired answers from his prey. Finally his patience snapped and he shouted, "Young man, you are wasting your time and someone else's money in law school. You will never make a lawyer. You might as well get out right now."

The culprit mumbled something in response that was only audible to his fellow students close to him.

"What did he say?" shouted the professor to the young man sitting to the student's left. No answer.

"What did he say?" shouted the professor again. This time to the student sitting on the young man's right. The response was prompt this time: "He said he didn't give a damn what you thought."

An electric shock went through the room as the professor paused and stared at the ceiling in the sudden hush. Then he said, "I take it back. He will too make a lawyer."

—29 Detroit L. Rev. 84 (1961).
Law Professor: What constitutes burglary?
Student: There must be a breaking.
Law Professor: Then if a man enters a door and takes a sovereign from your waistcoat pocket in the hall, would that be a burglary?
Student: Yes, sir, because that would break me.
—72 Law Library Journal 3, Summer, 1979

Professor: What is the rule in Shelley's case?
Student: It's the same for him as for anyone else.
—72 Law Library Journal 3, Summer, 1979

If you are ever in Titusville, Fla., you might be approached by someone who will warn you that possession of marijuana is illegal. That is exactly what Timothy Barrett was ordered to do by Judge Larry Johnston. Barrett, 19, pleaded guilty to possession of a small amount of marijuana and the Justice sentenced him to the maximum penalty of a year in jail and a $1,000 fine. However, in a change of heart, Judge Johnston opted for a less harsh penalty. He ordered the young offender to walk the streets of Titusville and inform or remind 100 people that possession of marijuana is illegal. To prove he has fulfilled this unusual and lenient sentence, Barrett must obtain a signature from each person he speaks with, and then bring the list of names to the Judge.

—Boston Globe

Abraham Lincoln was pleading two cases the same day before the same Judge and both involved the same principle of law. In the morning, he was pleading for the plaintiff and won the case in an outstanding manner. In the afternoon he took the opposite side and was arguing just as fervently and just as forcefully as to the merits of the case. The Judge stopped him and asked, "Have you changed your attitude?" "No," Lincoln said, "I may have been wrong this morning, but I know that I'm right this afternoon."


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