In This Issue:
Criminal Law Interviews
Comparative Law Revisited
Howard Kingsley came to Suffolk to teach tax law not long after I joined the faculty. I was just beginning my teaching career while Howard had already taught for many years and we quickly became friends as well as colleagues.

Our common interest in tax law was reinforced by a shared background of tax practice and a concern about the effects of the random tinkering that passes now for tax reform. Over the years I had the benefit of frequent discussions with Howard on these and other matters and his prescient insights reflected a special combination of the practical and academic. I always left our talks with both a better understanding of some part of the field and the special satisfaction that follows a good conversation.

Howard was tolerant to a fault with his junior colleague. I owe him much.

Howard Kingsley's family was the focus of his life. His two daughters graduated from Suffolk: One from the law school and the other from the management school; he watched them both with pride. Often in the late evening, I would see Howard and his wife leaving the school for the long ride to New Hampshire. To see them together was to know they had a real partnership and there was a glow about them that marks those who are special with each other. Howard was, I believe, a tower of strength to his family and he, in turn, drew much from them. That, after all, is the way it's supposed to be.

For the rest, Howard was an honest workman who plied his trade well, all to his students' good. Many of them may remember him in practice, giving Howard the teacher's true reward.

Howard shared time, work and part of the journey with us; we remember and miss him. May the Most High Providence have him in His Keeping.

The staff of The Advocate dedicate this issue to the memory of Professor G. Howard Kingsley, friend and teacher of a decade of Suffolk University Law School students.

Professor Kingsley was a graduate of Columbia University and New York Law School. An attorney and certified public accountant, Professor Kingsley dedicated his skills to teaching students the mysteries of tax law. Above all, he was respected by both students and faculty for his kindly, thoughtful and interesting scholarship, which brought his subject matter alive for hundreds of students over the last decade. His constant smile and sincere interest in students will be missed at Suffolk.
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The ADVOCATE is a publication of Suffolk University Law School. Our current circulation is 12,000 throughout the United States. The ADVOCATE is published three times a year: orientation, fall and spring issues. The orientation issue is distributed to law students only.

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

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

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

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Perspectives On the Criminal Justice System:

ADVOCATE INTERVIEW

The following interviews are a result of the efforts of the Advocate Staff to provide our readers with an insiders' view into the Criminal Justice System. Questions were prepared to cover a wide range of current issues. The persons interviewed offer their perspectives on the current problems they face in their respective positions within our criminal system. The question format was made flexible so as to tailor the interview to explore in detail the individual's position and opinions.

The opinions contained within are not necessarily those of the Advocate or Suffolk University Law School.

Editors in Chief

Judge McNaught
The Honorable John J. McNaught is a justice of the U.S. District Court in Massachusetts and teaches Evidence at Suffolk University Law School.

ADVOCATE: What do you think are the most significant problems in the criminal system as far as your particular area is concerned?

J. M.: Well let's limit it to my particular area because I am not an expert in areas of legislation, law enforcement, prosecution, of probation or parole. So I would limit myself to the particular area in which I am located. I am simply a trial judge. Problems in the area of the trial of cases or the taking of pleas and what not. You asked me what are the most significant problems. I don't know whether you mean for the system in which I am located as a whole, that is, the area in which trial judges function, or what is the most difficult problem that I face. If you mean what is the most difficult problem I face, in a criminal area—it is sentencing. As an individual I find that to be the most difficult problem facing a trial judge—determining what is an appropriate sentence to impose in the case of a person who has either been found guilty or has pleaded guilty in my court. That I find to be the most troublesome problem with which I am faced.

ADVOCATE: What do you think is the goal of the criminal justice system and how should it accomplish this?

J. M.: When we talk about criminal justice system now I assume you mean the entirety of it, legislation, enforcement, prosecution, the part played by the court itself and part played by the correction areas. I guess the goal was best stated many, many years ago by a former president, I think it was John Adams, who was also a lawyer. My recollection is that he made an argument at one time in his criminal case, in which he said the protection of the innocent was the most important goal. Detection of the guilty and the subsequent punishment and protection of society are terribly important. He made a very famous statement that he would rather see a number of guilty persons go free than one innocent person be convicted and I suppose that is the ultimate goal—protection of the innocent, but detention of the guilty and taking appropriate steps.

ADVOCATE: Recent publications have talked about the default problem in criminal cases. What is your opinion?

J. M.: I don't feel qualified to talk about the so called default problem because I haven't had to contend with it. I suppose because my sole experience as a judge has been on the Superior Court level in the Commonwealth of Massachusetts and on the trial level in Federal system. I have not found it to be a great problem. I think perhaps that is a greater problem in the courts that handle the multitude of criminal problems, such as our district and municipal court systems. I don't feel qualified to say that the default problem is one with which I am particularly concerned and I don't feel qualified to pass on the opinions others have given, so I'll beg off with respect to that question if I may.

ADVOCATE: How do you think the recent Supreme Court ruling in U.S. v. Leon the "good faith" exception will effect the criminal justice system?
J. M.: I don't think the effect will be as great as an awful lot of people think it is. I don't think it signals a great turn in any particular direction. It may be something of a step in different direction from what had been done in the past, but a lot of people say that this signals a turn in the other direction. I don't think it does. I simply don't see that it will make that great a problem. Sure it means that another issue will have to be decided, but I simply don't think that it will have a great effect on the administration of the criminal justice system.

ADVOCATE: Do you think judges today are responding to public pressure in their sentencing practice?

J. M.: Yes, although I don't think that we are conscious of that fact. The reasons I say yes, is if we take a look to the number of people who have been sentenced and the length of sentences that have been given by judges, I think that judges have become more firm in response to the attitudes of the public. I do think that judges are affected by public pressure, even though they would deny it or wouldn't recognize it. But I do think they respond to public pressure.

ADVOCATE: Do you favor the Governor's sponsor Presumptive Sentencing Bill that was before the House and Senate?

J. M.: Now, I can't answer that specifically because I am not familiar with the provisions. I have been studying the federal proposals which are somewhat similar. Do I favor any plan which will do away with disparity in sentencing? The answer is yes. I have no fear of being given sentencing guidelines. That thought doesn't bother me at all, so generally I am in favor of the concept of sentencing guidelines.

ADVOCATE: Presently the defendant can leave the room anyway and ask questions?

J. M.: Yes, he can. You know that particularly in this circuit everyone is warned that he or she is a target of a grand jury investigation and they may have counsel available and they may leave the room at any time to confer with their counsel. I think that it would complicate matters so terribly that it would slow down the grand jury system altogether. Unnecessarily in my opinion.

ADVOCATE: Do you think a single defense lawyer should represent multiple clients who are targets in criminal grand jury investigations?

J. M.: No, I do not and I think that the defense lawyer who has been offered the opportunity to represent multiple clients has an ethical problem facing him or her. They have to determine for themselves whether multiple representation may work to the detriment of the persons whom they are asked to represent. Counsel know that as well as I do. Even though counsel are aware of that problem when we get to the stage where two people enter a courtroom and want to be represented by the same
ADVOCATE: Do you think there is a tendency by prosecutors to misuse their closing arguments in the light of the large number of cases in this area? What type of controls would you propose?

J. M.: I do not personally feel that there is a tendency to abuse closing arguments. Lawyers many times become caught up in the fever of the moment and they use expressions in closing arguments that they ordinarily would not. For example, any lawyer might fall into the error of making the comment in the course of argument which is a reflection upon the failure of the defendant to take the witness stand or a lawyer might go too far and say something like, "let's send a message" and matters along those lines. I think those are a result of a lawyer becoming so intensely involved in argument that he or she forgets for the moment that limits are imposed on them. I do not think that is done deliberately. I do not think there is a tendency to abuse the closing arguments. Now don't forget that in many instances the prosecution doesn't have the right to go upstairs on abusive arguments by their opponents. There may be just as much abuse on the part of defense counsel as there is on the part of prosecutors. I think on the whole, prosecutors behave themselves very well but we notice these things because they become highlighted in the opinions that come back from court of appeals. My personal feeling is that prosecutors do not ordinarily abuse their rights in the course of closing arguments.

ADVOCATE: Do you favor new rules of criminal evidence? If yes, what particular rules would you like to see instituted?

J. M.: Now you have me at a disadvantage. Do you mean new laws of criminal evidence in the Commonwealth of Massachusetts? We have no proposed new rules of criminal evidence in the Federal system. As you know, we have our federal rules of evidence, we have rules of criminal proceeding and we have rules of civil procedures here federally. But I don't know of any proposed rules of criminal evidence.

ADVOCATE: So these must be at the state level?

J. M.: I think there may be a mistake there. Now there have been proposed rules of evidence which would apply both civilly and criminally in the Commonwealth of Massachusetts and as you know the Supreme Judicial Court has considered the adoption of those in toto and has declined to adopt them as an entire body, as of the present time. However, there have been recent cases like Commonwealth v. Elchal and Commonwealth v. Day. I guess there have been about twenty instances in which the Supreme Judicial Court and the Massachusetts Appeals Court have cited the proposed rules of evidence and indeed Rule 801 (d) to some extent has been adopted by the Supreme Judicial Court. Prior testimony before a grand jury for example was allowed in and the Supreme Judicial Court said, I believe it was in Commonwealth v. Elchal that to the extent of the factual pattern presented by that case at least, they would adopt one of the proposed rules of evidence. I do not know what is going to happen in the future in Massachusetts. I know that a great deal of study has been given to it and that they are confronted with the consideration of new problems, the Appeals Court and the Supreme Judicial Court frequently resort to looking up those proposed rules of evidence. I personally of course operate as a judge under the federal rules and the proposed Massachusetts rules of evidence are very similar to those.

ADVOCATE: If you could make one change in the criminal justice system today, what would it be?

J. M.: Oh lord, that is a terribly difficult question to answer. However, I have one area in which I have been interested for a long time, I do not expect that this change will ever take place during my lifetime or during my service at least as a judge. I am a per-
J. M.: Well of course, the impact that it has on people who would believe in the use of sentencing councils if it were practically possible. Let's assume for example that a person is going to plea before me or has been found guilty before me. I said before that in my opinion, the single most difficult thing that a judge must do is determine what an appropriate sentence is. If we have the power to be able to take two other judges and seek their advice in determining ultimately what a sentence would be, if we just had that luxury, of being able to have the advice of two other judges on this court each time I was going to impose a sentence, I think that would be a marvelous thing. Regrettably we don't have that person power, as I call it. I don't think the change will take place, but I think it would be a marvelous thing.

ADVOCATE: Do you think various federal and state legislation providing for speedy trials is working?

J. M.: Well I can only speak to the federal end of it and the answer is obviously, yes. We are not having too many problems with the speedy trial act. However, of course it creates problems on federal side of the court where our dockets necessarily suffer. I am not complaining about it, it is just a fact of judicial life — that's all.

ADVOCATE: How do you perceive the role of parole in our criminal justice system?

J. M.: Do I believe in parole? Yes I do. Not necessarily in the form in which our particular jurisdiction is using it now, but I think whenever a person enters a correctional system you can not leave them totally without hope of getting back into society at a later time. So I think there obviously is a place for parole, sort of a light at the end of the tunnel, the hope that a person must have, without which a person could become very desperate persons. I think parole is terribly important and that it be administered correctly. I believe in parole. However I would say many times there are people on parole whom I don't believe should be on parole. But those decisions are left to persons other than me and I do not consider myself any wiser than anyone else. On the whole I think parole does work.

ADVOCATE: What impact does overcrowded prison conditions have on the system and what should be done?

J. M.: Well of course, the impact that it has on the system is terribly important. Overcrowded prison conditions impact horribly on the people who are directly affected by them. Obviously this is something which should be avoided if we can possibly avoid it and yet you know it has an adverse effect on people who have been convicted and are serving time for their crimes. We know it has an adverse effect upon the people who work with them; we know it should be done away with. And yet we don't find a willingness to spend the amount of money which is going to be necessary to correct the situation and until there is a will on part of the public which can be communicated to our legislators I don't think we will ever do away with overcrowded prison conditions.

ADVOCATE: You don't see judges being more reluctant to send someone to prison because of these conditions?

J. M.: Well yes, don't misunderstand me now. When you get back to how does it affect judges, if for example someone is being detained prior to trial under conditions which I consider to be adverse to that person's right to prepare for trial, sure that may have an effect on whether I order that he be detained prior to trial. No question about it and overcrowding is one of the things we want to avoid. If a person's going to prepare for trial they should be able to do it adequately. So yes, it does have an effect upon judges. Yet it does have an effect upon the length of the term a judge will impose if the judge feels that when they send this person away that they are going to be subjected to more difficult conditions that they normally should be subjected to. Sure it has an effect on judges but the big thing is, it shouldn't exist in the first place and the effort should be in doing away with the necessity of overcoming.

ADVOCATE: I understand that they are planning on putting up a highrise prison over where Charles Street prison is located now?

J. M.: Yes, and that's a decision that's been made by Judge Laocas, Mr. Justice Laocas of the Supreme Judicial Court.

ADVOCATE: Do you see an increasing tendency to use habeas corpus petitions to obtain post conviction releases?

J. M.: I don't see any change at least since I have been a federal judge it seems to be a fairly constant supply, let's say of such cases. As a matter of fact one of the habeas corpus petitions which was drawn to me happened to have been involving a person who I sentenced as a state court judge. In terms of numbers I don't see an increasing tendency to use them perhaps that just my individual experience.

ADVOCATE: Do you think the use of civil rights actions have had much impact on police misconduct?

J. M.: I think it's too early to answer. I don't know honestly whether the use of the civil rights actions have had an impact on police misconduct. One would think that if you
employ a remedy to improve a particular evil that it would have some effect, but I really can’t answer that question. I don’t feel qualified.

ADVOCATE: Do you favor the establishment of police/civilian review boards to investigate and rule on police misconduct?

J. M.: Let me put it this way. Everytime we create a new review board we hope to avoid or lessen an evil which is in existense. I don’t know of enough evidence that convinces me that in each of the police establishments in our municipalities that we need a police/civilian review board. I simply have not been convinced that there is a need for one, for example we have how many communities in the Commonwealth of Massachusetts? 231? Cities and towns. I am not certain of that number but it’s a large number. If we conduct police/civilian review boards in all of those municipalities, I would want to be convinced of the need for it before it’s done. Many of our professions have proven themselves capable in most instances of policing themselves. The judiciary I think does a pretty good job of policing themselves the legislature polices itself. If there is a need for a review board such as a board to oversee judicial misconduct lets have one similarly. If there is a need for some review board to look over police misconduct, I would simply want to see the evidence of the need for it and then I would have no objection to it at all of course.

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ADVOCATE: What do you think are the most significant problems in the criminal justice system?

J. S.: The delay in dealing with the inventory of pending cases. This is both a major problem on the civil side of the court, as well as on the criminal side. Rule 36 was designed to compel all of us involved in the criminal justice system to bring cases to trial or dispose of them as soon as is humanly possible. However, with the proliferation of pre-trial motions it has been very difficult. That is, as I see it, a major problem. It is certainly the problem we have with our public image and the public perception about how the system works.

ADVOCATE: What do you think is the goal of the criminal justice system and how should it be achieved?

J. S.: The goal, of course, of the criminal justice system is to achieve substantial justice for the Commonwealth, for victims, and to make sure that defendants are accorded even-handed justice. We should not forget, of course, the rights of the public. We should also deal with defendants in a humane manner, but firmly when that is required.
ADVOCATE: Some recent publications have raised the issue of the default problem in criminal cases. Do you have an opinion on this?

J. S.: The default system does not worry me. I don’t know that that sort of thing is proliferating. What bothers me personally is people who have been ordered to pay fines, restitution or money reparation and who promise to do so in connection with the probation conditions, accept these conditions, and then utterly fail to perform. I understand that this is a national scandal in the federal system. Criminal defendants all over the country, after having had their cases disposed of or an order of restitution or reparation entered, are apparently failing to comply. I find in my experience that it is happening in the state courts in Massachusetts as well. I think it is going to lead judges to be extremely reluctant to order court costs, money damages, or reparation, which are, of course, granted in lieu of incarceration or other sentencing. This is a pet peeve with me.

ADVOCATE: So you believe that this development could lead to fewer suspended sentences?

J. S.: It may well. It hasn’t worked out, and in numbers these defendants are scoffing at the law.

ADVOCATE: You are not talking about failing to show up in court, that is, defaults.

J. S.: No I am not. I don’t know whether defaults are proliferating or happening more frequently than in the past.

ADVOCATE: How do you think the recent United States Supreme Court ruling in United States v. Leon will effect the criminal justice system?

J. S.: We will all have to learn to live with that. The liberals, so-called, are upset about it. The conservatives seem happy with it. Just as we all adjusted under the Warren Court, we will adjust under Leon. Under Warren we had expansion of defendant’s rights, expansion of the fourth amendment, fifth amendment, and sixth amendment, and we learned to live with it. Current Supreme Court decisions may lessen the public perception that criminals are being released by judges on the flimsiest of technicalities, whether or not this will so result.

ADVOCATE: So you don’t necessarily see the Leon decision as infringing on defendant’s rights?

J. S.: Yes, I do see it infringing on defendant’s rights, but again it is a delicate balance. We cannot forget the protection of the public. The public’s perception, widely held, that criminals are being released on technicalities and that they are not being brought to justice because of very tenuous legal technicalities is a problem. That is the public’s perception and if it changes that perception I welcome it.

ADVOCATE: Do you think judges today are responding to public pressure in their sentencing practices?

J. S.: Yes, I think so. I think the judges are very sensitive and want to respond to public pressures as to sentencing. I don’t agree with this simplistic idea that long sentences reduce the crime rate, but we must, just as the cliche goes, not only do justice but be seen to do justice. We have to listen to the public. It is important that the public feels confident that the system is working.

ADVOCATE: Do you favor a presumptive sentencing arrangement?

J. S.: I was at first opposed to it. As I understand it now, it probably will accomplish consistency among judges. That is, there won’t be what is seen as a disparity of sentences as between one judge and another. It might reduce, among criminal lawyers, forum shopping. It is probably a good idea overall, that is, that we have a range within which we must sentence or write an essay-type explanation as to why in a particular case we did not do it. It makes some sense, yes, but again I repeat, the assurance that longer sentences and swift incarceration will reduce the crime rate just does not comport with experience.

ADVOCATE: Do you agree with the reasoning behind the presumptive sentencing bill that consistency in sentencing is a better idea than forum-shopping?

J. S.: Yes, without reservation. Reasonable consistency is important. Total consistency is not always possible. Yes I do agree with that last concept.

ADVOCATE: What do you think about the role of plea bargaining in the criminal justice system? In particular is it a misuse of the system?

J. S.: Plea bargaining is not a misuse of the system. The system clearly could not operate without the plea bargaining process because all across the United States most criminal cases are disposed of by disposition apart from trial, which means, pleas of guilty. Plea bargaining leads ultimately to the guilty plea. The system would be terribly slow if most cases had to be tried to juries — it is costly, it is cumbersome — and our system simply could not accommodate more trials. We simply couldn’t do it. It is not only Massachusetts, or Pennsylvania, or New York, it is all across the country. The same problem exists in Minnesota and California. About 80 or 85% of criminal cases are disposed of apart from trial. It is absolutely necessary. There are certain guidelines, of course, which we
must follow. The judge must not actively participate in the process. In the past I would permit lawyers to confer with me in the lobby as to disposition. I don’t do that anymore. In certain cases I do see counsel at the side bar, but I do it in the courtroom and on the record. However, we can tighten up our guidelines. On the way in which we will accomplish dispositions by way of pleas and the plea bargaining attendant upon that.

ADVOCATE: I assume that you would not favor the abolition of plea bargaining?

J. S.: No I would not. I am unalterably opposed to that. I don’t see how you could do it. There has to be give and take because the district attorney must professionally take the prosecutorial stance and the defense counsel must interpose every possible reason why his man should be treated fairly. I think it is impossible for a judge to intelligently dispose of a case without some plea bargaining as between the district attorney and the defense counsel. The judge must hear all sides, including character witnesses, and any other materials which may bear on the disposition. Clearly it is up to defense counsel to induce me to be as lenient as possible when it comes to incarceration because we are taking away the most precious thing which a man owns, his freedom, and equally it is important that the district attorney on behalf of the public make sure that the defendant gets his just deserts.

ADVOCATE: Do you see substantial growth in “sting” operations in the future?

J. S.: It is so un-American, that sort of thing. Federal people have convinced us that it is necessary when we are dealing with organized crime because of the system where the so-called King Pin is protected by several echelons of soldiers (as they are called) and it is almost impossible to bring that person to justice. The so-called crime boss is a problem. On the other hand some of the recent and widely publicized cases show its weakness and its fundamental unfairness in some situations. Also, very often the undercover person, who is usually a criminal now serving as a government agent, usually has such an unsavory reputation and record of convictions that he or she does not convince juries. It involves enormous expense and it is really an un-American way to bring a felon to justice.

ADVOCATE: Do you see the sting operation as entrapment?

J. S.: I think it is very close to entrapment, although it is not technically entrapment. But it should only be used in extreme circumstances and, at least at the outset, under the supervision of the court.

ADVOCATE: What is your opinion on whether defense counsel should be present in the grand jury room, and what would his function be there?

J. S.: I don’t have any strong feelings about that. However, I think that the witness should have access to his lawyer and be permitted to interrupt his testimony at any time when he feels his constitutional rights may be involved. He should be allowed to step outside and confer with his lawyer, who can remain very close by but not actually in the grand jury room. On the other hand, I have no strong feelings as to whether or not, in certain circumstances, where the attorney would be a passive observer except as to advising his client as to his constitutional rights, he should be permitted in the grand jury room.

ADVOCATE: Do you think a single defense lawyer should represent multiple clients who are targets of a grand jury investigation?

J. S.: There are many pitfalls as you well know. Divided loyalty is one. The possibility of one client in mid-trial deciding to become a government witness or to create a Burton problem is acute. When a co-defendant testifies or confesses, or has his confession read in court during trial, and the confession incriminates the co-defendant, all sorts of problems exist. It places on the earnest attorney the burden of divided loyalty. The possibility of divided loyalty among his clients should be of concern. Thus multiple representation should be discouraged, and if it is permitted it should be permitted in a way that it is done now. We make judgments on it, by making the client aware of all the pitfalls, practical and legal, when one attorney represents more than one defendant. If, however, the client understands and accepts all those pitfalls and legal problems and practical problems after they are brought to his attention, and he still insists that the one attorney should represent him, then of course in those circumstances it is all right. But it should not be encouraged.

ADVOCATE: Do you think the present system of providing defense counsel for indigents will substantially kill private practice in criminal law?

J. S.: It will have some significant effect on it, but to use your term, it would not “kill” it. It certainly, even up to this point, has affected the criminal bar. Obviously it is very convenient for a person of modest means to convince the probation officer that he is indigent in the sense that he can have private counsel appointed to represent him at public expense. This is a very peremptory examination by the probation officer. It is burdensome. The officer must
make a decision as to indigency based not on a lot of information, and the judge usually must rely on the suggestion of the probation officer that the man is indigent. I suppose there are people who are cheating. It does have an effect. What the long range effect will be I don’t know. I know that most of the public paid defense lawyers who have specialized for four or five years provide excellent representation.

ADVOCATE: Do you think there is a tendency by prosecutors to misuse their closing arguments in light of the large number of reported cases in this area? What types of controls would you propose?

J. S.: There were a number of cases a few years ago. I’ve got a copy of an article in one of my notebooks dealing with criticism of prosecutors and I know that some cases were reversed because of highly inflammatory arguments. I think that most of the experienced criminal trial bar are aware of these decisions. I think they probably have modified their conduct. You don’t seem to get the extremely inflammatory, passionate, Victorian oratory that you used to get twenty years ago. I think that the intent of the appellate courts, as expressed in their opinions, to have the prosecutor modify their arguments has had some effect. I don’t think we are getting as many unfair arguments as we used to get.

ADVOCATE: Do you think that we should adopt the proposed rules of criminal evidence?

J. S.: I agree with the Supreme Court. I do not think those rules are necessary. I think adopting new rules of evidence for criminal cases would produce hundreds of appellate decisions. I do not think it is necessary. We do have a good body of evidentiary rules, case law and statutes. It can be improved and we can adopt some of the evidence rules piecemeal. When we think it is necessary to treat a particular problem we can do it. As far as accepting the whole body of proposed evidentiary law, I do not think it is necessary and I think the Supreme Court of this state has spoken and I agree with the court.

ADVOCATE: If you could make one change in the criminal justice system today, what would it be?

J. S.: I would eliminate the grand jury. I think it is an historical anachronism. Many states, including the federal prosecutor’s office in the District of Columbia handle these matters largely by way of information. The interviewing district attorney signs the indictment or information, and he is ultimately responsible to make sure that the accusation is ultimately supported by every element necessary to constitute the crime. It is an enormous waste of time of the citizens, prosecutors and supporting personnel for what I am convinced is no longer needed. I think we could do it much more efficiently, and much more less expensively, by way of an information system.

ADVOCATE: Do you think various federal and state legislation providing for speedy trials is working?

J. S.: Yes. It doesn’t have any overnight or dramatic effect but it is working, and ultimately will work and will get all of us to cooperate — prosecutors, defense counsel, and trial judges. Especially the criminal assignment session judges. I think the time can be reduced and the law mandates it of course.

ADVOCATE: How do you perceive the role of parole in our criminal justice system?

J. S.: I would not eliminate it. I would not expand it. The criticism I have is that there is too much power in the parole board to parole people, and I think that should be seriously considered. Perhaps it has changed. The parole board has enormous power, and in many instances of which I am personally aware and have been involved, I disagree sharply with them. So that should be looked into.

ADVOCATE: How do you suggest that the power of parole boards be curtailed?

J. S.: Perhaps by a report to the judge who sat on the trial, or disposed of the plea, for his approval or participation. There was some suggestion during Governor King’s administration that the parole board should be dissolved and another system be put in place. I don’t know what that system would be. I am not familiar with the details. I do know it is an area which should be studied and is right for significant reform.

ADVOCATE: What impact do overcrowded prison conditions have on the system?

J. S.: It has a profound effect on the system because these people whom judges feel must be incarcerated run into a problem where we are being asked to shorten our sentences because if we did so that would, even in a matter of months, result in more space, more beds. Most of the institutions, as you well know, and most laymen know because of the ongoing recent publicity, with judges visiting them and condemning them, and ordering that prisoners be sent elsewhere, looking around for suitable sites for building prisons, rehabilitating old hospitals and other public buildings no longer in use — there is a dire need for more adequate and humane conditions in these places of incarceration. It has to have a profound effect on the whole criminal justice system and it has. I think it will get
worse before it gets better. The average layman's response is that we are only coddling criminals. Judges especially are accused of coddling criminals. There is also the old and strongly held opinion that incarcerating people for longer periods of time will reduce the crime rate. Social scientists tell us that it will not, and I believe that it will not, but in certain circumstances, as a last resort perhaps because we don't know what else to do with the individual or because he is potentially violent, and the public needs protection, these types of offenders must be incarcerated, and if we incarcerate them we have to provide adequate facilities so that the incarceration doesn't involve a violation of the prisoners' constitutional rights, which constitutes cruel and unusual punishment.

ADVOCATE: Do you feel that sentences are sometimes of less duration because of this problem?

J. S.: I think if we are dealing with an offender who must be incarcerated and is a repeat offender, but he is not perceived to be terribly violent, and the sentence involves no more than a year, then I think if one were asked by correction people (and when I was in the district attorney's office we were in fact asked) to shave off a couple of months and sentence him to 8 months instead of a year, I think the answer is yes. But when it comes to hardened, hard-core criminals, with a long record, repetitive criminal offenses involving violence, armed robbery for example, then I think it makes little difference. A judge will sentence that type of person to the number of years he feels is just, and without any real consideration as to the availability of accommodations.

ADVOCATE: Do you see an increasing tendency to use habeas corpus petitions to obtain post-conviction release?

J. S.: Yes. I see a slight increase in that sort of thing, in other words, habeas corpus petitions to the federal courts.

ADVOCATE: Do you have any opinion on this?

J. S.: I really do not. In some circumstances perhaps it is, in the opinion of experienced criminal lawyers, the proper remedy after they have exhausted the state remedies. In some cases it is a waste of time because there is not any significant constitutional, or if you want, purely federal question, apart from that which was dealt with by the state court. But there is a tendency to file such petitions, since we are the most litigious society in the world. We litigate in multiple courts.

ADVOCATE: Do you think the use of civil rights actions has had an impact on police misconduct?

J. S.: I do not know. Hopefully it has, but I really do not know. I have no way of knowing and therefore my opinion would be worthless.

ADVOCATE: Do you favor the establishment of police-civilian review boards to investigate and rule on police misconduct?

J. S.: Yes I do. I have changed my mind on this. Ten years ago my opinion was that policemen were policemen. I thought that when they misbehaved professionally they should be judged by their peers, by their superiors, sargent and captains. I thought that perhaps there should be representation on these administrative disciplinary boards by some patrolmen. What I think now, because of so many instances of cover-up, such as those uncovered in New York, and also because of widespread police misconduct, failing to enforce the gambling laws, etc., is that it occasionally needs the intervention of some member of the public so that the board is balanced and you do not get involved in cover-up situations. Because there is a certain comradeship among the police, the boards are sometimes effected, which unfortunately sometimes leads to cover-ups. Therefore, having changed my mind on this, I do feel that proper and very carefully chosen members of the community should serve on police review boards.

I would hope that we would choose outstanding members of the community, from the professions, from the business community, and that they would be people who are sincerely interested in their city. These are people who have time to invest in civic pride and who would find the time to serve, not particularly to punish police officers but to help other members of the board balance their decisions and give these officers the benefit of their advice and perspective. It would bring more objectivity to the disciplinary board. The nuts and bolts of how they should be chosen, I do not know, except that whatever system is worked out we should go after the outstanding members of the profession and the business community.
Fred W. Riley, Chief, Criminal Bureau:
Department of the Attorney General

As Chief of the Criminal Bureau, I obviously operate that Bureau. Our function is to prosecute crimes and we have the same jurisdiction as the District Attorneys. We don’t have the same mission, however; in the Attorney General’s Office, we do not generally handle street crime cases developed by the police, so we have the luxury of targeting types of crime. For example, we handle organized crime, political corruption, hazardous waste and white collar crime. We have specific reasons for targeting those types of crimes. Our mission also differs in that we represent the Commonwealth in every Sexually Dangerous Petition throughout the whole state. We represent the Commonwealth on all federal habeas, which is when the prisoners challenge their convictions in Federal Court on Constitutional grounds. We do the state habeas. We represent many Commonwealth officials on petitions under Chapter 211, §3 in the Supreme Judicial Court under their supervisory powers. We also prosecute virtually every tax crime in the Commonwealth. All Welfare fraud is funneled through this Bureau, as are virtually all hazardous waste investigations from the Department of Environmental Quality Engineering, so in that sense, our mission does differ. We also prosecute all cases under Chapter 151A which is the Employment Security Act. We have the only self-contained prosecutorial unit on any governmental level, including the federal unit, in that we do our own investigations.

My personal duties involve supervising a staff of approximately fifty (50) people, about twenty (20) of those are lawyers and the others are investigators from the State Police, Boston Police, M.D.C. Police, our own civilian investigators and secretarial help. We are completely equipped with electronic gear, photographic gear, dark room, and so forth. We present our own cases to the Grand Jury, try our own cases, and handle our own cases on appeal all the way to the Supreme Court of the United States.

ADVOCATE: So, in that respect, it’s almost like a firm.
F.W.R.: It is a firm within a firm. We are one of five Bureaus, the other four being the Public Protection Bureau, the Government Bureau, the Medicaid Fraud Control Unit and the Civil Bureau.

ADVOCATE: Today, we would like to discuss problems in the Criminal Justice System in Massachusetts. What sort of problems does this office encounter in the course of its operation?

F.W.R.: It’s difficult to say that we run into problems. Attorney General Bellotti, because of his position, and his authority, does not have perhaps some of the problems that would make a District Attorney’s life a little bit uncomfortable or anxious. We usually, for example, get the Grand Jury time that we need, when we need it, because we use the Grand Juries of the various District Attorney’s counties. If we really want to move a case to trial, we could move it to trial upon request. Generally speaking, they accommodate us because we do have statewide jurisdiction and because of our logistical problems. People many times go out of their way to help us. So therefore, I don’t think that we have any glaring problems that would amount to a complaint.

ADVOCATE: Let me ask you something about case evidence, particularly this office. There’s the question about whether you see a substantial growth in “Sting” operations or have they hit their peak, have they bottomed out, and do you think it’s a tool that the Attorney General’s Office will use more?
F.W.R.: We have, in the past, used so-called “Sting” operations. And by that, let me try to define it a little bit to see if we’re talking about the same thing. It always kind of eludes definition for me. When I think of a “Sting” operation, I think of an illegal enterprise that law enforcement gets intelligence about and law enforcement then takes affirmative steps to integrate itself into that illegal enterprise
and pretend to become a part of it so that it may gather evidence and present it to a Grand Jury and prosecute. That's what I would call a "Sting" operation.

ADVOCATE: Does your investigative staff carry on this type of operation?

F.W.R.: We do. We have engaged in so-called "Sting" operations. We have engaged, to my memory, as far back as the federal government's Operation Lobster, which was a "Sting" operation involving truck hijackings. We set up a warehouse, cameras were installed in the warehouse and bought hijacked goods from those who did the hijacking. It was an extremely successful operation with dozens of people being indicted and it has been given credit with nearly eradicating organized truck hijackers within the Commonwealth of Massachusetts. We have engaged in a number of "Sting" operations, if that's what you want to call it, in political corruption cases, for example with tax violations, bribery situations. In addition, we have conducted them in traditional areas, for example, organized luxury auto theft rings.

ADVOCATE: Have you ever run into any evidentiary problems with what you gather in your information gathering process?

F.W.R.: Generally, what you'll run into in "Sting" cases is the entrapment defense. As you know, the law on entrapment is court created. It began in the federal courts where I think it has two aspects. I don't think the second aspect has been developed by our state courts. The two aspects are the pre-disposition of the defendant, that is, is the government leading him into a crime? The second is the conduct of the law enforcement personnel which is also part of the entrapment defense. The former we have adopted in the Commonwealth, the latter seems to be developing. So, when you get into "Sting" operations, I think that's perhaps essentially the defense you run into. I think now, with the MBTA cases that we have before the court, the so-called "MBTA Larceny" cases, the use of electronic surveillance equipment and its use by law enforcement personnel has become the subject of pre-trial motions by defense counsel. I think the entrapment defense is probably the most predominant part of these motions, but in every "Sting" case I remember handling, I think we have been successful in surmounting whatever defenses have been raised. Maybe that's because in Frank Bellotti's office we are very careful, we're extremely careful. That's because so many of us in the office have been defense counsel, starting with Frank himself and including me. We first establish that a

criminal enterprise is, in fact, taking place through investigation and never become part of it or attempt to infiltrate that enterprise until we're sure that it is, in fact, happening and then investigators are always cautioned by the prosecutors and taught entrapment law prior to becoming part of the operation. So, we've been very successful and had very little, if any, setbacks.

ADVOCATE: You mentioned that you handle the federal and state habeas corpus proceedings. Do you see an increasing tendency to use habeas corpus petitions to obtain post-conviction releases?

F.W.R.: Oh, I think there has been an increase, no question. The numbers I can't give you offhand, but in both federal and state habeas I think there has definitely been an increase.

ADVOCATE: Do you think it's an abuse?

F.W.R.: It would be presumptuous of me to answer that question. What might be an abuse to me might be a very real right. There have been studies, as you know, on the national level and there has been exposure on the national level by the electronic media recently in which they suggested that it's become an abuse. Some courts have called it an abuse. And, of course, we have frequently attempted in the federal and state appellate courts to throw out cases you and I might identify as abuses. Still, I just hesitate to call increased use of the writ an abuse. I'm certain, as far as percentages go, there has to be some percentage, even if it's very small, of abuse. Just what that is, I can't really say without an extended study of the cases.

ADVOCATE: Is there a typical hypothetical situation that this office encounters with it's habeas corpus proceedings?

F.W.R.: Federal or state?

ADVOCATE: Say, state, we'll stick with Massachusetts.

F.W.R.: State usually involves the implementation of the Rules and Regulations of the Department of Corrections, involving many times the good time credits, for example. It's on a narrow basis, unlike the federal habeas which challenge the convictions and constitutionality of the convictions on a much broader basis. Because you have the panoply of the constitutional rights that they say were abridged, it's difficult, to create a typical situation. The Prisoner Rights cases, from a generic point of view, we have obviously been very involved with. As a matter of fact, approximately a month ago one of our Assistant Attorneys General, Martin Levin, argued a case before the Supreme Court of the United States on a Prisoner Rights case and next month another Assistant Attorney General is arguing a second Supreme Court Prisoner Rights case, so from a generic point of view, those cases occupy some of our resources as well as the attention of the highest court of the land.
ADVOCATE: Now that you've been talking about Prisoner Rights, what impact does overcrowded prison conditions have on the system in Massachusetts and in particular how does it affect this office?

F.W.R.: The over-crowding affects this office. That's really two questions. Does it affect the Criminal Justice System and does it affect this office? It affects this office very much so because we represent the Commonwealth. We are a party to and involved in recent litigation involving the Order of Judge Liacos on the Charles Street Jail. Heavily involved in that. We are involved in many of those issues that generally are handled by our Government Bureau. As to the over-crowding affecting the Criminal Justice System, that's a little bit more difficult to answer. The Department of Corrections has done an excellent job in keeping things in order. There have been no serious outbreaks in the Commonwealth of Massachusetts for years. I think that's a credit to them, a great credit to them. As it relates to other parts of the system, for example a Judge's sentencing, does he take into consideration that there are no beds in a particular institution?

ADVOCATE: That's another question, how do you think it affects sentencing?

F.W.R.: That's difficult to say. You would have to go to each and every Judge and ask him that question and he would have to answer that honestly. I don't hear talk among the Judiciary that it affects their sentencing at all. Now that's from my personal observation, my personal experience, I don't hear any of that talk. If a particular Judge takes that into consideration, I'm unable to answer that question. Beds in the system are needed, there's no question, especially with mandatory legislation and if the Governor's Presumptive Sentencing becomes law, I think you're going to need extra beds. The increase in litigation would be the third reason you need extra beds. How badly does it affect the system, I suppose you would need an empirical study of that and I wouldn't even know how you could do that.

ADVOCATE: What's your view on the roll of prisons being used in Massachusetts?

F.W.R.: The roll of the prisons could be playing in Massachusetts — I think your question implies, one or perhaps two of the reasons for sentencing — deterrence and rehabilitation. As you know, under the old, what was called the "Pennsylvania system", when a defendant was sentenced, the sentence was meted out purely as a punishment. As our system evolved, it evolved into what was called the "Auburn system" which took into con-

sideration three things when you sentence a defendant: number one, punishment; number two, deterrence; number three, rehabilitation. In my opinion, I don't think rehabilitation has been successful to any large degree. I don't know of many people who would dispute that, maybe a few would who operate programs, but to any large degree I don't think rehabilitation has worked. As to deterrence, deterrence has not worked within a large group of the criminal element. The more violent crimes tend not to be able to be deterred by a sentence, for example, murder, armed robbery, kidnapping, rape, those types of crimes. There are a small number of crimes, a small percentage of criminal defendants whose sentences can have a deterrent effect upon others of a like nature. Those are the types of crimes we focus on in the Attorney General's office. For example, in the tax prosecutions that we do. I think there's a deterrent that can be created and we've worked very hard in the type of prosecution program here to create that deterrent by acting as tax prosecutors and not as tax collectors. Since we are an industrial/technological state, any embezzlement, larceny and so forth that happens within the High-Tech industry affects our ability to compete with states that produce the same goods. So, we have targeted those crimes and we believe they are susceptible to deterrent. The bookkeeper at a major electronics facility, for example may be embezzling. We think hazardous waste, which is a particularly pernicious gender of crime, mainly in many cases because of its carcinogenic ramifications, we think that that's susceptible, to a degree to deterrence. But those, I think, are the minority of cases. When you think of the Criminal Justice System, you think of violent crime and allied crimes, for example, narcotics, burglaries and B & Es. I don't think they're very susceptible to deterrent.

ADVOCATE: Do you think plea bargaining system that's now in use in Massachusetts courts adds to that lack of deterrence factor in those kinds of crimes?

F.W.R.: No. My experience with the plea bargaining system, having been an Assistant District Attorney in Boston and this position, has been, and this is my own personal experience, and my own personal observation and also as having defended cases for five years, that the plea bargaining system is not misused. My experience is that defense counsel and prosecutors, by and large, operate very fairly and thoughtfully. Now that's truer in the Superior Court obviously than it is in the District Court. In the
District Court the cases turn over at a much more rapid rate. In the Superior Court you’ve got time to pull back and see exactly where you are. Factors do change from investigation to indictment to prosecution. Things are always changing and happening within a case within the system.

ADVOCATE: What kind of factors are you talking about?

F.W.R.: Well, for example, if you lost a witness. If a witness moved to California and there was an economic reason to balance against the severity of the crime, for example, it wasn’t very severe and it would cost $4,000 to transport that witness and house that witness for a trial and you’re talking about a larceny and not a serious larceny, obviously those factors change. So, the prosecutors take that into consideration. I mean, you may learn something more about the defendant, some mitigating factor that would mitigate his behavior. Generally speaking, I’m not talking about the merits of the case. For example, this Office has a very firm philosophy that we do not present to a Grand Jury unless we’re ready to try the next day, I mean literally try the next day. But things do change. By and large plea negotiations have been fair, open and honest and in addition to that, from a practical point of view the system could never handle the amount of cases that it handles if each and every one of them or a vast majority or even a majority of them went to trial. We just don’t have the resources to handle them, so the plea bargaining process I think has gotten a bad rap over the years, from my own personal experience and that’s from both ends of the spectrum both as a defense lawyer and as a prosecutor. I see it as a very fair system and a well-run system.

ADVOCATE: You mentioned the Presumptive Sentencing Bill. Are you in favor of it?

F.W.R.: Attorney General Bellotti really hasn’t taken a position on the Bill. I think there is a need, in certain cases, in certain courts, for stiffer sentences. However, I also believe that the judges should be given a lot of discretion on the parameters of sentencing. I say that because the crime itself is not the only thing the judge has to take into consideration. Most of the time, when this Office enters into a disposition on a plea not agreed upon, we do not force defense counsel to agree with us and walk into a court agreeing. We like defense counsel to be given the freedom to be able to make their appeal to the court on disposition and the reason for this is that we feel that there’s a lot a defense attorney knows and can provide the court in terms of information on the defendant. The prosecutor, a lot of times, knows more about the crime and less about the defendant. So that we feel that the court should have that information prior to sentencing. Therefore, it’s not only the crime itself that should be taken into consideration but the person and the circumstances that have brought him before the court. So, I’m not sure that Presumptive Sentencing, and this is my own personal view, would address the problem. I think that it may put more of a constraint upon the personal philosophy of a certain judge who may not be as strong a sentencer as you would like. In that case it may help, but I’m not sure that across the board application would be a good thing for the system. But Attorney General Bellotti has no position on this regulation, that’s just my own personal feeling.

ADVOCATE: You mentioned previously that you spend some time before Grand Juries. As a prosecutor, do you think a single defense lawyer should represent multiple clients who are targets in a Criminal Grand Jury investigation?

F.W.R.: I don’t have a problem with multiple representation, per se. If we do have a problem with it, we can always go to a court by way of motion because, as you know, the Grand Jury is an arm of the court and we go to a Superior Court Judge, which we have done on occasion, and tell the judge that we think there is a problem here with multiple representation, and let the court inquire and make a ruling. If we have our reasons, obviously, we would make it part of the motion. Of course this comes about mainly when you are before an investigatory Grand Jury, not accusatory. When it’s investigatory, the multiple representation does not allow the prosecutor and, we feel, the witness, whether he be a target or non-target, the mobility to deal with the government and becoming a witness in a particular case. One attorney, for example, representing four people, each of whom has a different part in the crime, can hold that group together. Our job in an adversarial system is to break up that group and get at what happened if the criminal laws were violated. To do that sometimes, many times, you need witnesses who are participants or have knowledge of, whether it be a percipient witness or just a knowledgeable witness. If we find that out and we know that a lawyer represents a target or a non-target witness, or a participant and a non-participant in the criminal action, then obviously we would like to be free to develop that particular witness. So that, yes, it would be a problem for us. It is not a problem that we have not been able to solve by going to the court and it has
not been a problem, to my experience, that has prevented us at any time that I can remember, from doing our job. Under the recent statute, defense counsel who comes into the grand jury room is not an adversarial role, but merely acts as an observer. He’s an advisor, but, as you know, can’t object to anything happening in the Grand Jury. I think the statute works. It has been handled very well by the defense bar, prosecutors and the court. There have almost been no problems with the statute that I have experienced.

ADVOCATE: Do you think a Grand Jury witness should have the right to counsel in the Grand Jury room?

F.W.R.: The federal system differs from the Massachusetts system in that the witness must ask for leave to consult with his attorney outside the room. Unlike the federal system, our practice is to permit defense counsel in the room and our practice is not a problem. And if it ever becomes a problem, because the Grand Jury is an arm of the Superior Court, you go to the First Criminal Session and inform the judge and the judge will preside over it and solve the problem. It’s never been a problem with us. Maybe the feds should adopt our system.

ADVOCATE: Do you think that the present system of providing defense counsel for indigents will substantially kill or substantially adversely affect the private criminal practice?

F.W.R.: Of course you have two facets of the problem. You have the Office of Public Defenders and you have the private bar that is appointed individually by the courts. The private practitioner, many times obviously, is the recipient of that court appointment. So, in that sense, I suppose it helps the practice although the pay isn’t very great. And, certainly, people have the right to be represented in critical stages in the proceedings against them. I think that’s well-understood now and well-accepted. It certainly is by myself personally and by most prosecutors that I ever talked to about it. I think, however, that in certain courts, with certain judges and certain probation officers, that they do not take the care in determining whether or not someone is really indigent under the standards of the law that they should. That part of the system I am critical of. I think in the majority of cases, and this is purely a personal feeling, that it’s applied well. But, I think there’s enough of the minority of cases where it is not applied well, that it does have an adverse effect on the private practitioner. And I’ll leave it at that.

ADVOCATE: Do you deal with any police misconduct problems?

F.W.R.: Yes, we do. Do you favor the establishment of police and civilian review boards to investigate and rule on police misconduct?

F.W.R.: Again, I think that’s really a political and not a legal question. My personal view of it is that we’re always looking for solutions by appointing boards and commissions and committees. Very rarely are those the solutions. It might be a solution for the short term because it’s in the public mind, it’s receiving publicity, but as soon as that dies, in the long term, I think, their function dies with it. I think the only solution to these problems of social behavior which amounts to criminal conduct or social misbehavior which amounts to criminal conduct are the other institutions that have been failing us and that is, for example, the family. The increase in two parent occupations, the increase in divorces contribute. The real solution to these problems whether it be some violent behavior on the part of a policeman or any other criminal conduct, is never going to be solved by a commission or a committee but by those traditional institutions that have started breaking down in society. Incidentally, I feel that same way personally about the narcotics problem. I don’t think that the solution to our problem is through legislation and bills and mandatory sentences and more investigations, more police and more prosecutors. It’s more of a problem society has with it’s institutions.

ADVOCATE: One last question, which is pretty topical and has to do with police: What do you think of the Supreme Court’s good faith exception in U.S. v. Leon? How will that affect criminal justice?

F.W.R.: You know the Osborne Shepard case, which was decided the same day as Leon, was a Massachusetts case that was argued by a member of my staff, so obviously we believe in it very much. I think the decision is a good decision. I think it makes the distinction between a member of the Criminal Justice System making a mistake and distinguishing that from the original purpose of the exclusionary rule which was to deter certain behavior by the police. Obviously, if the police don’t perpetrate that kind of behavior, why would you want to deter it? I think that case, which Barbara Smith of this Bureau argued and won, recognizes the reality of that situation and the distinction. So, obviously, we are very happy with it. When you look at New Jersey v. T.L.O., a search and seizure of a student’s purse and although the Fourth Amendment protects the student, the school authorities do not need probable cause nor do they need a warrant, all they need is reasonable suspicion if a school rule
or criminal law has been breached, but also look at *U.S. v. Hensley*; you see the investigatory stops now on reasonable suspicion not amounting to probable cause. So, I think that the pendulum is swinging back. I am a firm believer in the exclusionary rule, that it should be there, that it is a prophylactic device and a valid one. However I feel that it should swing back more in line with the reality of the limitations it places on the Criminal Justice System, as I think these decisions are doing. But I should never hope that the exclusionary rule itself and the privacy rights that it guarantees would ever be abrogated. None of us want to see that, even many prosecutors, myself included, and I know Attorney General Bellotti holds that view very strongly.

Walter B. Murphy, Esq.

Walter B. Murphy, Esq. is the Assistant Commissioner of Probation in Boston, Massachusetts. He was a Boston Police officer before attending Suffolk University Law School from which he graduated in 1964. He was a special law student of Harvard in 1965. He has written numerous articles on criminal law and served on three criminal justice panels in Massachusetts.

**ADVOCATE:** What do you think are the most significant problems in the criminal system as far as your particular area is concerned?

**W. M.:** Well the particular area that I am dealing with quite a bit is the Interstate Compact; the transferring of probationers from one state to the other. We deal with all of the 50 states plus Guam, Puerto Rico, and people in the Virgin Islands. There is a constant flow of probationers and parolees being transferred from one state to another and the system has been in existence since the 1930's and has worked very effectively. But going to your question, the most significant problem in the criminal system I see is a lack of funds to go after probation and parole violators that are transferred we'll say, into our state from California. They violate the terms of the probation, or they commit another crime in this state, and there is a lack of funds in other states to come into Massachusetts to arrest, apprehend, and bring them back because they have signed agreements to return. It goes the same way when our probationers are transferred to another state and we receive a notice that they have violated their terms of probation. Basically we don't seem to have the funds. The way it usually works is that if someone commits a horrendous crime we go after them. This is usually paid out of the funds from the District Attorney's Office. There is the Interstate Compact dealing with probationers which I deal with, both adult and juveniles. In that area we probably have approximately 1500 people that have either been transferred into Massachusetts from other states or are Massachusetts citizens that have committed a crime in another state. In other words half my caseload might be Massachusetts defendants who are living out-of-state and the other half might be people who have committed crimes in another state and are now coming into Massachusetts to live, which they have a right to do under the compact if they have a place of employment or they have a residence here.

Parole is a separate body. The parole board has an Interstate Compact which is also part of probation. Probation and parole are together, but they work separately. Parole is separated from probation since they deal strictly with parolees, those people who have now been released from jail and are here. We handle people who are actually probationers before commitment. Is there a particular fund set aside for transportation of runaway children and is it adequate?

**W. M.:** There is an actual fund, but it is insufficient. There is not enough money in that budget. As a result I worked with the National Chief's of Police Organization and we started up something very interesting this year. It is regarding runaway children and we work with the bus lines. If children who are either missing or are runaways, turn themselves in to any state in the United States, and it's verified that they are either missing or runaways, then Trailway buses will give them a bus ride back to Massachusetts completely free. We got the
first two children back this year and one of them was on the Good Morning America show. However this program only involves missing and runaway children that are under 18 years of age.

What happens, for example, is a child runs away to Florida and the Florida police department will notify my office, the Interstate Compact Office. Suppose the child is from Salem; we will notify the Salem police department and verify through the Chief of the Police in Salem that the child is actually a runaway or a missing child. Then Florida will put the child on the Trailway bus and it won't cost the state anything for the good service that they provide. It is something we have been trying to get going for years and now it is really working and is a good program.

But you have to remember that if the child is a real runaway, and is a real runner, you can't put him on a bus, you have to fly him hopefully nonstop. However, if you can't get a nonstop flight we have a network in the Interstate Compact where we have surveillances at all the major airports in the United States. Therefore, if a child is coming from Mississippi, naturally the route up is through Atlanta where we have to have probation officers make sure that, when a child is being transferred from another place or to another flight, someone is watching the child. The probation officers have clothing descriptions and everything else and there is a lot of work involved with the runaway.

It would be two to three times the cost to put someone on the plane with them. Therefore we work through the airlines. I will give you an example. I had one about a month ago, a child was a runaway down in Texas, near the Dallas-Fort Worth area, so what I did is prepay the ticket in Boston through American Airlines nonstop to Boston. So the officials in the Dallas-Fort Worth area bring the child over to American Airlines and the child is put on a nonstop flight right to Logan. Then I have the probation officers or myself at the airport and pick the child up.

ADVOCATE: Do you also notify the airline personnel, including the stewardesses that the child is on the flight so that they can monitor the situation?

W. M.: We are very fortunate and the airlines have been really great. Now on that particular flight on American Airlines the child came nonstop and everyone was alerted. I cross my fingers to say we have never lost a child in the 15 years that I have been doing my work. You have to be very, very careful, because if a boy or a young lady takes off from Logan airport and they end up in the Combat Zone and they get either raped or killed or something like that the responsibility could be on our part. So we have to be very careful.

ADVOCATE: What do you think is the goal of the criminal justice system and how should it accomplish this?

W. M.: In probation and parole, I think one real goal in the criminal justice system is intensive supervision on the part of probation. Intensive supervision is used when the probation officer is dealing with someone who is one step away from a suspended sentence. This situation involves intensive supervision, where the probation officer actually visits the defendant on probation 10-15 times a month, monitoring them and giving the defendant aid and encouragement in what is probably the first structured environment they have had over many years. It involves probation officers just dealing with an intensive supervision caseload. It is not the old system where someone comes and sees you once a month and you'll say "How are you, what are you doing?", or you'll receive a green sheet from some of the probationers. Where they are actually on minimum supervision, they might send a letter into the probation officer saying everything is well or I am working here or I am doing this or doing that. Basically when someone is on intensive supervision you know what they are doing on almost a daily basis.

ADVOCATE: While this close supervision would obviously be more apt to eliminate any problems which could occur, isn't it an expensive program?

W. M.: There is a cost problem, but when you really look at it, it only costs about $467 dollars a year to keep someone on probation. That is quite a difference to being in jail, when you are talking $1500 dollars a year. When we get involved with females in the correctional systems, that's even a little more money, and if you get the defendant who needs psychiatric care, that is even more money. So it's cheaper in the long run to have people on intensive supervision, if possible. It might mean the addition of two or three hundred probation officers, but in the long run that's cheap. The basic idea is to get these people working again, and when they are working and out of trouble they are taxpayers again. A lot of these people need immediate psychiatric evaluations, educational assistance, and help actually getting a job in their particular areas.
ADVOCATE: Recent publications have talked about the default problem in criminal cases. What is your opinion?

W. M.: There is no question that there are many defendants in default. In the default cases, when there are warrants outstanding the probation officers forward them to the police department. You have to remember that probation officers are not police officers and it is basically up to a peace officer or a police officer to apprehend and bring in these people.

As far as apprehending these people, if someone is involved in a violation, say some kind of a traffic violation, and they send the check to the wrong court or whatever foul-up happened in the bureaucratic system, there might be a warrant out on them and they won't actually know it until they are arrested by a state police officer. There are a lot of warrants out there but I think we could use existing methods to locate defendants who have defaulted. One of the basic remedies which we could possibly use on these people is to work through the Motor Vehicle Registry when they go to renew their licenses. We do this sometimes to locate errant husbands. They might take off from Boston and move to Plymouth or Pittsfield, but when his license is going to be renewed and there is a ticket out for him, they can locate defendants through the Registry of Motor Vehicles.

Another way you could apprehend them is through the United States Post Office. One could send a registered letter return receipt requested to the last address at the instant a warrant or default occurs. The post office will do an awful lot of work for a dollar fifty four. There are also methods we can use through the postal authority to get forwarding addresses for the probation officers. I think this is an area where we could eliminate a lot of defaults that are out now and the warrants that are out for the arrest of these defaulters. The federal government has pumped in a lot of money to get these defaulters. This is true not only in this state, but throughout the United States.

ADVOCATE: What do you think about the role of plea bargaining in the criminal system today? In particular, is it a misuse of the system? Would you favor the adoption of no plea bargaining as in N.H.?

W. M.: I first would like to say that I don't like the system of no plea bargaining. You have to remember that New Hampshire is a rural area compared to the greater Boston area of Worcester, Springfield, and some of the Fall River-New Bedford areas and we have people who do commit minor offenses. I'll give the example of minor trespassing. Now, what are we going to say, that there is no plea bargaining on that? And clog our judicial system up so that everyone has to go to trial, and everybody demands a six man jury trial, or a twelve man jury trial in Superior Court? Suppose a 17 year old kid (and in Massachusetts he is an adult by law the day he turns seventeen) is caught stealing apples; are we going to say, that there is no plea bargaining there? The plea bargaining area has worked very well, especially in the area of probation.

I don't have any opposition to plea bargaining for those minor offenses, because that leads to areas of alternative sentencing, community work by the defendant, such as working at a hospital, cleaning up the roads, or cleaning up the parks and streams. They may be assessed fifty or one hundred hours under a probation officer's supervision. I think it is good that both these male and female defendants and juveniles are working in hospitals, or cleaning up skating rinks that they have damaged, which happened in Quincy several years ago. Now they are under the supervision of somebody, a probation officer, and they have somebody to look up to, look for guidance and so forth. A lot of these young juveniles and young adolescents don't get anybody to pay any attention to them or talk to them or discuss their problems.

So getting back to N.H.'s system of no plea bargaining; I don't think we are ready for that in this state as yet. I am talking about minor offenses, not serious offenses against property and person. We are going heavy in probation into alternative sentencing and community work by the defendants and it has worked out well.

ADVOCATE: Do you think various federal and state legislation providing for speedy trials is working?

W. M.: My answer to that is absolutely yes, especially in the criminal justice area. But my question is what about the Plaintiff that is involved in a civil case and has to wait two, three, four years to have her civil case handled. That is the area where someone has received some bad injuries from a fall or an accident or something and you know that plaintiff is really suffering. But in the criminal justice area it has worked.

ADVOCATE: How do you perceive the role of parole in our criminal justice system?

W. M.: Parole is a very effective tool in dealing with those people who have been incarcerated and are now on the street. The parole department comes under the Executive branch of government and probation is
under the Judicial branch of government. There is a separation between parole and probation. I would say that the Massachusetts parole department would probably rate in the top 10 percent of our country. We have a very good parole department here. It is very effective given the work that they are doing. I think that they could use more actual parole officers on the street. In the last 25 years probation has gone from about 200 probation officers to up over a thousand and this is very cost effective.

Some states have eliminated parole and I think this is not the right way to go, especially in Massachusetts. Some people believe parole doesn’t work, but I feel as though you are giving someone who has been released from the state prison and is out on the street some guidance. They need someone to carry them along. You just don’t take them, unlock the door, give them a suit and fifteen dollars, and say alright go on your own way. It doesn’t work that way. They need someone they can go to and to help them get a job. Some of these people have drug problems in prison because of the drug smuggling and they need aid, encouragement, and guidance when they get out on the streets. The parole department in Massachusetts should stay in existence and they are doing an excellent job.
Robert A. George is a graduate of Suffolk University Law School. He served as Assistant District Attorney for Norfolk County, after which he joined the law offices of J. Albert Johnson and F. Lee Bailey as a staff attorney. Mr. George is now a trial attorney in the law offices of Balliro, Mondano and Balliro. He has tried numerous criminal cases, both as a prosecutor and as defense counsel.

ADVOCATE: What are the most significant problems in the criminal justice system, in your opinion?

R. G.: In criminal law the most significant problems in the system, in my opinion, are mandatory sentencing, the overloading and potential breakdown of the system, and the devastating and traumatic effect of the system on those persons who are unfortunate enough to be processed through it. I might add that this devastating effect takes place whether the person is found guilty or innocent. There is nothing more frustrating than to be faced with a criminal case, where because of mandatory sentencing requirements in the statute, there is no discretion or leeway in the plea bargaining process. In such a situation counsel must try the case regardless of the strength or weakness of the prosecution’s case or any mitigating circumstances. Because of the effect of heavy caseloads on the system and its employees, swift, sufficient and fair justice is very difficult to obtain. Finally I also see a substantial problem in the devastating effect which the system has upon defendants, their families and loved ones, as well as upon the victims. It sometimes seems so tragic to me that it cannot be expressed in written or spoken words.

ADVOCATE: What do you think is the goal of the criminal justice system and how can it be achieved?

R. G.: The goal of the system is the ascertainment of the truth, and fair and proportionate justice for those convicted by its processes. A streamlining of the system, clearer appellate avenues, abolition of mandatory sentencing, and more qualified personnel within the system are some of the methods by which we might achieve the proper goal. Certainly qualified personnel will come into the field only when employment is made more attractive.

ADVOCATE: Various publications have recently talked about the default problem in criminal cases. Do you have an opinion on this?

R. G.: This is an issue which the media has recently chosen to highlight because of the Reagan administration’s recent “strike” by the Justice Department against defaulters. If the average person paid attention to the coverage of criminal justice issues by the media and our government, he or she would find that the default system is only one of many areas of concern. It is a system which is ridden with far greater problems than defaults. Our system, as I mentioned above, is already set to break down due to the overload, and the processing of default cases is only going to add to that overload.

ADVOCATE: How do you think the recent Supreme Court ruling in United States v. Leon on the “good faith” exception will affect the criminal justice system?

R. G.: It will pave the way and thereby encourage more numerous and far more serious instances of police misconduct in search and seizure, as well as investigatory situations. As a result, there will be a heightened disregard for the constitutional rights of persons accused of crimes.

ADVOCATE: Do you think judges today are responding to public pressure in their sentencing practices?

R. G.: Yes. It is very rare that a judge will respond in the face of overwhelming public pressure by sentencing a defendant in the same way that he would in a more quiet atmosphere.

ADVOCATE: What do you think about the role of plea bargaining in the criminal system today? In particular, is it a misuse of the system? Would you favor the adoption of no plea bargaining, as is the practice in New Hampshire?

R. G.: No, I do not want to see the abolition of plea bargaining. Plea bargaining is the most essential aspect of our system, because the system inadequately deals with the needs of those persons who are accused of crimes. In many instances it is the only method by which a defense lawyer can obtain a fair and reasonable disposition of a criminal case.

ADVOCATE: Do you see substantial growth in “sting” operations, or has this method of law enforcement reached its peak?

R. G.: Again, depending upon the whim or impulse of the people in our government at any time, and their particular concerns, there is no way of determining whether sting operations will be phased out or increased. The constitutionality of these operations are not of as much importance to government officials as is their success rate. Success, not constitutionality, will translate into political popularity, which in turn translates into votes.
ADVOCATE: What is your opinion on whether defense counsel should be present in the grand jury room? If defense counsel should be present should it be only as an observer, should he be able to advise his client, or should he be able to ask questions?

R. G.: I think it is absolutely essential for counsel to be present in the grand jury room and to take an active role. It is the only phase of the criminal proceedings at which counsel is not present under our current system. Counsel's presence is critical because it is at this stage, and only at this point, that criminal charges can be privately dropped or dismissed because of the lack of evidence. It is only then that the case will not enter the public eye, which is the point when a person's public reputation is destroyed.

ADVOCATE: Do you think that a single defense lawyer should represent multiple clients who are targets in criminal grand jury investigations?

R. G.: Only if their interests do not conflict and the clients are fully advised and understand the possible aspects of joint representation.

ADVOCATE: Do you think our present system of providing defense counsel for indigents will substantially reduce the private practice of law?

R. G.: No. Although it should be remembered that many competent attorneys are always available from the private bar to represent those persons who need representation in criminal cases, the private bar continues to exist. It is only when court-appointed cases are channeled en masse to certain attorneys that the system of court-appointments is abused and sometimes inappropriate.

ADVOCATE: Do you think there is a tendency by prosecutors to misuse their closing arguments in light of the large number of cases which have been reported in this area? What type of controls would you propose?

R. G.: Yes, I think there has been abuse. Automatic mistrials and/or required findings of not guilty, as well as fines for prosecutors when an abuse occurs, are solutions. Such sanctions would discourage those prosecutors who choose to tread thin ice in this regard.

ADVOCATE: If you could make one change in the criminal justice system today, what would it be?

R. G.: Flexibility in indictment, trial, and sentencing procedures.

ADVOCATE: How do you perceive the role of parole in our criminal justice system?

R. G.: The current image of parole gives the public a false sense that the parole system is too lenient. This image has been created in large part by media coverage. However, it should be made clear that the concept of parole and eligibility for parole is the most important aspect of our system of rehabilitation, which is the true goal of the criminal justice system.

ADVOCATE: What impact do over-crowded prison conditions have on the system, and what should be done about it?

R. G.: Over-crowded prisons can only be solved by additional construction of many new and more modern facilities for the incarceration of convicted criminals.

ADVOCATE: Do you see an increasing tendency to use habeas corpus petitions to obtain post-conviction release?

R. G.: No. Habeas corpus petitions are generally a last resort and a very rare appellate opportunity in our system. As a result these actions are not used enough to be considered as abused.

ADVOCATE: Do you think the use of civil rights actions has had much impact on police misconduct?

R. G.: Yes. Such suits at least make police officials somewhat accountable for their misconduct. However, the impact of such suits will not be fully realized until many more quality civil rights suits are brought and won by plaintiffs in this country.

ADVOCATE: Do you favor the establishment of police or civilian review boards to investigate and rule on police misconduct?

R. G.: Yes, I do favor such boards, but only if they are filled with qualified, carefully screened and impartial persons.
Freedom of Religion From the Soviet Perspective

By Walter L. Jacobsen

Mr. Jacobsen, a past Advocate staff-member, graduated from Suffolk Law School in 1975. Presently he is with the Navy attending George Washington University in Washington, D.C.

INTRODUCTION

In 1982, The Reverend Dr. Billy Graham made a trip to the Soviet Union. During this trip he said that it appeared to him that the churches in the Soviet Union were wide open and freely able to have worship services. He also said that he had seen no evidence of religious repression. These remarks were very controversial at the time. Perhaps they were simply just well chosen words. There was some evidence that Dr. Graham was simply being a good guest so that he would be invited back to the Soviet Union at which time he could have a greater religious impact. In any case, in September, 1984, Dr. Graham did make a speaking tour of the Soviet Union, one that made fewer headlines but which offered more opportunities to speak.

However, Dr. Graham’s statements inevitably raise the question as to what the status of religion is in the Soviet Union and more interestingly, how does the Communist Party of the Soviet Union and the Soviet Government view religion there. This paper takes a look at religion in the Soviet Union, especially through Soviet publications.

1. Religion in the USSR-Soviet Viewpoint

A. Marx and Lenin

To understand the orientation of the Soviet Union or the Communist Party of the Soviet Union toward religion some background into the thinking of Marx and more significantly of Lenin is needed.

Karl Marx, the mid-Nineteenth Century philosopher of communism was opposed to religion. His basic stance was that it is necessary to liberate the conscience from religious superstition. Marx felt that religion had been used by the exploiters of the workers to keep the workers from rebelling against their poor lot in life. “Religion is the sigh of the oppressed creature, the heart of a heartless world...[.] It is the opium of the people.” Marx also felt that religion placed a divisive role in the necessary move toward the unity of the people. Part of the reason for the nonassimilation of the Jews was the role played by religion in keeping Jews and Christians apart by making them separate philosophically. By abolishing religion the opposition between the two groups would be impossible. Both groups would be unified under science which would rationally solve any remaining contradictions between them. Marx put great weight on a scientific basis of the world. He opposed religion because it was unscientific, that is, you could not prove in a laboratory that there was a God. Because of his opposition to religion, he bitterly opposed its institutionalization in a church.

Lenin, as the Russian disciple of Marx, also followed in his opposition to religion and a church.

In a 1909 essay entitled The Attitude of the Workers’ Party to Religion, he wrote:

“...A Marxist must be a materialist, i.e., one who treats the struggle against religion not in an abstract way, not on the basis of remote, purely theoretical, never varying preaching, but in a concrete way, on the basis of the class struggle which is going on in practice and is educating the masses more and better than anything else could.”

But Lenin was also a pragmatist who had studied the nature of his enemy. And while an opponent of religion, he advised caution against antagonizing believers as can be noted in a speech to a congress of working women in November, 1918:

“We must be extremely careful in fighting religious prejudices; some people cause a lot of harm in this struggle by offending religious feelings. We must use propaganda and education. By lending too sharp an edge to the struggle we may only arouse popular resentment; such methods of struggle tend to perpetuate the division of the people along religious lines, whereas our strength lies in unity. The deepest source of religious prejudice is poverty and ignorance; and that is the evil we have to combat.”

The relation of the state to the church was stated by Lenin in his work, Socialism and Religion and his position stated there clearly forms the basis for the laws that have been written in the Soviet Union to govern religion from the Soviet takeover in 1917 until today:

“The state should not be concerned with religion, nor should religious societies be linked with state authority. Every person should be completely free to profess whatever religion he pleases or to profess no religion at all—to be an atheist, which every sort of socialist ordinarily is. No distinction whatsoever is to be made as between citizens in respect of their rights as dependent upon their religious faiths.”

B. The Communist Party of the Soviet Union on Religion

The legal structure governing freedom of conscience and the separation of church and state found in the Soviet legal system are the results of the guiding influence on the Soviet people of the Communist Party of the Soviet Union (CPSU). While the Soviet State actually legislates, it does so as a reflection of the policies of the CPSU. Therefore, when looking at Soviet laws it is vital to keep CPSU attitudes always in mind.

The CPSU advocates legislation that recognizes that there is a struggle between the progressive scientific and materialistic world view and the anti-scientific, religious view of the world. But while recognizing this ongoing struggle, the CPSU, has always felt that forcible attempts to make believers give up their convictions is not practical. The party’s position is that atheism must be spread by consistent persuasion and drawing believers into an active social life. As a result of this policy, the statutes and rules of Soviet social organization and association do not require people to become atheists.

However, to be a member of the CPSU or the Komsomol (Communist Youth League) one has to have atheistic convictions. Lenin is quoted as saying: “I favor expulsion from the Party for those who participate in rituals.”

Under rules of the CPSU adopted at the Twenty Second Party Congress in 1961, as amended, it is stated that:
must respect and not infringe on each others duties as long as religious believers exist. The state as the expression of the will of the people through the party should not get involved in ministering to the religious needs of believers and by the same token churches should not interfere with the role of the state in its duties to care for all the other needs of the people.14

2. Early Law. The first government definition of the relation of the Soviet state and religion was in the decree issued on January 23, 1918, by the Third Party Congress of Soviets. This decree, provided for the separation of the church from the state and the school from the church and provided for freedom of conscience, including the freedom to profess no religion at all. The decree also provided that there was to be no deprivation of rights regardless of the faith professed by a person and that likewise there was to be no deprivation of any rights on the basis of professing no religion at all. A note in this decree also provided that any reference to a person's religious preferences or lack thereof was to be expunged from public records. The decree allowed believers to continue to conduct religious ceremonies provided neither the general social order nor the rights of other Soviet citizens were encroached upon.

The Constitution of the Russian Soviet Federated Socialist Republic (the predecessor to the USSR) adopted by the Fifth Congress of the Soviets on July 10, 1918, provided in article 13: "To the end of assuring actual freedom of conscience in behalf of the toilers, the church is separated from the state and the school from the church; but freedom of religious and anti-religious propaganda is conceded in behalf of all citizens." This constitution also deprived class enemies of the right to vote. The definition of class enemies included monks and priests. This constitution also had language in article 23 that deprived all individuals of rights which would be used by them to the detriment of the socialist revolution.

On December 30, 1922, a delegation of four soviet republics met and implemented a program for federation. They signed a treaty of union and approved a constitution for the new state modeled on the Russian Soviet Federated Socialist Republic's model. No bill of rights was placed in the new federal Constitution because the individual republican constitutions were at the time believed to be the appropriate repositories of such bills. This constitution was put into effect on July 6, 1923, after review by the state agencies and ratified by the Second Union of Soviet Socialist Republics on January 31, 1924. Additional republics and autonomous regions joined the USSR or were created as conditions within what had formerly been the Russian Empire stabilized.

On April 8, 1929, a comprehensive decree entitled "On Concerning Religious Associations" was issued by the All-Union Executive Committee and the RSFSR Council of People's Commissars was issued. This decree is still in use today throughout the USSR with only minor changes since the original. It reflects the decree of January 23, 1918, and sets out the rights and duties of religious groups. It provides for the registration of religious groups and regulates their activities, executive bodies and clergies. This decree or law provides that the sole activity of a church is confined to satisfying the needs of believers. No other church activity is permitted.

Paragraph (3) of the decree provides: "A religious society is a local association of citizens who are believers and who have attained their eighteenth birthday: who are in the same cult, denomination, direction or orientation; who number at least twenty persons; and who have joined for the mutual satisfaction of their religious needs.

Those citizen-believers who, due to their small number, cannot form a religious society, are given the right to form a group of believers. Religious societies have the right to acquire church vessels and garments, religious paraphernalia, and means of transportation; they have the right to build, purchase and rent structures for their needs, in accordance with legal procedures.

Religious societies or groups of believers are not given the right to be represented as judicial entities before court.

The law goes on to provide the routing for an application to form a religious society or group. The application is submitted to the local city or equivalent government who forward the application, with endorsements, to the Council of Ministers of the Autonomous Republic or other next level of government. This level of government then forwards the application, together with endorsements, to the Council for Religious Affairs of the Council of Ministers of the USSR for a final determination.
There is also a Council on Russian Orthodox Church Affairs also under the USSR Council of Ministers.

The law proceeds in detail to provide for the method that approved groups must use in obtaining access to real property to use for meetings, the provision for care of that property and the rights and limits of use of the property. The law also covers the handling of items of chattels that may be used in religious services. Two noteworthy articles also deal with the limits of the activity of a religious organization:

"(17) Religious associations are forbidden to:
(a) forms funds for mutual aid, cooperatives, production unions or, in general, to use any of the property which they are empowered to administer for any other purpose than the satisfaction of religious needs
(b) render material support to their members
(c) organize special children's, youth's and women's prayer meetings; also general bible-reading, literary, needlework, labor or any other meetings held within the teachings of religion or similar meetings, groups, circles and sections; and to arrange excursions and children's playgrounds, open libraries and reading rooms, organize sanatoria and medical aid stations.

Prayer buildings and facilities may contain only those books which are necessary for the functions of the cult concerned.

(18) The teaching of religious belief in any form whatsoever, at educational institutions is forbidden. The conduct of religious instruction is only permissible at those religious instructional institutions which have been opened in accordance with regulations."

The article dealing with the limits on religious group activity such as Bible reading groups and needlework meetings certainly may surprise some Western churchgoers, but it is in keeping with the CPSU philosophy that these activities are more properly within the role that the state plays as educator or as the sole provider of social activity. Communist Party philosophy holds that these outside activities have nothing to do with religious activity. The article on education means that there will be no parochial schools except in direct training of the clergy.

The regularity of the legal protection of religious rights was certain enough after 1929, that in 1933, the Soviet Commissar for Foreign Affairs, Maxim Litvinoff was able to reassure U.S. President Franklin Roosevelt with a list of religious guarantees in response to a question by Mr. Roosevelt during their negotiations on the recognition of the USSR by the United States. Commissar Litvinoff listed the following religious rights then existent in the USSR:
- full freedom of conscience
- no laws restricting or limiting the right of freedom of conscience
- the free performance of religious rites subject to the need of public order and the right of others
- penalties for interfering with the performance of religious rites
- the right of groups to build or lease structures
- the right of groups to collect funds
- the right to impart religious instruction privately outside of school

Shortly thereafter, the USSR promulgated a new Constitution, but the basic law of 1929 remained unchanged.

On December 5, 1936, under Stalin, an extraordinary Congress of the Soviets of the USSR adopted a new Constitution.

Chapter X of this Constitution was entitled "Fundamental Rights and Duties of Citizens." Article 124 recognized freedom of conscience as follows: "In order to ensure to citizens freedom of conscience, the church in the U.S.S.R. is separated from the state, and the school from the church. Freedom of religious worship and freedom of anti-religious propaganda is recognized for all citizens." This article was backed up by protective legislation. In recognizing the protections offered in the Soviet law to religious believers, a Soviet legal textbook changed in 1938:

"What has been said [about Soviet safeguards for religious believers] discloses how nonsensical are the scurrilous aspersions appearing from time to time in the bourgeois press as to supposed persecution of religious by the government of the USSR. The struggle with religion is there carried on, not by administrative repressions, but by the socialist refashioning of the entire national economy which eradicates religion, by socialist reeducation of the toiling masses, by antireligious propaganda, by implanting scientific knowledge, and by expanding education. The mass exodus of USSR toilers away from religion is directly due to these measures taken in their entirety.

Great work in the matter of anti-religious propaganda is carried on by the mass society of the toilers, the Union of Militant Atheists."

[The period from 1917 to the present saw a great deal of open persecution of religious believers. Initially in the 1920's it was the Russian Orthodox Church which felt the brunt of the effort. However, in the 1930's, massive persecutions of all religious groups occurred in the USSR. These only abated with the coming of World War II and the need for unity against the Nazi invaders. The postwar period offered a breathing spell from aggressive persecution until Khrushchev came to power. There was then another round. More recent efforts have focussed primarily on "extremists" although this is not to imply that the official antagonism to religion has tapered off.]

The next significant statement of religious freedom in the USSR came in the 1977 Constitution.

3. The 1977 Constitution. In 1962, a drafting commission was established to revise the 1936 Constitution. The Constitution produced by the drafting commission was adopted in 1977, with some changes. One of noteworthy items was the repositioning of the "Bill of Rights" in the new Constitution. This list of rights and duties of citizens was moved from a position following the articles on the structure of the Soviet state to a position ahead of these articles. The drafting commission believed that this would add prestige and importance to the section on rights. The 1977 Constitution's section on rights and duties was redrawn to conform to the obligations of the two international covenants adopted by the UN General Assembly in 1966, which implement the Universal Declaration of Human Rights. These covenants were ratified by the Soviet Union on September 18, 1973.

The 1977 Constitution contains several articles touching on religious freedom. Article 34 provides citizens equality before the law regardless of attitude toward religion. Article 52 contains the basic rights regarding freedom of conscience. It provides that:

"Article 52. Citizens of the USSR are guaranteed freedom of conscience, that it, the right to profess or not to profess any religion, and to conduct religious worship or atheistic propaganda. Incitement of hostility or hatred on religious grounds is prohibited.

In the USSR, the church is
lead of the RSFSR. Leafleting, cir-
legislation or which slander the state are
in 1975. 26
4. Current Laws. As a reminder, the
the other Soviet Republics follow the
proscriptions of children outside of the home.
section was apparently article 127, of the
criminal code referred to by Commissar
Litvinoff in his correspondence with
President Roosevelt in their 1933 cor-
respondence. A violation of article 127
was punishable by six months com-
pulsory hard labor. 18
Article 227 of the criminal code of the
RSFSR prohibits infringements upon the
person and rights of citizens under the
pretext of performing religious rituals.
Article 227 is directed against the socially
dangerous activities of leaders, organizers and active participants that
engage in activity harmful to health or
personal rights under law or who teach
citizens to refrain from fulfilling the
duties of a citizen or who teach citizens to refrain from civic activity. 31 (This especially comes up where some religious groups—generally unregistered ones—teach their followers not to take part in the armed forces, to refrain from
any oaths or not to send their
children to state schools). Part 1 of the
law is directed at organizers and leaders
and part 2 at active participants.
However, in recognition that some people
are merely passive participants in the
proscribed activity, the Supreme Soviet of
the RSFSR on July 25, 1962, adopted
a note that where offenders under part 2
of article 227 are not a serious danger to
society measures for public influence
may be used to handle offenders instead
of prosecution. 13 The Chairman of the
Criminal College of the Supreme Court
of the USSR urges the use of this alter-
native to prosecution to avoid the
needless creation of martyrs. 33 Estonia
has a relatively recently tailored religious
statute. It differs in several areas from
the model of the revised 1929 statute.
Another commentator, the Chairman of
the RSFSR provisions for mosques, churches and individual
clergy and laws forbidding the com-
pulsory performance of religious
rituals. 14
And finally, one step beyond the laws
is the administrative structure that im-
plements the laws. In this regard a vital
part to the entire program of religious
regulation is the registration of religious
groups with an ascending range of
governmental agencies ending at the
Council of Ministers level with the
Council on Russian Orthodox Church
Affairs and the Council on Affairs of
Religious Denominations mentioned
earlier.
Registration of religious organizations
is especially important. It facilitates the
protection of the rights of believers to
state protection. It also guarantees the
observance of socialist legality on the
part of the believers and the church.
There is nothing extraordinary in the
regulation of religious groups. It is
regarded no differently than the regulation
of conservation or motorist
groups. 17 According to the sense of
Soviet laws, if a religious group meets in
spite of the refusal of local authorities to
register them, this only deprives the
group of the rights to a prayer house, a
pastor, etc. It may also open them up to
administrative action as provided by law.
But the meeting of the group when un-
registered cannot in itself serve as the
basis for criminal indictment of the
members of the group. 19
D. Problems.
1. Application of the Law. The applica-
tion of the laws regulating religious
freedom is not without its problems.
Commentators have criticized the courts
for their handling of these matters. Two
commentators, writing in 1971, in the
journal Soviet Justice, have been critical of
imprecise verdicts that do not correctly
identify the criminal conduct of the
malefactor and in at least in one case
this lack of precision caused the verdict
to be set aside by a higher court. 39
Several other cases of the imprecise
classification of misconduct were cited.
Another commentator, the Chairman of
the Criminal College of the USSR
Supreme Court, writing in the journal
Soviet State and Law in 1965, called for
greater mercy in the prosecution and
sentencing of some participants in illegal
religious activity, noting that when the
maximum penalties are given out
without the proper foundation, higher
courts set aside verdicts and reduce
sentences. 44 The chairman also noted
that when some malfeasors do not constitute a serious threat to society investigators and courts should consider measures of public influence instead of prosecution. He also noted that unimaginative sentencing often produces more problems than it cures. For example, the internal exile of a religious fanatic often provides no atheistic education to the offender and on the contrary allows the offender to gain new converts in the place of exile. The writer urges that for trials of religious cases, the trial personnel need to be the best and most experienced and the trial itself needs to be well organized so as to be an effective teaching tool for atheistic propaganda.

2. Signs of Religious Revival. It is reported that in 1983, seventy to eighty percent of the adults in the USSR were nonreligious. However, there is concern reflected in Soviet writings for what is seen as a step up of activity by religious organizations and the unwitting seduction of some Soviet citizens by religious symbols. There are still a nun... of people who have not developed the proper scientific-materialistic world view and who still observe religious rites and traditions. This is seen as a problem of education.

Some young people in the Soviet Union reportedly feel it fashionable to have a church wedding, to baptize children and to wear small crosses around their necks. The reasons given for this conduct are that some grandmothers are unwilling to babysit for unbaptized grandchildren, also that the people fear censure by relatives and neighbors. Young people are seen in some Orthodox churches but more so in Baptist, Adventist and Pentecostalist chapels. Of course this is seen as their right under the Soviet Constitution but the people who participate in these rituals give no thought to the fact that their conduct is incompatible with the norms of Soviet life. Unfortunately in the eyes of some Soviet commentators the people feel that their following of religious traditions and rites is harmless and they forget that in any form, religion hinders man’s creative and public activity. The phenomenon are attributed to fashion and confusion and are not seen as any genuine religious feeling.

One Soviet Ph.D., candidate who addressed a group at a research institute was disturbed to encounter feelings of sympathy for the spiritual value of religious rituals, especially that expressed through music. The author pointed out the subtle seduction of this religious activity and suggested atheistic alternatives-focussing on the atheistic aspects of the arts as a counter to religious musical efforts.

3. Extremists. Unregistered religious groups are the primary setting for extremist activities. These groups are characterized by extreme views and actions contrary to Soviet law, by a posture as the defenders of the rights of all believers in the Soviet Union and by attacks on the Soviet Constitution by using the pretext that the Constitution is merely a pretext giving rights to atheists alone. In their actions they inflame nationalistic moods, do not permit their children to attend schools or Communist Party youth groups, they keep their children away from social and cultural activities, they slander the state, they infringe upon the rights of others under the Soviet Constitution and they may even endanger the health of Soviet citizens.

The reasons for extremism are felt to be:
- a crises in religion
- the erroneous actions of local authorities
- the special services of the imperialists
- improper activity of foreign emissaries

and people the General Secretary of the CPSU, Yu. V. Andropov characterized in a speech as, “individuals whose views and actions are at variance with our morality and our laws as the result of... political or ideological errors, religious fanaticism, nationalistic aberrations, moral degredation or simply an unwillingness to work.”

The cure for religious extremism was felt by the Deputy Directory of the Institute of Scientific Atheism of the CPSU Central Committee’s Academy of Social Sciences in 1983, to include tact and care, sanctions in deliberate cases, education and meetings with believers at work and home, one on one discussions, separation of the passive believers from ringleaders, use of television and the press, and proper teaching in schools and universities. However, the drive to cope with religious extremism was being hampered by a lack of good atheists skilled in debate, good writing for the press and a lack of good atheistic literature.

E. Atheistic Propaganda and Activity. Throughout the foregoing discussion there have been repeated references to anti-religious or atheistic propaganda. A brief separate discussion of that effort is made here to emphasize the strong Soviet effort directed in this area designed to bring the whole of the USSR out of the grip of religion.

One of the purposes of the Soviet state is to cultivate the spirit of communism and a scientific, materialistic world view in the Soviet people. CPSU policy in this area holds that it is necessary to conduct extensive and systematic propaganda for scientific atheism and to patiently explain the untenability of religious beliefs. To this end the League of Militant Atheist was formed in 1925 to support the Soviet State and the CPSU in anti-religious campaigning. With the coming of World War II, this group was abolished. However, in 1949, the Society for the Dissemination of Scientific and Political Knowledge was set up. This group supports the anti-religious propaganda effort and teaches that religion and science are incompatible.

In fulfilling its responsibilities for freedom of anti-religious propaganda, the state provides for the use of its citizens: the press, radio, television, cultural agencies, movies, theaters, clubhouses, community centers and libraries. But in spite of this extensive array of assistance available to those engaged in the important work of implementing anti-religious propaganda, improvements are felt by dedicated atheists to be needed. In particular, as noted above, better lecturers and debaters are needed particularly for the Knowledge Society which spreads anti-religious propaganda campaign.

A writer in Pravda in 1981, also noted that anti-religious propaganda must conform to the nature of the new believer. Traditionally, believers were workers and accordingly atheistic propaganda was aimed at that level. However, the article said that the new believers are often educated and internationally aware and the old level of antireligious propaganda simply doesn’t work. The author felt that new approaches must be developed.

One Western author has summarized the ways in which the officially approved policy of anti-religious propaganda is manifested:

1. The entire nation is constantly being bombarded with anti-religious films, books, brochures, etc. There is no limit to this type of propaganda, while there is a severe limit on the printing of religious literature. Bibles,
Rights, was signed by the USSR on March 18, 1968, and ratified by it on September 18, 1973. Article 18 of that Covenant provides even stronger protection for freedom of thought and freedom of religion. This includes freedom from coercion that would impair a belief or religion of choice. Generally the freedoms in this covenant are limited only by lawful acts necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. However, religious freedom under Article 18 is specifically noted to be a freedom that may not be suspended even in a public emergency.

Another U.N. document ratified by the Soviet Union at the same time as the foregoing covenant is the International Covenant on Economic, Cultural and Social Rights. Article 13, section 3 provides that a state party will respect the rights of parents to ensure the religious education of children in conformity with their own convictions. Articles 4 and 5 cover attempts of states to limit rights under the covenant and the limitations in the exercise of the rights guaranteed under this covenant for the general welfare. The Soviet Union has ratified both of these human rights covenants.

The Soviet Union has frequently been accused of religious persecution and violation of the foregoing human rights covenants in connection with religion. What is its answer? The president of the USSR and general secretary of the CPSU, Leonid I. Brezhnev, in a speech to a session of the Supreme Soviet on October 4, 1977, made the following remarks showing the Soviet view of human rights as part of his report to the Soviet legislative body on the new Constitution of 1977. He addressed some of the accusations made in the West against the Soviet interpretation of human rights. President Brezhnev said in part:

"According to the Draft Constitution, the rights of citizens may not be used to the detriment of socialist society and the state, and that means, says the Austrian newspaper Salzburger Volksblatt, that “Soviet citizens have no rights at all”.[sic] That is logic for you! The Italian Corriere della Sera does not like the fact that the Draft speaks of the duty of Soviet citizens to observe the USSR Constitution and Soviet laws, and the rules of socialist behavior in everyday life. “All these restrictions,” this mouthpiece of the Italian monopolies declares, “in effect nullify civil rights, at any rate as we understand them.” It follows that the exercise of civil rights in the USSR must consist in violations of the law! Speaking in general, it seems that from the standpoint of our class adversaries Soviet citizens should evidently be granted the one and only “right” to fight against the Soviet state, against the socialist system, so as to gladden the hearts of the imperialists. However, we must disappoint such “critics” of our Constitution: the Soviet people will never comply with their wishes.

Our critics pretend to be unaware of the facts that the clauses in the Draft Constitution which evoke their dissatisfaction fully conform to fundamental international documents. Let us remind them of this fact: the UN Universal Declaration of Human Rights clearly states that “everyone has duties to the community in which alone the free and full development of his personality is possible”[sic] and that the exercise of rights and freedoms by citizens requires “due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society”[sic].

The critics of the Soviet Constitution, however, have found themselves in an unenviable position. They cannot escape the fact that the Soviet Constitution defines the social, economic and political rights and freedoms of citizens and the specific guarantees of these rights more widely, clearly and fully than has ever been done anywhere else before. People who deviate from the human rights position outlined above by President Brezhnev are labeled extremists.

The 1977 Constitution did omit mention of some of the rights found in the International Covenant on Civil and Political Rights, particularly concerning freedom of religious education.

IV Comments and Conclusion

Looking at the Soviet human rights picture, it clearly seems to fail to live up to the requirements of the human rights framework of the United Nations. The real question seems to be whether the leaders of the Soviet Union are sincere or cynical in their assertions that they are following human rights norms. A working theory is that based on the socialization of the leaders of the USSR as Russians and communists they may well feel that the human rights that are found in the USSR are the only valid ones to be found and that what are called human rights in the West are just not workable. In support of this view are
In the Schools Urged by an Anxious Pravda”:

When reading between the lines of the Soviet press, the trend of young people to take part in religious ceremonies and the concern that educated people are finding worthwhile things in religion one senses a yearning on the part of at least some Soviet citizens and it is hard to not suspect that the Communist Party war on religion in the USSR may not be won. Two recent articles in the Western press seem to bear this out. From the September 24, 1984, issue of Time Magazine:

Wiping flowing tears from his cheeks with a handkerchief, the pastor of Leningrad’s lone Baptist church looked down at his packed congregation last week as he welcomed the evening’s special preacher. ‘We know the difficulties you faced in coming here, Billy Graham,’ said Piotr Konovalchik. ‘We rejoice that you are with us here tonight.’ …

The evangelist’s words are likely to be heard by more than those who came to see him; surreptitious cassette recorders will doubtless give his sermons wide distribution among Soviets. Graham also took note of how difficult it is for Soviets to display their faith. In his usual appeal for public commitments to Jesus Christ, he asked his Baptist listeners in Leningrad to raise their hands. Despite the presence of KGB plainclothesmen with cameras, two dozen people did so. A parishioner later explained poignantly why more did not respond: ‘You Americans live in freedom. Our arms are always pressed down to our sides. We are like prisoners. It is hard for us to lift our souls to God.’

And from a news in brief headline in The Christian Science Monitor for October 19, 1984, entitled “More Atheism in the Schools Urged by an Anxious Pravda”:

The Soviet daily Pravda indicated Thursday increased Kremlin concern that large numbers of young people are drifting to religion and called on schools and youth organizations to step up atheistic propaganda. The editorial accused ‘imperialist circles’ in the West of using religion as a weapon against communism.

‘It is imperative to carry out more active propaganda of scientific materialistic opinions, [sic] pay more attention to atheistic education… The party is particularly concerned that young people should form firm atheist convictions,’ Pravda said. Religious believers are persecuted in the USSR, not as much officially through the organs of the state, but subtly through the even more powerful influence of the CPSU. Therefore while the rules of the state seem to conform to a norm that is tolerant of religious practice, the CPSU members that man state offices are not. However, in spite of sixty-five years of such persecution, religion survives in the Soviet Union.

ENDNOTES

2. Id. at A-1, col. 4.
3. Id. at A-8, col. 3.
8. Id. at 44.
10. Konstantin U. Chernenko, supra note 5, at 70.
14. Id.
17. Iu. A. Rozenbaum, supra note 12, at 156.
20. Id. at 213.
21. Id. at 215, 216.
23. 1936 USSR Const., art. 124.
25. 1977 USSR Const., art. 52.
26. Leo Hecht, supra, note 19 at 212.
27. Id.; reference to RSFSR criminal statutes may be found in Berman and Spindler, Trans. Criminal Code of the RSFSR, October 27, 1960, as amended to December 31, 1963 1 Soviet Statutes and Decisions 3-11 (1964).
30. Maxim Litvinoff, supra note 22 at 808.
33. Id. at 25.
35. Id. 92.
36. G.Z. Anashkin, supra note 13 at 22; Iu. A. Rozenbaum, supra note 12 at 158.
37. F.M. Rudinsky, supra note 16 at 14.
41. Id. at 25.
42. Id.
43. Id.
44. F.M. Rudinsky, supra note 16 at 14.
45. E. Filimonov, supra note 11 at 1.
46. Id.
47. Id. at 2.
48. Id. at 3.
49. Id. at 2.
51. Id. at 4.
55. *Id.* at 12.
56. *Id.*
60. F.M. Rudinsky, *supra* note 16 at 14.
62. *Id.*
65. Universal Declaration of Human Rights, *supra* at note 64 art. 18.
66. *Id.* art. 29.
69. *Id.* art. 4.
71. *Id.* art. 13.
72. *Id.* art. 4.
74. Leonid Brezhnev, Report to the Session of the USSR Supreme Soviet of
Does the Massachusetts Rape Shield Statute Violate the Sixth Amendment Right of Confrontation?

Written by Nancy Regan, a third year Suffolk University Law Student, for her Evidence Seminar taught by Judge Fenton.

I. Introduction

The Massachusetts legislature’s enactment of the rape shield statute 3 was part of a national trend to legislatively alter traditional rules of evidence which permitted cross examination of a rape complainant in the area of her prior sexual history. The purposes behind the enactment, protecting victims from courtroom humiliation and encouraging the reporting of crimes of rape, have generally been hailed. However, the enactment of this and comparable statutes has been accompanied by expressions of concern that enforcement of the provision may result in an erosion of defendants’ right to a fair trial as guaranteed by the Confrontation Clause of the Sixth Amendment. This paper addresses the issue of whether the statute is likely to withstand a constitutional test.

II. Evolution of Rape Shield Laws: Historical Perspective

In the development of common law, admissibility of a rape complainant’s sexual history became the widely accepted rule. One commentator has attributed acceptance of this rule of admissibility to three factors: the fear of false charges brought by vindictive women, the concept that chastity was a character trait, and the belief that pre-marital sex was immoral.2

The rationales behind the rule of admissibility varied somewhat, but included a notion that evidence thought to show a propensity toward sexual relations was relevant to the issue of consent. That is, a woman who has consented to sexual intercourse in the past is more likely to have consented in the instance in question.2 Additionally, lack of chastity as a character trait was admissible in a number of courts for purposes of impeaching the credibility of a complainant witness. This theory is premised, apparently, on a notion that a woman with a general reputation for being unchaste is implicitly immoral and, consequently, her capacity for truth and veracity should also be suspect.4

Wide acceptance of the general rule of admissibility of evidence of a rape victim’s sexual history resulted in what many prosecutors, legislators, and enforcement officials considered an untenable state of affairs. Crimes of rape were reported less frequently than other comparable crimes. Victims, aware that their consent to participate in the prosecution of an alleged rapist could lead to a public exposure of their sexual history and subsequent invasion of privacy, were increasingly reluctant to testify in court. Thus, the threat of trial and imprisonment, the major deterrent to crime in our society, was perhaps effectively emasculated.

Moreover, some of the societal attitudes and underpinnings which had supported the rule for generations have undergone dramatic changes in recent decades. The notion that chastity was the sole mode of behavior for a moral person has been eroded by a more general acceptance of extramarital sexual behavior for both men and women. Additionally, concern for victims’ rights in a judicial system which has come to be perceived by many as favoring defendants’ rights at the expense of victims’ rights led to increasing concern about the continuing viability of a rule of evidence the essential central thesis of which was in doubt.

At issue, essentially, was whether evidence of a rape complainant’s sexual history was relevant to either the issue of her consent to sexual intercourse or her credibility as a witness. Professor Wigmore, in his treatise on evidence, had stated that, “the character of the woman [in a rape case] as to chastity is of considerable probative value in judging the likelihood of [her] consent.”5 However, society had changed since Wigmore first articulated this principle. In a society that no longer considers non-marital sexual behavior immoral or even unusual, it would be incongruous to suggest that there is an immoral character trait of unchastity. Moreover, an argument that a woman who has engaged in extramarital sexual relationships is more likely to consent indiscriminately than would a chaste woman is insupportable in modern thought.1

Massachusetts courts, up to within the last decade, adhered to the general rule that “reputation evidence was, according to established law, relevant on the issue of consent to the alleged rape.”6 However, a rape complainant witness’ reputation for truth and veracity was not subject to impeachment by admission of character evidence of sexual conduct or reputation for unchastity.9

This general rule was, however, not without its critics. Justice Braucher, in a frequently quoted dissenting opinion in Commonwealth v. Manning, noted that the “established law,” as quoted above, “is part of a legal tradition, established by men, that the complaining woman in a rape case is fair game for character assassination in open court. Its logical underpinnings are shaky in the extreme.”7 In his criticism of the logic employed by the majority, Braucher restated the court for its use of an “illogical premise,” that premise being that a jury could infer from evidence of a woman’s reputation for being unchaste not only that she may have consented to intercourse, but also that her testimony that she did not consent was false and, therefore, everything she said was false.11

The overall concern that a rape victim’s courtroom experience involves trauma, invasion of privacy, jury prejudice and character assassination led to the reform of rape laws.12

The voices of dissatisfaction with the traditional rule of admissibility of evidence of a victim’s sexual history apparently prevailed in Massachusetts and numerous other jurisdictions13 which responded to the urge for reform by enacting statutes which restrict the use of such evidence in rape trials. By Chapter 110 of the Statutes of 1977, the Massachusetts legislature enacted what has come to be known as the Massachusetts Rape Shield Law, codified in M.G.L. ch. 233, §21B.14

Along with changing the admissibility standard, the Massachusetts Rape Shield law changes the procedure that must be followed prior to admission of prior sexual acts, which is statutorily limited to acts between the complainant and defendant. These requirements include a written motion, an offer of proof, an in camera hearing and written findings by the judge.15 However, according to Massachusetts courts’ construction of the statutory requirements, the threshold determination of admissibility to be made under the statute is the same as at common law in regard to the relevance of such evidence.16 Once an initial determination of admissibility is made:

the statute then imposes an additional responsibility on the judge. Such
evidence may be excluded under the statute if the judge finds that the weight and relevance of the proffered evidence is not sufficient to outweigh the prejudicial effect to the victim." (emphasis added)

The judicial interpretation expressed by the court in *Commonwealth v. Grieco*, supra., and cases discussed below (section IV B, infra) suggests that the prohibitions of the statute may be viewed by Massachusetts courts to be, in a sense, directory rather than mandatory. That is, where sexual history evidence survives a traditional relevance inquiry, the statutory proscription against admitting the evidence will be honored to the extent that no infringement of a defendant’s constitutional right to a fair trial results.

III. Constitutional Issues Raised By Massachusetts Rape Shield Statute

The Sixth Amendment of the Constitution provides, in pertinent part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor.” The Confrontation Clause of this provision of the Bill of Rights, made applicable to state proceedings by way of the Due Process Clause of the Fourteenth Amendment, controls the extent to which a defendant has the right to cross-examine a witness who testifies against him. The Compulsory Process Clause, also applicable to state proceedings, is the basis for the right of one accused of a crime to present his or her own witnesses.

In addition to these federal constitutional provisions at issue in the enforcement of the Massachusetts Rape Shield law, Article 12 of the Massachusetts Declaration of Rights provides that every person held to answer for a crime has a right “to meet the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor.” This state version of the Confrontation Clause is statutorily reaffirmed in M.G.L. ch. 263, §5.

In essence, these federal and state provisions are intended to ensure that the fundamental right to a fair trial is preserved and assured for any person accused of a crime. The rights which have been articulated by the highest courts at the state and federal level include the right to cross-examination and to present relevant evidence in a criminal defense. The Supreme Judicial Court of Massachusetts has articulated the principle as follows: “The right of confrontation and cross-examination, especially in the area of bias and interest of the witness, is crucial to ensure a fair trial.” Similarly, the United States Supreme Court has stated:

There are few subjects, perhaps, upon which this Court has been more unanimous than in their expressions of belief that the right of confrontation and fundamental requirement for the kind of fair trial which is the country’s constitutional goal.

The Massachusetts Rape Shield Law has been interpreted by some commentators to be at least potentially violative of the Sixth Amendment. The Massachusetts appellate courts, which have avoided specifically addressing this question, have not declared the statute unconstitutionally violative (see section IV B, infra). Whether the question of the constitutionality of this state’s Rape Shield Law will be addressed directly by the United States Supreme Court or inferentially in the event that Rule 412 of the Federal Rules of Evidence or some similarly worded state statute is construed is, as yet, unknown.

The question which will be posed should the constitutional question be squarely presented is whether an absolute prohibition against introducing sexual history evidence violates a defendant’s right to confront witnesses against him.

The threshold question to be addressed in such an inquiry is whether the statutorily proscribed evidence is relevant. Interestingly, Massachusetts appellate courts to date have avoided addressing the constitutional question of whether sexual history evidence which is relevant because of its rational tendency to show bias is proscribed, thereby violating the Sixth Amendment, by interpreting the statute as not proscribing the introduction of the evidence.

In considering whether evidence of a rape complainant’s sexual history is admissible in the context of testing the constitutionality of the Rape Shield statute the same initial line of inquiry should be conducted as would be in the absence of such a statute. To be admissible, the evidence must be relevant, that is to have some logical tendency to make a fact more or less likely. Furthermore, this probative value must not be outweighed by the prejudicial effect.

Professor McCormick cites four reasons for excluding evidence which has been established otherwise to have probative value: (1) the evidence may unduly arouse the jury’s prejudice hostility or sympathy; (2) the jury will be distracted from consideration of the main issues by introduction of a side issue; (3) the line of inquiry introduced will be unduly time consuming; and (4) the party against whom the evidence is to be used will suffer undue surprise.

The constitutional issue should only arise in instances where evidence of sexual history survives this preliminary inquiry, at which point the statute would come into play to exclude what is established to be relevant and admissible.

Should relevant sexual history evidence be determined to be inadmissible because of the statutory proscription, the court must determine whether there is a constitutional violation by conducting a due process balancing test. The test involves the court identifying the state’s interest in excluding the evidence and weighing this interest against the right of the defendant to confront the witness.

The state’s interest in prohibiting admission of sexual history evidence is, “sheltering the victim from humiliation and psychological damage and encouraging the reporting and prosecution of rape.” A number of states addressing the question of the constitutionality of Rape Shield statutes have found that this interest is outweighed by a defendant’s “critical” right to confrontation.

However, implicit in this tendency to tip the balancing test in favor of finding statutes unconstitutional is a determination that the defendant’s need to introduce the sexual history evidence is in fact, “critical” under the *Davis v. Alaska* standard. Thus, a defendant has the burden of proving that the evidence is not only relevant, but “critical” in presenting an argument that the exclusion of the evidence would be a constitutional error.

Some commentators have suggested that the outcome of this due process balancing test is dependent upon the standard of review applied by the court. Under a totality of circumstances test in which “the legitimate interests of the state” are weighed against the “constitutional rights of the defendant,” a state is likely to sustain its right to reasonably regulate the trial process as long as a defendant is not denied a fair trial. Applying such a standard, Massachusetts Rape Shield law is likely to withstand a constitutional test, at least in the context that the statute has been applied by the Supreme Judicial Court to date (see section IV B, infra).
However, if the United States Supreme Court were to apply a strict standard of review even a minor restriction of a defendant's rights will be struck down. Although the United States Supreme Court has, to date, appeared to apply a balancing test in Sixth Amendment cases, thereby suggesting that a "totality of circumstances" test is appropriate for review of rape shield laws, it is hypothesized by some commentators that a strict standard of review was in fact being applied. If such a strict standard were to be applied to Massachusetts Rape Shield law it would, undoubtedly, be held to be violative of the Sixth Amendment.

IV. Judicial Construction of Massachusetts Rape Shield Law

A. Pre-enactment case law

As noted in section II above, Massachusetts courts followed the general rule of admissibility of evidence of a rape complainant's reputation for unchaste character as relevant on the issue of consent. However, such evidence was generally inadmissible for impeachment purposes. Opinion evidence and evidence of prior sexual intercourse between the victim and men other than the defendant were generally inadmissible, with the exception that when evidence of a victim's pregnancy and miscarriage was introduced over a defendant's objection, the defendant was entitled to introduce evidence to show another was responsible.

Despite the majority opinion of Commonwealth v. Manning, supra, contemporaneous case law revealed that Massachusetts courts were responding to the urging of reformists on the issue of admissibility of evidence of a rape victim's sexual history. The Supreme Judicial Court's questioning of the underpinnings of the rule was revealed in dicta that a "victim's consent with one man does not imply her consent with another." Additionally, the practical effect of the rule was subject to question because collateral questions, at least those relating to a complainant's specific acts with men other than the defendant, were viewed as potentially prolonging the trial and diverting the attention of the trier of fact from the alleged criminal act of the defendant.

The case of Commonwealth v. Bohannon, argued in the same year that the legislature enacted the Rape Shield statute, illustrates the pre-enactment thinking of the Supreme Judicial court on the issue of the right of defendants in rape trial to confront witnesses. The case involved a mildly retarded complainant who had accused the defendant and several others of assorted sexual assaults and rape. The complainant's testimony was "inconsistent and confused" on the central issue of whether the particular defendant had raped her. During cross examination the complainant explained the inconsistency of her testimony by saying that she had recently seen "in a mist" that this defendant had raped her.

During cross examination, defense counsel attempted to impeach the witness by questioning her on whether she had made prior accusations of rape. In support of the propriety of the question, counsel made an offer of proof that the complainant had made a number of unsubstantiated accusations of rape. The trial judge refused to allow counsel to pursue the line of questioning. On appeal, the court addressed the issue of the propriety of the line of questioning in terms of the defendant's constitutionally guaranteed right to present a full defense, noting that when evidence which might have a significant impact on the result of a fair trial is excluded, this right has been denied. (The court thereby recognized an exception to the general rule that evidence of prior false allegations are inadmissible under the purview of the principle that evidence of prior bad acts may not be used to impeach a witness' credibility.)

The court, emphasizing that the complainant's credibility was critical to the central issue of consent, stressed two features which were determinative of its decision. First, the defendant made an offer of proof indicating a substantiated factual basis for concluding that prior allegations had been made. On this point the court pointed out that when a proposed question even remotely connected with sexual conduct is to be asked, "the cross-examiner should have a reason for asking such questions and be prepared to disclose that reason to the judge." Second, the proposed line of inquiry dealt with prior allegations of rape rather than the complainant's sexual history or reputation for chastity.

Although the trial court decision was reversed and the case was remanded for trial, Justice Abrams, in her concluding remarks, emphasized that the court, "firmly reject[s] approval of any evidentiary rule which is grounded in a mistrust of women rather than in logic."

Thus, the pre-enactment of the Rape Shield law posture of the Supreme Judicial Court regarding presentation of evidence to impeach a complainant in a rape case may be summarized as follows. When a defendant sought to introduce evidence even remotely involving a complainant's sexual conduct, such an effort would be the subject of close judicial scrutiny — the court would tolerate no fishing expeditions which would result in embarrassment of a plaintiff. However, the court would assiduously protect a defendant's constitutionally guaranteed right to present a defense. Whether anticipation of the implementation of the rape shield statute with its accompanying constitutional issues was implicit in the court's deliberations is not known. However, the balancing process prescribed by the United States Supreme Court for testing whether a statute is violative of the Sixth Amendment guarantees was clearly in evidence.

B. Post-enactment of the Rape Shield law

The concern for balancing the state's interest in preserving a rape complainant's privacy and a defendant's constitutionally protected right to a fair trial was reflected in the first case to which the rape shield law was construed at the appellate court level. Discussing the effect of the statute in order to provide guidance to the trial court on remand, the Massachusetts Appeal Court stated:

[The statute requires counsel (and the judge) to walk a fine line in dealing with the testimony regarding the complainant in a rape case. On the one hand, counsel must have a demonstrable good faith basis for asking any question "even remotely connected with [the complainant's] sexual conduct"...and must seek an advance determination of the propriety of such a question if its propriety is unclear...on the other hand...there are circumstances in which the defendant's questioning concerns "a critical issue" in the trial and excessive limitation of such questioning can have such a "significant impact on the result of the trial" as to deny the defendant his "right to present a full defense."]

The court noted that even in light of the statute, "it is not feasible for us to frame a rule which would guide counsel
in determining how far he or she may go," concluding that "the decision must be left to the judge." That court added parenthetically that:

just as a prosecutor must carefully prepare closing argument to avoid prejudice to the rights of the defendant, counsel of the defendant in a rape trial must carefully prepare examinations to avoid prejudice to the rights of the complainant under the statute. 54

The question of admissibility of evidence of a rape complainant's sexual activity with men other than the defendant under the rape shield law was squarely addressed by the Supreme Judicial Court in Commonwealth v. Chretien. 55 Counsel for the defendant, who was the estranged husband of the plaintiff, sought to question the complainant in the presence of the jury regarding recent sexual intercourse with men other than her ex-husband, arguing that the question would "explain that this sperm may well have come from a source other than the accused." Additionally, the defendant sought to introduce evidence that the complainant was taking birth control pills, arguing that such evidence would show the victim's "state of mind with respect to the defendant." On this latter question, the court held that the evidence was properly excluded because the defendant failed to demonstrate that the evidence was relevant.

As to the propriety of questioning the complainant regarding sexual encounters with other men, the defendant presented an argument on constitutional and statutory grounds. The constitutional argument was essentially that the exclusion of the evidence violated the defendant's right to confront the witness. Admitted was an argument that, even under the rape shield law, the evidence should have been admissible as "evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristics, or condition of the victim." The court rejected both arguments, reasoning that:

[the constitutional right to confront one's accuser does not extend so far as to entitle the defendant to engage in an unbounded and free wheeling cross examination in which the jury are invited to indulge in conjection and supposition.] 53

The 1981 case of Commonwealth v. Joyce56 presented the question of whether a trial court judge's rulings pursuant to the rape shield law amounted to an unconstitutional abridgment of the defendant's Sixth Amendment right of confrontation, the cognate rights guaranteed under Article 12 of the Declaration of Rights to the Massachusetts Constitution, and by M.G.L. ch. 263, §5 as well as the Due Process right to fair trial. 57

The case involved a defendant who sought to introduce evidence of two charges of prostitution brought against the complainant in the year of the alleged rape. The theory in support of allowing the introduction of the evidence was that "the allegations of rape against the defendant may have been motivated by her desire to avoid further prosecution." The judge ruled that the evidence should be excluded, basing the ruling on the prohibition in the rape shield law against admitting in a rape trial evidence of reputation or of specific instances of a victim's conduct with someone other than the defendant.

Noting that "the issue of bias was squarely raised," the court reached its decision that the exclusion was a reversible error without reaching the constitutional questions raised. Instead, the court reached its conclusion by interpreting the statute as co-existing with, rather than overriding, recognized rights. Further, noting that "there is nothing in the history of the enactment of §21B which indicates any legislative consideration of constitutional issues, and, more particularly, the question of impeachment by proof of bias," the court reasoned that, "[r]easonable cross-examination to show motive or bias has long been a matter of right" and concluded that, "we do not read the rape-shield statute as abridging this constitutional right." 58

Thus, the court seemingly preserved the integrity of the rape shield statute from assault on constitutional grounds while at the same time chipping away at what was presumed to be its purpose — to preclude admission of such testimony in all but the exceptional situations enumerated in the statute itself. The exceptions created in Commonwealth v. Joyce, however, appeared narrow. 59 The direction which the court provided trial court judges, whose important role in exercising discretion to ensure both proper implementation of the statute and preservation of recognized constitutional rights, was as follows:

[A] trial judge should consider the important policies underlying the rape shield statute. He should exclude evidence of specific instances of a complainant's sexual conduct insofar as that is possible without unduly infringing upon the defendant's right to show bias. 59

The bias or motive exception to the rape shield statute's general prohibition against introducing evidence of a rape complainant's prior sexual acts was revisited by the Supreme Judicial Court in the 1983 case of Commonwealth v. Elder in the context of a statutory rape charge. 60 The defendant therein had been charged with four specific instances of statutory rape of the fourteen year old daughter of a woman with whom he cohabited.

The defendant, appealing on the grounds that denial of his attempt to introduce evidence of the complainant's sexual relations with a boy friend was error, argued that the evidence was relevant on the issue of bias and that he had been denied his right to confront the witness against him. His argument was premised on a theory that the complainant was willing to fabricate rape charges against him to prevent him from interfering with her intimate relations with her boy friend. The trial judge had excluded certain evidence which he considered irrelevant under the standards of M.G.L. ch. 233, §2B. However, the trial judge had permitted the defendant to introduce other forms of evidence of hostility between the complainant and defendant, including evidence of her hostile response to his steps to terminate her relationship with her boy friend. According to the court:

Evidence of bias was fully elicited through direct and cross examination of the complainant, as well as through testimony of the defendant. Thus, the defendant was able to argue to the trier of fact that the witness was biased on the record he established, without introducing evidence of prior sexual history.61

On this point, the case was distinguished from Davis v. Alaska, supra, and Commonwealth v. Ferrara, supra, in which introduction of the questionable evidence was "critical" since there was no other way in which the bias of the witnesses could otherwise be elicited. Thus, the rule as articulated by the highest court of Massachusetts is that, "[w]here evidence of bias is available by other means, no evidence of the complainant's prior sexual
history should be admitted." The important role of the trial judge was, once again, emphasized by the court in its approval of the trial judge's conduct in giving proper attention to, "the important policies underlying the rape shield statute" as well as the Confrontation Clause of the Sixth Amendment.

The intention of the court to interpret the bias exception to the rape shield law narrowly in the context of charges of constitutional violations was reiterated in the 1983 case of Commonwealth v. Frey, another statutory rape case. The defendant in that case was the patient of the complainant's father who was a "psychiatrist and leader of a group called the Institute for Advanced Maturation." The complainant, aged 14, had been permitted to live in the defendant's home. Following an argument she was returned to her parent's home. Shortly thereafter, upon the advice of her father and a lawyer, she went to the state police to bring criminal charges and also filed a civil suit.

The defendant argued that, in keeping with the guarantees of the Sixth and Fourteenth Amendments and Article 12 of the Declaration of Rights to the Massachusetts Constitution, he should not be precluded from introducing evidence of the complainant's prior sexual acts to prove bias or motive to lie, citing Commonwealth v. Joyce, supra. The court in Commonwealth v. Frey distinguished the two cases, stating that the proffered evidence of prior sexual encounters had no tendency to show that the proponent brought charges against the defendant for bias or other ulterior motive. The court further noted that even if the evidence were "marginally probative," ample evidence of the complainant's bias and motive to lie had been presented to the jury. Thus, as had been the case in Commonwealth v. Elder, the bias exception to the rape shield law was narrowly interpreted so as to avoid the creation of "unwarranted inroads upon the rape shield law" that Chief Justice Hennessy had warned against.

Thus, to date the Massachusetts courts appear to have construed the Rape Shield law to co-exist with the constitutionally protected right of a defendant to confront a witness; thereby succeeding in preserving the Sixth Amendment right to a fair trial while at the same time enforcing, with a modicum of limits, the legislative intent in enacting M.G.L. ch. 233, §21B.

V. Conclusion

Should the question whether the Massachusetts Rape Shield law violates the Sixth Amendment right to confrontation be addressed by the United States Supreme Court, the outcome may well depend on the level of scrutiny applied by the court. The statute is unlikely to survive judicial inquiry if its language is subjected to a form of strict scrutiny. Similarly, even if the court were to apply a balance of interests test, as has been applied historically in cases involving Sixth Amendment rights, it is possible that this statute would be found violative based on the strongly prohibitive language.

However, in the context in which the statute has been interpreted by the Massachusetts courts, at least to date, the statute may well survive a constitutional inquiry, inasmuch as the courts have assiduously preserved the principal confrontation right recognized by the Supreme Court — the right to show bias in cross-examination.

In the event that the statute is determined to be unconstitutional, it is suggested that the protection of rape complainants achieved by the enforcement of the statute is not likely to be reversed. Recent decisions by Massachusetts courts of appeal suggest that the protections afforded by statute can as readily be achieved by application of traditional rules of evidence.

NOTES

1. M.G.L. ch. 233, §21B. Evidence of sex crime victim's sexual conduct; admission; findings.
4. It has been suggested that chastity as a character trait is of importance only in considering the credibility of female witnesses. See State v. Sibley, 131 Mo. 519, 531, 33 S.W. 167, 171 (1895):
   "It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman..."
5. Wigmore, 1 Evidence §62 at 464.
9. Id. at 610.
10. Id. at 613-14.
11. Id.
13. Massachusetts enactment of the Rape Shield Law was in keeping with a trend which culminated in the addition of Rule 412 to the Federal Rules of Evidence, as enacted by Congress in 1978 as part of the Privacy Protection For Rape Victims Act, P.L. No. 95-540. This rule, entitled "Rape Cases: Relevance of Victim's Past Behavior," closely parallels Massachusetts' version.
14. M.G.L. ch. 233, §21B states as follows:
   Evidence of the reputation of a victim's sexual conduct shall not be admissible before a grand jury or any court of the Commonwealth for a violation of sections thirteen B, thirteen F, thirteen H, twenty-two, twenty-two A, twenty-three, twenty-four and twenty-four B of chapter two hundred and sixty-five or section five of chapter two hundred and seventy-two. Evidence of specific instances of a victim's sexual conduct in such an investigation or proceeding shall not be admissible except evidence of the victim's sexual conduct with the defendant or evidence of recent conduct of the victim alleged to be the cause of any physical feature, characteristic, or shall be admissible only after an in camera hearing on a written motion for admission of same and an offer of proof. If, after said hearing, the court finds that the weight and relevancy of said evidence is sufficient to outweigh its prejudicial effect to the victim, the evidence shall be admitted; otherwise not. If the proceeding is a trial with a jury, said hearing shall be held in the absence of the jury. The finding of the court shall be in writing and filed but shall not be made available to the jury.
15. Commonwealth v. Grieco, 436 N.E.2d 167, 170-71 (Mass. 1982) (holding that a pattern of recent consensual activity between the complainant and the defendant is relevant on the issue of consent; therefore exclusion premised on the prohibition of the rape shield law is a reversible error).
16. Id. (to be relevant, evidence "must merely render the desired inference [of consent] more probable than it would be without the evidence").
17. Id.
18. U.S. Constitution, Amend. VI.
21. Tanford and Boccino, supra, note 2, at 556.
23. M.G.L. ch. 263 §5, entitled, "Counsel; right of accused", states as follows:

A person accused of a crime shall at his trial be allowed to be heard by counsel, to defend himself, to produce witnesses and proofs in his favor and to meet the witnesses produced against him face to face.

27. See, e.g., Burnim, supra, note 3, at 67-69. See also Tanford and Boccino, supra, note 2, at 589. (statutes which absolutely prohibit all or certain uses of victim's sexual history cannot be reconciled with Sixth Amendment); Berger, "Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom," 77 Colum. L. Rev. 1,55 (excluding evidence under rape shield statutes conflicts with defendants' constitutional right to confront witnesses.)
28. See Commonwealth v. Ferrara, 330 N.E.2d at 841 (Court's initial inquiry was whether the juvenile records which were inadmissible pursuant to M.G.L. ch. 119, §60 had a rational tendency to show bias of the witness).
32. Tanford and Boccino, supra, note 2, at 566-67. See also Note, "Indiana's Rape Shield Law: Conflict with the Confrontation Clause?" 9 Ind. L. Rev. 418, 435 (1976).
34. Tanford and Boccino, supra, note 2, at 560-565.
35. Id. at 544.
36. Washington v. Texas, 388 U.S. at 16 (testimony excluded was "vital" to defense and rule excluding evidence was considered "arbitrary"); Davis v. Alaska, 415 U.S. at 314-17 (the credibility of the witness was a "key element" in the case, therefore, right to confrontation by means of cross examination "paramount").
37. Tanford and Boccino, supra, note 2, at 562 (posing that excluded testimony in Davis v. Alaska was "not very important" and witness' potential infringment was comparatively unimportant).
43. Id. at 227.
44. Commonwealth v. Bohannon, 376 Mass. 90, 378 N.E.2d 987 (1978) (since the evidence the admissibility of which was in question dealt with prior allegations of rape rather than the complainant's prior sexual activity or reputation for chastity, the court did not reach issues related to M.G.L. ch. 233, §21B).
45. Id. at 989.
46. Id. at 990.
47. Id. (the court reached its determination on the credibility issue alone, refusing to address the bias issue raised on appeal because the bias aspects of cross examination had not been brought to the attention of the trial judge, citing Commonwealth v. Mississippi, 410 U.S. 284, 935 S.Ct. 1038 (1973); and Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974).
49. Id.
50. Id. at 992.
52. Id. at 763-64.
53. Id. at 765.
54. Id.
56. Id. at 1211-12.
57. Id. at 1212.
58. Id. (The court added that the rape shield statute provided no greater opportunity for such cross examination, although, upon complying with statutory prerequisites a defendant is entitled to test his theory by presenting his evidence outside the jury's presence in a voir dire hearing. Despite the defendant's failure to meet statutory requirements, the trial judge had afforded him a voir dire after which the judge, in his discretion, excluded the evidence).
60. Id. at 184.
61. Id.
62. Id. at 186.
63. Id. (in reaching its conclusions the court reiterated its posture on the issue
of admissibility of such evidence in general, noting:

We do not depart from the long held view that prostitution is not relevant to credibility. . . . Nor do we depart from the policy of the statute in viewing prostitution or the lack of chastity as inadmissible on the issue of consent.

64. See the concurring opinion of Hennessey, C.J., at 415 N.E.2d 188:

The opinion of the court . . . is narrowly and carefully confined to cases where the disputed evidence is clearly relevant to a showing of bias or motive to lie by a complaining witness. If the court's opinion is not read in this cautious fashion, there is a danger that there will be unwarranted inroads upon the [rape-shield] law . . . and the legislative purpose which inspired the statute.

65. Id. at 188.


67. Id. at 1109.

68. Id.

69. Id. at 1110. (Additionally, the court noted that hostility alone has been held to be an inadequate basis for introduction of specific instances of a complainant's prior sexual acts, citing Hubbard v. State, 271 Ark. 937, 611 S.W.2d 526 (1981)).

70. Id. The court also discussed the issue of whether the judge's exclusion of the defendant's proffered evidence of the complainant's non-virginity violated the defendant's right to confront the witness. Noting that lack of virginity is not a "condition" within the exception of M.G.L. ch. 233, §21B, the court rejected the defendant's arguments on two grounds. In a statutory rape charge a complainant's sexual history is clearly irrelevant insofar as consent is not an issue. Also, it was determined that any prejudicial effect which the evidence of lack of virginity might have could not be counteracted by the defendant because his counsel had elicited the damaging information.


72. Id. at 479-480.

73. Id. at 481-82.
Saunders v. Rhode Island

Special Interrogatories and the General Verdict: Is There A Duty To Reconcile?

by John Masiz

John Masiz is a third year day Suffolk University Law Student and is the Advocate’s Business Editor.

Introduction

Rule 49(b) of the Federal Rules of Civil Procedure provides for the use of special interrogatories with a general verdict and remedies to reconcile inconsistencies between the special interrogatories and the general verdict. In Saunders v. Rhode Island, the Court of Appeals for the First Circuit applied the standards of Rule 49(b) to resolve interrogatory answers which were inconsistent with both each other and the general verdict. However, this court did not attempt a reconciliation to avoid conflict with the seventh amendment right to a jury trial. Instead, it found that the special interrogatory answers were inconsistent with each other and the general verdict. Following this finding, the Saunders court ordered a new trial pursuant to Rule 49(b).

Facts of the Case

On November 2, 1974, several inmates in the Adult Correctional Institute murdered Claude Saunders, who was confined to the maximum security facility. Martha L. Saunders, the decedent’s mother, brought a 42 U.S.C. 1983 civil rights action and a wrongful death claim against the state of Rhode Island and the warden of the Adult Correctional Institute. The jury was instructed on the civil rights action and returned a verdict for the state and the warden. The Court then instructed the jury on the wrongful death action. These instructions included general instructions on the wrongful death negligence claim and, by reference, general instructions given for the civil rights claim. The trial court also submitted to the jury a set of sixteen interrogatories to answer when it rendered its general verdict. The jury returned a general verdict that found the state of Rhode Island negligent, as did their answers to the interrogatories. However, the state's agent, the prison warden, was found not to be negligent. Further, Claude Saunders, the victim, was found contributorily negligent. Finding logical inconsistency, the trial justice submitted three questions to the Rhode Island Supreme Court. These questions certified the requirements needed to establish liability for wrongful death against a correctional facility. This court compared the Rhode Island Supreme Court’s Requirements for liability with the general verdict and found them to be irreconcilable. The trial court then entered a judgment for the defendants based on the special interrogatory answers.

On appeal, the First Circuit Court of Appeals determined that the special interrogatory answers were inconsistent with both the general verdict and each other. The appellate court refused to reconcile the interrogatories to support the verdict that had been entered. Instead, the appellate court, pursuant to Rule 49(b), ordered either a resubmission of the special interrogatories for reconsideration by the jury or a new trial. Since the jury had been discharged, a new trial was required.

Historical Development of Rule 49(b)

Special interrogatories accompanying general verdicts have evolved from medieval common law. This common law was codified into Rule 49(b) with the enactment of the Federal Rules of Civil Procedure. Many courts extolled the procedure in Rule 49(b) for its use in resolving inconsistencies between the interrogatories and the general verdict. Court decisions subsequent to the enactment of the Federal Rules of Civil Procedure show that a strict adherence to Rule 49(b) therefore, when interrogatory answers were consistent with each other but inconsistent with the general verdict, the courts would enter a verdict based on the special interrogatory answers pursuant to Rule 58 of the Federal Rules of Civil Procedure. In those cases in which a jury's interrogatory answers were inconsistent with both the general verdict and each other, the courts would either resubmit the questions for the jury's reconsideration or order a new trial. The courts blind adherence to Rule 49(b) was gradually replaced. The courts began to require that inconsistent interrogatory answers had to be both material and supported by evidence in order to supersede a general verdict. Therefore, the general verdict would not be disturbed if the inconsistent special answers related to a nonmaterial finding. Further, the general verdict would be upheld if the jury's inconsistent answers were not grounded on evidence before the court. Both the materiality requirement and the evidentiary requirement represented obstacles which had to be resolved before Rule 49(b) would even be considered.

In the case of Gallick v. The Baltimore and Ohio Railroad Company, the Supreme Court further restricted the application of Rule 49(b). The Gallick court expounded the exegesis theory. This theory requires a court to resolve a jury’s inconsistent interrogatory answers if at all possible, in order to maintain the jury’s verdict. If a court did not do this, the Seventh Amendment to the United States Constitution would be violated. In practice, courts have interpreted the exegesis theory to mean that if any logically reasonable explanation exists which would harmonize the jury’s inconsistent answers then, by definition, they are not inconsistent. The jury’s general verdict, or a verdict on the special answers, would then be entered. Thus, the Gallick decision restricted the application of Rule 49(b) to instances in which the special interrogatory’s inconsistency is material, not supported by evidence, and unable to be harmonized by any logically plausible explanation.

Court’s Reasoning

In Saunders v. Rhode Island, the Court of Appeals for the First Circuit evaluated the district court’s two-step application of Rule 49(b). The First Circuit Court of Appeals found that the jury’s special interrogatory answers could not be harmonized with the general verdict. The wrongful death
At this stage of evaluation, the circuit court's finding that the general verdict could not be upheld mirrored that of the district court.

The First Circuit Court of Appeal's second stage of analysis determined that the jury's special answers were logically inconsistent with each other on two grounds. First, the jury found that both the prison guards negligent in their duty to protect Saunders, while also finding that the guards had no knowledge that Saunders was in danger. Second, the jury, in its special answers, found the state liable because the general verdict of the jury can not be reconciled with the special answers. Further, since the interrogatories themselves are inconsistent, the Gallick decision would have the court, not the jury, determining which special interrogatory answer would be reconciled to become the verdict. Therefore, the Saunders court, by mandating either a new trial or a resubmission of the interrogatories, actually returns the verdict rendering process to the jury and upholds the seventh amendment.

In addition, the Saunders court's illustration of a theoretical problem continued in the reconciliation principle. Generally, a special interrogatory answer controls the verdict when that answer is irreconcilable with a general verdict. The rationale is that a jury can more accurately answer specific questions than formulate a general verdict. However, special interrogatory answers inconsistent with themselves indicate jury confusion. Justice is not served by entering a verdict based on confusion, as the Gallick procedure would do. The better alternative, as propounded by Saunders, would be to either resubmit the interrogatories to the jury or to order a new trial. In this way, the integrity of the verdict is preserved.

Conclusion

In Saunders, the First Circuit Court of Appeals narrowed the application of the reconciliation doctrine expounded by Gallick. However, this narrowing applies only when a jury's answers to special interrogatories are inconsistent with both the general verdict and each other. In this one situation, Saunders requires either a resubmission of the interrogatories to the jury for reconsideration or a new trial pursuant to Rule 49(b). Although procedurally different from the Gallick case, the application of Rule 49(b) by the Saunders court protects the seventh amendment rights. Therefore, courts confronted with answers to special interrogatories that are inconsistent with both the general verdict and each other should apply Rule 49(b) to avoid the possibility of a seventh amendment confrontation or a miscarriage of justice.
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Inconsistent interrogatory answers resulted in a new trial. Inconsistent interrogatory answers resulted from erroneous instructions to the jury or ordering a new trial. Since the jury had been discharged a new trial was ordered. See Infra note 18 and accompanying text.

731 F.2d at 81. The prisoners evaded the guards and stabbed Saunders when his cell door opened for the evening recreation.

Specifically under the s.1983 action, Martha Saunders claimed that violence was so rampant at the prison that it became tantamount to an official custom of the state of Rhode Island. This then violated Claude Saunders's fourteenth and eighth amendment rights.

The wrongful death claim was based on the failure to provide adequate protection for her son. Id.

Specifically under the s.1983 action, Martha Saunders claimed that violence was so rampant at the prison that it became tantamount to an official custom of the state of Rhode Island. This then violated Claude Saunders's fourteenth and eighth amendment rights.

731 F.2d at 81. The prisoners evaded the guards and stabbed Saunders when his cell door opened for the evening recreation.

1. Do the State of Rhode Island, its officers, and employees have a duty to exercise reasonable care to protect prisoners in state correctional institutions from violent attack by other inmates, or is their duty measured by some other standard of care?

2. In order to establish a violation of this duty, must a plaintiff prove any of the following:

(a) That prison personnel knew, or had reason to anticipate, that the victim was in danger?

(b) That prison personnel knew, or had reason to anticipate, that the aggressor might attack the victim?

(c) That prison personnel knew, or had reason to anticipate, that the aggressor had dangerous propensities and/or was likely to be involved in a violent outburst?

3. Is the State of Rhode Island liable on the theory of respondent superior for the negligence of prison guards, which negligence was a proximate cause of the death of an inmate at the hands of another prisoner?

All three certification questions were answered in the affirmative by the Rhode Island Supreme Court. Id. at 83.

15. Id. at 82-83. The certification questions which specified the requirements needed to establish liability on a prison in a wrongful death action were the following:

1. Do the State of Rhode Island, its officers, and employees have a duty to exercise reasonable care to protect prisoners in state correctional institutions from violent attack by other inmates, or is their duty measured by some other standard of care?

2. In order to establish a violation of this duty, must a plaintiff prove any of the following:

(a) That prison personnel knew, or had reason to anticipate, that the victim was in danger?

(b) That prison personnel knew, or had reason to anticipate, that the aggressor might attack the victim?

(c) That prison personnel knew, or had reason to anticipate, that the aggressor had dangerous propensities and/or was likely to be involved in a violent outburst?

3. Is the State of Rhode Island liable on the theory of respondent superior for the negligence of prison guards, which negligence was a proximate cause of the death of an inmate at the hands of another prisoner?

All three certification questions were answered in the affirmative by the Rhode Island Supreme Court. Id. at 83.

15. Id. at 82-83. The district court followed the generally accepted practice of entering a verdict on the special interrogations when they are inconsistent with the general verdict. U.S. v. City of Jacksonville, 257 F.2d 330, 336 (8th Cir. 1958). The courts usually feel that the interrogatory answers control the general verdict when there are inconsistent with the general verdict. U.S. v. City of Jacksonville, 257 F.2d 330, 336 (8th Cir. 1958). The courts usually feel that the interrogatory answers control the general verdict when the two are inconsistent. Nice v. Pennsylvania R.R. Co., 168 F.Supp. 641, 644 (N.D. Ohio 1959).

See Yancey v. Union Carbide Corp., 353 F.2d 672, 672 (5th Cir. 1965) (Where the general verdict and special interrogatory answers were inconsistent but there was ample evidence to reconcile the interrogatory answers and maintain the verdict entered on them as opposed to the general verdict).

But see Cone v. Beneficial Standard Life Ins. Co., 338 F.2d 456, 460 (8th Cir. 1968) (If verdict is perverse because of inconsistency with the answers to special interrogatories, then a verdict on
the special interrogatories may not be entered.
19. 731 F.2d at 84. The court found that the answers to the special interrogatory questions were "hard to square." This appears to indicate an attempt to logically reconcile the answers.

20. Id. The Saunders court attempted to use logic as the basis of their attempt to reconcile the general verdict with the interrogatory answers. But exegesis reconciliation is needed to avoid confrontation with the seventh amendment. 


Further, to search for a view of the case that will render the jury's findings inconsistent results in a collision with the seventh amendment. Id. 

See Ratay v. Lincoln National Life Ins. Co., 378 F.2d 209 (3rd Cir. 1967) (Where a view of the case exists which makes the general verdict and special interrogatories consistent, the case must be resolved that way); Missouri Pacific R.R. Co. v. Salazar, 254 F.2d 847, 848 (5th Cir. 1943) (Error on the part of the court to fail to reconcile inconsistent interrogatory answers when they are not fatally inconsistent). 

But see H.T. Arnold v. Panhandle and S.F. Ry. Co., 353 U.S. 360, 361 (1957) (Court should not accept interpretations of inconsistent interrogatories that would nullify the effectiveness of the special interrogatory answers).

21. 731 F.2d at 84. This court order is pursuant to the remedy provided in Rule 49(b) for situations where the special interrogatory answers are inconsistent with the general verdict and each other.

22. Id.

23. Yale L.J. 575, 577 (1923) (A primitive form of special interrogatories accompanied with general verdicts can be found to have evolved by the end of the twelfth century); Kentucky L.J. 5.52 (1964) (Special interrogatory with general verdict is used as a matter of practice in Mass. in colonial times).

24. Supra note 23 and accompanying text. Supra note 1 and accompanying text.

25. Sutherland, The New Federal Rules, West Virginia L.Q. 5, 27 (1938) At an address delivered at the fifty-fourth annual meeting of the West Virginia Bar Assoc., remarks that the special interrogatory used with a general verdict as provided by Rule 49(b) is a very useful tool. Skidmore v. Baltimore & O. R.R. Co., 167 F.2d 54, 61 (2nd Cir. 1948). Justice Frank extolling the use of special interrogatories to remove the mystery from the jury's general verdict.

See Foster v. Moore-McCormack Lines, 131 F.2d 907, 908 (2nd Cir. 1943) (Special interrogatories should be used to "penetrate the impenetrable darkness" of the general verdict).


27. Supra note 1 and accompanying text.

28. Supra note 1 and text. Infra note 53 and accompanying text.


30. Hinton v. Chicago, Rock Is. & P.R. Co., 172 F.Supp. 747, 751. See Safeway Stores v. Dial, 311 F.2d 595, 600 (5th Cir. 1963) (If the special interrogatories relate to an issue that is not pertinent to a material fact, then the verdict is not disturbed).


The general rule is that a verdict should only be disturbed when it is against the great weight of evidence. Perricon v. Kansas City So. Ry. Co., 704 F.2d 1376, 1380-81 (5th Cir. 1983).

See Malm v. U.S. Lines Co., 269 F.Supp. 731, 731-32 (So. N.Y. 1976) (Odd jury verdict was not disturbed since evidence was supporting the verdict).

32. See Lesperance v. Wolff, 79 Ill. App. 3d 134, 34 Ill. Dec. 685, 398 N.E. 2d 360, 363 (1979) (The threshold question in reconciling inconsistent interrogatory answers is whether the answers are supported by evidence and material to the issue at hand).


34. Id. at 119.

35. Id. at 119. The exegesis theory purports that if any logical basis can be used to reconcile the inconsistency in the interrogatory answers, the case must be resolved that way. Supra note 4 and accompanying text.


See Reiner v. Banker's Security Corp., 305 F.2d 189, 193 (3rd Cir. 1962) (To search for an inconsistent view of the case is to confront the seventh amendment).

37. U.S. v. O. 78 Acres, 81 F.R.D. at 621. The test used to reconcile conflicts between interrogatory answers is to determine whether the answers represent a logical and probable decision on relevant issues as submitted.

See Ludwig v. Marion Laboratories, 465 F.2d 114, 118 (8th Cir. 1972) (In this instance, no real inconsistency existed between the interrogatory answers since a duty to harmonize exists); McIntyre v. Everest & Jennings Inc., 575 F.2d 155, 157 (8th Cir. 1978) (Duty of courts to make every reasonable effort to reconcile special interrogatory answer inconsistency); Pyzynski v. Penn. Central Transportation Co., 438 F.Supp. 1044, 1046 (W.D. New York, 1977) (Jury's verdict is not lightly overturned — it should be reconciled if possible).

See also Infra note 50 and accompanying text.

38. Supra note 37 and text.

A final verdict based on the jury's general verdict would occur if the interrogatory answers were reconcilable with the general verdict. Koppinger v. Cullen-Schiltz, 513 F.2d 901, 905 (8th Cir. 1975).

A final verdict based on the jury's answers to the special interrogatories would be entered if the answers were reconcilable with each other but not with the general verdict. Conner v. Jeffes, 67 F.R.D. 86, 90 (M.D. Penn. 1975).

39. See Gallick, 372 U.S. at 120. (This theory represents the combination of Gallick and all the historical development of restrictive application of Rule 49(b)).

40. 731 F.2d at 84. The first step of the analysis was an attempt to determine if the interrogatory answers were inconsistent with the general verdict. The second stage of the analysis was an attempt to determine if the interrogatory answers were inconsistent with each other.

41. 731 F.2d at 83.

42. Id. at 84. Supra note 16 and accompanying text.

43. 731 F.2d at 83.
44.  Id. at 84. The court did not in its analysis perform the depth of reconciliation as specified by the exegesis theory. Supra note 36 and text.
45.  Id. Supra note 12.
46.  731 F.2d at 84. Supra note 12.
47.  731 F.2d at 84. Supra note 12.
48.  731 F.2d at 84. Supra note 37. Infra note 50 and accompanying text.
49.  731 F.2d at 84. Supra note 1.
50.  Gallick, 372 U.S. at 119. The court must reconcile the jury's findings by exegesis if necessary before the court can disregard the jury's special verdict and remand the case for a new trial. Morgan v. Consolidated Rail Corp., 509 F.Supp. 281, 284 (S.D.N.Y. 1980) The preservation of the seventh amendment right to a jury trial demands reconciliation. See Neider v. Chrysler Corporation, 361 F.Supp. 320, 324 (E.D. Penn. 1973) (In this case the jury found Chrysler negligent in the special answers but not negligent on the general verdict. The court harmonized this to mean that Chrysler failed to adequately test the car but the car was safe so therefore — no liability and general verdict upheld). Id. Case shows the extent a court will go to harmonize inconsistent interrogatory answers. Mayer v. Petzetl, 311 F.2d 601, 603 (7th Cir. 1963) (The court went through extraordinary exercises to rationalize a finding that the plaintiff did not use ordinary care but that this was not inconsistent with finding defendant liable for negligence). Willard v. Hayward, 575 F.2d 1009, 1011 (5th Cir. 1978) (Even if the jury verdict is inconsistent on its face — it is not to be considered inconsistent if it can be explained by assuming the jury reasonably misunderstood the court's instruction).
51.  Supra note.
52.  731 F.2d at 84.
53.  See 731 F.2d at 84. This is basically the procedure that the Saunders court followed.
55.  Id.
56.  Gallick, 372 U.S. at 124-27. In the dissent of Justices Stewart and Goldberg, they indicated that the attempt at reconciliation should be made when the interrogatory answers are inconsistent only with the general verdict. Id. A reconciliation attempt should not be made when the interrogatory answers are inconsistent with each other. Id. The majority decision of Gallick has invaded the province of the jury.
57.  Supra note 36.
58.  Gallick, 372 U.S. at 127. Dissent of Justices Stewart and Goldberg — special interrogatory answers which are inconsistent with each other should be put to another jury, i.e., remanded for a new trial; a court should not attempt to reconcile them because the reconciliation process would be a violation of the seventh amendment.
See Walker v. New Mexico & S.P. Ry. Co., 165 U.S. 593, 596 (1897) (The seventh amendment does not regulate pleadings or procedure but attempts to preserve the substantive rights of trial by jury). Id. (A court can not take either directly or indirectly the verdict away from the jury).
See also Wright, Handbook of The Law of Federal Courts, 463-69 (1976) (Theoretically, the judge could continue to set aside the verdict until the verdict was one he agreed with).
But see Amendments To Rules of Civil Procedure For U.S. District Courts (1963) (Statements of Justices Black and Douglas — Rule 49 should be repealed since it is a way for the courts to weaken the constitutional power of the jury). Supra notes 36, 37, 50 and accompanying text.
59.  Supra note 18.
61.  See Gallick, 372 U.S. at 124-27. (Dissent of the case which felt that new trial should be granted because of jury confusion). Studley v. Gulf Oil Co., 407 F.2d 521, 529 (2nd Cir. 1969) (Dissent by Chief Judge Lambard — the court is going to great lengths to reconcile something it is not sure of). Welch v. Bauer, 186 F.2d 1002, 1004 (5th Cir. 1951) (If there is an inconsistency between the general verdict and answers reconcile them, if answers inconsistent with each other do not reconcile but give new trial).
See also U. Chicago L.R. 321, 324 (Purpose of special interrogatory is to check correctness of the general verdict). Wright v. Kroeger Corp., 422 F.2d 176, 178 (5th Cir. 1970). (Reconciliation must be performed in light of the surrounding circumstances).
A View Of The Chinese Criminal Justice System

By Terry and Harriet Segal

In 1983, Mr. and Mrs. Segal visited China as part of a legal delegation organized by the People-To-People Foundation. Mr. Segal is a partner with the Boston firm of Segal, Moran & McMahon, and previously taught federal criminal procedure at Suffolk University Law School.

In the Summer of 1983, we visited The People's Republic of China as part of a delegation of American lawyers and criminologists selected to study the Chinese criminal justice system. One of the highlights of our trip was the chance to see a criminal trial.

On August 5th, in Shanghai, we saw the trial of Din Chengren, a 47-year old bus driver employed by the Yanchou transportation unit. He was charged with negligent homicide in connection with the death of a bicyclist struck by Din's bus on May 2nd, and the trial was conducted in the Changning District People's Court.

The courtroom was very plain; the three judges (presiding judge) and two law judges (assessors) sat behind a plain judicial bench. After the judges were seated, the accused was ushered by a policeman to a central microphone facing the judicial bench. On his right side were two prosecutors (procuratorates); on the other side were two legal advisors (defense lawyers).

The trial began with the presiding judge reminding the accused of his right to lawyers, investigators and presenting evidence. The presiding judge then advised all parties not to commit perjury or exaggerate their testimony. The prosecutor then read the indictment which basically charged Din with operating the bus negligently and at an excessive speed so as to hit a cyclist as the accused was passing another vehicle.

Two witnesses then testified. Both had been passengers on the bus and essentially confirmed that the excessive speed and negligence of Din caused the death of the cyclist. After each testimony, the accused was asked if he objected to any of the testimony; both times he said no. One of the lay judges then read the accident report and the other read the hospital records of the victim.

The prosecutor then summed up by explaining how the evidence was clear that Din's negligent driving had caused the fatality, and how the evidence proved he violated the speeding and keeping to the right provisions of the traffic code. The prosecutor then stressed how the victim was a young man with a large family.

The defense lawyer then argued that Din did try to prevent the accident, and immediately took the victim to the hospital for emergency treatment. He also pointed out the defendant had a family, and produced a letter from the victim's family requesting leniency.

After rebuttal and subrebuttal, the presiding judge asked the accused if he had any final statement. He had none. Thereupon the Court recessed for approximately 15 minutes, and returned to pronounce judgment approximately 75 minutes after the trial started.

The presiding judge reviewed the facts and concluded that the defendant was criminally responsible for the cyclist's death. Since the defendant had a good attitude, however, the Court imposed probation and a 2-year suspended sentence, and ordered the defendant and his work unit to work out an arrangement to compensate the victim's family.

Based upon our observations of this case and discussions with Chinese lawyers, there are several apparent differences between the Chinese and American criminal justice system. In China, a “trial” appears to be the equivalent of an American sentencing hearing. In China, it appears that the pre-indictment investigation is the time for determining guilt or innocence. Once an indictment is returned, the only issue at trial is punishment. Additionally, the trial was held just 3 months after the fatality, and only 2-3 weeks after return of the indictment - something unknown in this country. Additionally, Chinese law provides for the simultaneous trial of related civil actions, and places heavy emphasis on having the guilty party and his work unit adequately compensate the victim and his family, and probably even his work unit.

At the trial, the “lawyers” rarely questioned witnesses. Rather, the Court did most of the questioning. It should be noted that there are only 8,000 trained
lawyers in all of China. Accordingly, the defense advisors, prosecutors and presiding judges are usually not all lawyers.

Although there are substantial differences between the Chinese and American criminal justice systems, the gap appears to narrow when one reads a portion of the report of Premier Zhao Ziyang delivered at the Fifth Session of the Fifth National People's Congress on November 30, 1982:

"The number of criminal offenses in the country as a whole was 15.7 percent less in the first three quarters this year than in the corresponding period of last year. In the same period, we handled 136,024 criminal cases in the economic sphere, of which 44,663 have been disposed of, with 26,227 offenders sentenced according to law. Under the impact of this struggle and the influence of our policy, 44,874 offenders turned themselves in and made a clean breast of their crimes. Some of these cases were major and appalling ones involving huge, illegally acquired sums, and people call the chief culprits "big tigers". There are some people who now complain that "we are only swatting flies, not hitting big tigers". In their view, we will be hitting "big tigers" only when we bag offenders from among senior leading cadres. The host of cases handled in our struggle against economic crimes this year have proved that this view does not tally with facts. Of the total of over one hundred thousand criminal cases uncovered so far in the economic sphere, only a very small number involve, to varying degrees, senior leading cadres. Some were taken in by the actual offenders due to serious bureaucratism, others were not strict enough with their children who degenerated into criminals, and still others have been tainted with unhealthy tendencies." (emphasis added) at p. 147-148.

Din (left) facing the Presiding Judge as a witness (to his right) testifies.
BOOK REVIEWS

THE INSANITY DEFENSE AND THE TRIAL OF JOHN W. HINCKLEY, JR.

Reviewed by Jim Howaniec

The 1982 verdict of not guilty by reason of insanity at the trial of John W. Hinckley, Jr., has rekindled a controversy regarding criminal culpability that has surfaced intermittently during the history of Anglo-American law and that, more than two years after the trial, has created even greater tensions between the polar views that have developed toward crime, punishment, and responsibility. Attending every day of the trial, attorney-journalist Lincoln Caplan covered the events of the Hinckley case for the New Yorker. Caplan incorporates his articles into this book, analyzing first the events leading up to and during the trial, and then advancing his argument that, irrespective of public outrage, the law of insanity should be left essentially intact.

Caplan recounts the troubled life of the defendant: his infatuation with Jodi Foster; the "deep mourning" he suffered over the death of John Lennon; his repeated viewings of the movie Taxi Driver. Hinckley's life during the months prior to his attempted assassination of the President, was a life of cross-country meanderings, estrangement from his parents, and addiction to valium and other drugs. (Several reporters at the trial dubbed these traits "dementia suburbia.") Hinckley's poems were the subject of much interpretation: "See that living legend over there? With one little squeeze of this trigger I can put that person at my feet moaning and groaning and pleading with God."

One of the major features of the Hinckley trial was the "battle of the experts." A chief witness for the defense was Harvard Medical School neurologist expert David Bear (dubbed "the Harvard doctor" by the prosecution). Hinckley's personality, according to Bear, reflected that of Travis Bickle—"a lonely, friendless, girlfriendless man," who was played by Robert De Niro in Taxi Driver. Bear analyzed the results of a CAT-scan which revealed a widened sulci of Hinckley's brain, and concluded that there was a 94 percent probability that Hinckley was schizophrenic.

Caplan traces the roots of the insanity defense in Anglo-American law back to an adoption of biblical notions of good and evil. He discusses the ramifications and controversies engendered by the decision in the famous 1843 English case of Daniel M'Naghten, the Scottish woodcutter who suffered from the delusion that he was persecuted by the Pope, the Jesuits, and Prime Minister Robert Peel, who he attempted to shoot (but shot his Secretary, instead). Under the M'Naghten Rule, a man is not responsible for his criminal acts when, because of a "disease of the mind," he does not know the "nature and quality" of his acts or does not know they are wrong. The rule spawned a popular Victorian verse: "Ye people of England: exult and be glad/For you're now at the will of the merciless mad."

In 1954, Judge David Bazelon of the United States Court of Appeals for the District of Columbia issued an opinion that established the simple "Durham Rule" rationale for determining a defendant's state of mind and criminal culpability. Under Bazelon's reasoning, an "accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect." The decision expanded the role played by psychiatrists at trial, and shifted the burden of proof in insanity cases: under M'Naghten, a defendant had to raise the issue of and prove his insanity; under Durham, the defendant still had to raise the defense, but, once he raised it, the prosecution had to prove him sane beyond a reasonable doubt.

Because it gave judges and juries little practical guidance, few states adhered to Durham. The D.C. Court of Appeals itself rejected the rationale in 1972, and adopted the current "Brawner Rule," under which Hinckley was acquitted. Under Brawner, a man is not criminally responsible if, as a result of mental disease or defect, he "lacks substantial capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law."

The test replaced knowledge with appreciation, so that a defendant could be acquitted if he knew right from wrong but his thinking was severely disordered and he lacked emotional appreciation of the difference.

The American public, however, has indicated an impatience with the moral and legal semantics of recent judicial reasonings. In an ABC poll on the day after the Hinckley verdict, 83% of a national sample thought that justice had not been done. Before the Hinckley verdict, about half of the states placed the burden to prove insanity on the defense—since then, the fraction has increased to two-thirds. Nearly nine out of ten Americans believe that too many murderers have been using insanity pleas to avoid jail; this view is shared by Edwin Meese who, as Counselor to the President, stated in a speech against the insanity defense: "We would do a lot better as far as ridding the streets of some of the most dangerous people that are out there."

The defense, however, is raised in less than one percent of all criminal cases and is rarely successful. In many states, insanity acquittes have been generally confined to maximum-security hospitals for periods that have often far exceeded those of convicted felons serving average prison terms for similar crimes. As Caplan correctly points out, all insanity acquittes are not deranged assassins and mass murderers. Caplan criticizes recent attempts to cut back the insanity defense and the efforts of those who, he says, have indicated a willingness to give up a civilized standard for a harsh reminder of the balance of power between the individual and society. The insanity defense insures that the criminal law has moral authority; and "(w)hen the trade-off (between the forces of law and the forces of lawlessness) is false, as becomes evident in study of the insanity defense, and the law gives up safeguards without any assurance of improvement in public safety, the government takes a step toward tyranny."
A WOMAN'S GUIDE TO THE
ABUSE PREVENTION ACT

Written by the Community Education Committee of Legal Advocacy for Abused Women

Reviewed by Diane Margolin

The Abuse Prevention Act, M.G.L. c. 209A, offers immediate civil relief to victims of violent husbands, ex-husbands, blood relatives or household members. Although the statute was designed to grant protection orders without legal counsel, its relatively simple language is not enough to bring the problems of battered women to the courts. A Woman's Guide to the Abuse Prevention Act provides battered women with the information necessary for their effective use of the protection statute. The Guide attempts to overcome the justifiable hesitation of victims of violence to trust the courts by translating the Abuse Prevention Act into an understandable, attainable, enforceable and safe means of legal protection.

The Community Education Committee of Legal Advocacy for Abused Women wrote the Guide with the belief that information can be a powerful tool for change. More specifically, their aim was to publicize the seven year old statute and inform battered women and their advocates of the ramifications of seeking protection orders. The Guide outlines the procedure for obtaining and enforcing 209A orders and suggests ways to avoid any negative effect of the legal relief.

The Guide also contains valuable practical assistance. An explanation of the summons procedure and sample complaints, motions and final orders are provided to help women prepare for the court experience. An appendix outlines the procedure for requesting the state to bring criminal charges of assault and battery against a batterer. Seeking protection through this route, however, is less certain and generally not relied on by women who are concerned with their safety and eligible for the civil 209A relief.

Most importantly, the Guide lists crisis telephone lines, support groups, legal advocates, shelters and other support services available to battered women. These services are essential to women in emotional crisis and physical danger.

When legal remedies are combined with the support offered by battered women's services providers, the chances of women ending the violence in their lives greatly increases.

A Woman's Guide to the Abuse Prevention Act is distributed by the Massachusetts Coalition of Battered Women's Service Groups, 25 West Street, Boston, MA 02111. The cost per Guide is $3.
SCHOLARSHIP (BY TOPIC) OF
SUFFOLK UNIVERSITY LAW
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Brown, Barry (co-author, co-editor), has authored a volume entitled Massachusetts Condominium Law, to be published by Butterworths Legal Publishers.


Epps, Valerie C., has had an interview with Professor Leo Gross entitled "The International Court of Justice and the Nicaraguan Case" accepted for publication as a videotape by Transnational, Inc.

Fentiman, Linda C., has had an article entitled "The Guilty But Mentally Ill Verdict as an Alternative to the Insanity Defense" accepted for publication by the Boston College Law Review.

Glannon, Joseph W., has had an article entitled "Recovery for Civil Rights Violations in Massachusetts: A Comparison of Section 1983 With State Tort Remedies" accepted for publication by the Suffolk University Law Review, to appear in volume 18, number 5.

Greenbaum, Marc D., has had an article entitled "Toward a Common Law of Employment Discrimination" accepted for publication by Temple Law Quarterly, to appear in volume 58, number 1.

Hicks, Stephen C., has had an article entitled "Dworkin, Society and Being in Law" accepted for publication by the University of Bridgeport Law Review, to appear at volume 5, pages 261-301.

Keenan, Bernard V. (co-author, co-editor), has authored a volume entitled Massachusetts Condominium Law, to be published by Butterworths Legal Publishers.

Mirabito, A. Jason, has had an article entitled "Technology Transfers of Patent/Data Rights in the Commercial Sector: A Primer" accepted for publication by the Boston College International Comparative Law Review, to appear in volume 7.


Contracts for Publication

Glannon, Joseph W., has a contract with Little, Brown and Company to author a text of supplementary materials for use in the course of civil procedure.


Ortwein, Bernard M., has a contract with Butterworths Legal Publishers to author a book concerning attorneys’ fees in Massachusetts.
Citations to Published Work of Suffolk Faculty


Diane Tillotson, an attorney in the firm of Hemmenway and Barnes, served as moderator of the recent Alumni continuing legal education program on Recent Developments in the Law.
Obituaries

Cosmo C. Borgioli of Revere, a public defender with the Middlesex County Bar Assn. died unexpectedly Jan. 22, 1985. He was a former assistant district attorney for Middlesex County and had a private law practice in Cambridge for 42 years. He was a 1943 graduate of Suffolk University.

John Chapman, a 1930 graduate of Suffolk University Law School, died Jan. 22, 1985 at the age of 87. He practiced law for more than 50 years in Massachusetts and Federal Courts. He had also served as an assistant district attorney for Suffolk County and was a former tax assessor and chairman of the Board of Review for the City of Boston under Mayor John B. Hynes.

Harry Dow, died January 22, 1985 of accident injuries. He graduated from Suffolk University Law School and in 1929 became the first Chinese American to be admitted to the Massachusetts Bar Assn. After working for the U.S. Immigration and Naturalization service he opened private law practices in Boston and New York.

Gershom Hall, 89, a retired judge in the 2nd District Court of Barnstable died Aug. 1, 1984. He earned his law degree at Suffolk University law school in 1930. He was appointed by then governor James Michael Curley as a special justice to the bench in Barnstable. He retired in 1969.

Edward Martin, retired justice of the Probate and Family Court of Massachusetts died at the age of 74. In 1931 he graduated from The American Institute of Banking and five years later from Suffolk Law School. In 1963 he received a master of laws in taxation from Boston University Law School, and a doctor of law from Suffolk University Law School and New England School of Law in 1977.

Paul Record of Worcester died December, '84 at the age of 84. He earned his law degree from Suffolk University Law School. He practiced general law in Boston for 52 years before retiring in 1972.

Daniel Riordan of Marblehead died at the age of 71 on December 6, 1984. He graduated from Suffolk Law School in 1944. He joined the Robert W. Welsh Law Office in 1977, after heading the bonding department at Commercial Union Insurance Co. in Boston for 33 years.

Joseph Schneider, of Natick, founder of the Boston law firm of Schneider, Reilly, Zabin, Connolly and Costello died at the age of 84 on Jan. 1, 1985. Mr. Schneider, a trustee emeritus of Suffolk University, was awarded an honorary doctorate of law by the university. He was also a founder of the Massachusetts Bar Foundation, the National Assn. of Claimants Compensation Attorneys and the New England Law Institute.
Notes

Alumni Notes

Retired justice of the Massachusetts Trial Court, Harry M. Lack, ('35) has resumed his practice of law with offices in Everett. Robert V. Mulken, ('50) is an associate justice for the Massachusetts Superior Court Department.

The town clerk of Hudson, Ralph W. Warner, ('51) maintains an office for the private practice of law there.

Kenneth Sherman, ('54) who is Director of the National Marine Fisheries Laboratory at Narragansett Bay, was elected in October 1983 to a three-year term as Chairman of the Biological Oceanographic Committee of the International Council for the Exploration of the Sea. The Council, which was founded in 1902 for the purposes of oceanographic exploration, is a distinguished independent scientific organization with members from some eighteen countries.

William F. Hennessey, ('58) has retired as principal of the Patrick F. Lyndon School in West Roxbury.

Carl L. Hoyer, ('60) is presently employed by Amica Mutual Insurance Company in Rhode Island as a senior assistant vice president.

Frank W. Colton, ('66) was recently promoted to vice president and controller at the New Haven Savings Bank in Connecticut.

A partner in the law firm of Sandler, Sandler and Laramee, Marc N. Sandler, ('66) has been appointed to the Board of Directors for Home Owners Federal Savings Association.

Robert T. Orner, ('68) has been appointed vice president and associate general counsel for intellectual property of GTE and is responsible for coordinating and directing the legal activities pertaining to patents, trademarks, copyrights and associated licensing throughout the company's worldwide operations.

A practicing attorney in New London, Connecticut, David F. Falvey, ('69) has become a partner in the law firm of Wilensky, Schwartz and Hirsch.

Edward J. O'Neill, Jr., ('69) is a partner in the firm of J.P. Sullivan and Company in Ayer, which is an internationally known distributor and exporter of apples.

Stephen A. Kurkjian, ('70) is employed by The Boston Globe as an editor.

Jerome L. Mendelsberg, ('70) is currently an assistant public defender for the Palm Beach County Public Defender's Office in Florida.

Ralph E. Stone, ('71) has received an award from the Federal Trade Commission for meritorious service for sustained superior performance as an attorney in its San Francisco regional office.

Andrea W. Gargiulo, ('72) has been reappointed to another six-year term as chairwoman of the Boston Licensing Board.

Gary Boland, (L.L.M., '72) has published an article on “Recent Developments in Patient Consent in Medical Procedures in Louisiana” in the Louisiana Bar Journal.

James F. Green, ('73) is a general partner in the Washington, D.C. law firm of Ashcraft and Gerel.

James F. O'Leary, ('73) has been reappointed to the position of general manager of the Massachusetts Bay Transportation Authority.

Thomas A. Meade, ('74) has been promoted to assistant counsel at Monarch Life Insurance Company in Springfield.

A practicing attorney in Malden, James A. Antonucci, ('75) is a partner in the firm of Fulman, Cooper and Fulman.

Michael J. Barry, ('75) is assistant city solicitor in Lynn.

A managing and leasing agent, Richard Bland, II, ('75) is president of Richard Bland Company, Inc. in Boston.

Paul F. Chinigo, ('75) is a partner in the firm of Brown, Jacobson, Jewett and Laundine in Norwich, Connecticut.

John J. Curran, Jr., ('75) has been appointed to the position of chairman of the Massachusetts Parole Board.

A partner in the law firm of McKay, Murphy and Graham, ('75) Charles P. Graham, has been reappointed town counsel in Salisbury.

A solo practitioner, Ralph R. Joyce, ('75) has been selected to serve as the city's legal counsel in North Andover.

George Keeches, ('75) is currently practicing law with the Taunton firm of Wynn and Wynn, P.C.

John G. Martin, ('75) has been nominated as a judge for the Worcester County Housing Court.

A partner in the Attleboro law firm of Smith and McGahan, Michael McGahan, ('75) has received his masters degree in taxation from Boston University School of Law.

Frederick L. Sewall, ('75) has been named office manager and appraiser in the assessor's office for the city of Dedham.

Gerard K. Williams, ('75) is an attorney currently engaged in private practice in Farmington, Maine.

Republic Airlines, Inc. has named Gary H. Lantner, ('76) vice president and secretary. Mr. Lantner will be responsible for the airline's legal department, properties and facilities, corporate design and shareholder relations.

Dr. Michael J. Lowney, ('76) who practices family medicine, has been appointed director of the Department of Physical Therapy and Rehabilitation at Huntington General Hospital in Boston.

Ronald P. Sudulko, ('76) is a special assistant in the community relations department at the Massachusetts Institute of Technology.

An attorney with the Boston law firm of Crossland, Aresty and Levin, Howard B. Wernick, ('76) is currently serving as chairman of the Young Lawyers Division of the Massachusetts Bar Association.

A senior trial attorney, Barbara Anthony, ('77) is working in the antitrust division of the U.S. Department of Justice in Washington, D.C.

Sumner W. Jones, ('77) has been appointed to the position of senior vice president at Naumkeag Trust Company, a subsidiary of Eastern Savings Bank of Lynn.

John Loftus, (J.D., '77), author of The Belarus File, recently had the experience of having his book developed into a television movie titled “Kojak: The Belarus File.” Mr. Loftus is a former Justice Department attorney who has made public charges that after the Second World War the State Department allowed Byelorussian Nazis to enter the United States and that the government used the former Nazi officials who were guilty of war crimes in intelligence-gathering operations.

Vincent G. Manning, ('77) is an assistant district attorney for Suffolk County.

Marc Greenfield, ('78) is presently practicing law in Providence, Rhode Island.

Specializing in business and commercial law, Malcolm C. McKay, ('78)
BSBA '71, is a partner in the law firm of McKay, Murphy and Graham in Amesbury.

Susan Mellen, (78) is serving as first assistant clerk for the Massachusetts Supreme Judicial Court.

Donald L. Polk, (78) was recently chosen as president of the Urban League of Eastern Massachusetts.

C. Robert Satti, Jr., (78) has been appointed to the staff of prosecutors in the state attorney's office for the Fairfield Judicial District in Connecticut.

Kevin Francis Driscoll, (79) is employed by the Suffolk County District Attorney's office as an assistant district attorney.

Currently practicing law in Connecticut, Barry Stephen Harsip, (79) is with the firm of Scheir, Scheir and Graham. Associate director of the Massachusetts Municipal Association, Richard J. Kelliber, has been named chief administrator for the city of Newton.

Bernice Kraft, (79), practices law in the firm of Kraft and Hall, in Chelsea, Massachusetts.

A partner in the Boston law firm of Sprague and Lupica, Jay Lupica, (79) is also working as a special counsel to the city of Dedham.

Frances McIntyre, (79) is an assistant district attorney assigned to the Superior Court Division in Plymouth County.

A partner in the Amesbury law firm of McKay, Murphy and Graham, Lawrence J. Murphy, (79) specializes in criminal and civil litigation law.

A. John Pappalardo, (79) is currently employed by the U.S. Attorney's office in Boston as an assistant U.S. attorney.

April L. Saber-Assad, (79) is a partner in the Fall River law firm of Saber-Assad and Assad.

William George Tais, (79) maintains offices for the general practice of law in Boston.

Donna M. Vaughn, (79) has been appointed first assistant register for Bristol County.

A lecturer at Boston University School of Law, Frank J. Bailey, Jr., (80) is associated with the law firm of Sullivan and Worcester.

Christine E. Conroy, (80) is an attorney with the office of the general counsel, U.S. Department of the Navy in Washington, D.C.

Michael D. Lincoln, (80) has been promoted to senior tax manager at Price Waterhouse, Inc in Providence, Rhode Island.

A practicing attorney in Warwick, Rhode Island, Michael A. St. Pierre, (80) is with the law firm of Reves and Deluca, Ltd.

Joseph C. Salvadore, (80) is a practicing trial attorney with offices in Providence, Rhode Island.

Francis T. Crimmins, Jr., (81) is engaged in the general practice of law with offices in Stoughton.

An instructor at Dan Webster College, Kevin E. Keegan, (81) has been promoted to trust officer at the Nashua Trust Company in New Hampshire.

Currently associated with the Winchester law firm of Murray and Quill, Judith A. Kelley, (81) was elected president of the Fourth Middlesex Bar Association.

Jean M. Kenevitt, (81) has been appointed first assistant clerk for the Massachusetts Supreme Judicial Court.

Michael P. Kinc, (81) has formed a partnership for the general practice of law with Attorney Michael Ryan in Goffstown, New Hampshire.

Bradford Neal Louison, (81) is the assistant clerk magistrate of the Taunton District Court.

Paul Twomney, (81) has joined the law practice of Charles F. Dalton, Jr. in Andover and Hampton, New Hampshire.

Specializing in real property law, John J. Vartelas, (81) has joined the law firm of Stoner, Gross, Chorches, Lapuk and Kleinman in West Hartford, Connecticut.

Paul N. Barbadoro, (82) has been appointed legal advisor to the Quincy Police Department.

Joan M. Laffey, (82) is an attorney with the law firm of Garnick and Princi in Hyannis.

Formerly a law clerk to the justices of the Massachusetts Superior Court, Mark Stephen Roder, (82) has joined the Boston law firm of Corwin and Corwin.

Francis K. Toto, (82) is currently practicing law with offices in Boston.

John G. Bagley, (83) is now associated with the law firm of Shagory, P.C. in Providence, Rhode Island.

Richard G. Boulanger, (83) has recently joined Digital Equipment Corporation's Northeast Region Law Group.

Meg Chambers, (J.D., '83) is an attorney in the Division of Securities Regulation, Office of the Secretary of State of Massachusetts.
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