1985

The Advocate, Vol. 16, No. 2, 1985

Suffolk University Law School

the Advocate

The Suffolk University Law School Journal
Volume 16 No. 2 Spring 1985

THE DEVELOPMENT OF THE "UNFIT PARENT" DECISIONAL STANDARD IN MASSACHUSETTS CARE AND PROTECTION CASES: 1975-1985

by Douglas Warren Sears

Douglas Warren Sears is a student at Suffolk University Law School. A graduate of Harvard College, he also holds a graduate degree from Harvard Divinity School. Mr. Sears is a minister of the Unitarian Church, and teaches classics at Malden Catholic High School. This paper was written for the Suffolk University Law School Center for Continuing Professional Development.

Preface

As we have suggested, the "best interests" standard...is a flexible one; the weight to be accorded the several considerations under it will vary with the circumstances. The decision in the present case was not an easy one. Here parent and child had been separated for only ten months when the proceeding was brought; this period was too short to be a decisive factor, particularly as the record does not state the foster parents are also to be the adoptive parents. We find most significant, however, the judge's conclusion that the mother "took an unrealistic approach to her problems and never worked out a practical way to implement her plans for herself or the child." The trial judge had the opportunity to observe the parties close up, and her findings are entitled to much respect... In the circumstances we do not think the results would be any different had the analysis been conducted in the language of the "unfitness" standard, as the mother urges it should have been.

Petition of New England Home for Little Wanderers to Dispense with Consent to Adoption, Kaplan, J. 367 Mass. 631, 645-6, 328 N.E. 2d 854, 862-3 (1975)

A. Introduction:

Mrs. Jones: this court has not found you to be an unfit parent in regard to the care and protection proceeding brought before it; however, it does find it to be in the best interests of your minor children, Bobby and Jennifer, that they be brought up by someone other than yourself. The court feels the children would be much better off if they were adopted by someone richer that you are, someone more stable, and someone who gets along better with psychiatrists and social workers. The court recognizes that you may not like its decision; however, it's just the price you have to pay for being a poor, uneducated parent who is unable to bring up her kids the way this court feels you should.

Terrifying words from a futuristic judicial horror novel, or imaginings from the gloomy pen of a Franz Kafka or a George Orwell? No. Imagined, yes. But is it unrealistic to think that any parent in Massachusetts would be put in this position in 1985? May a court award custody of a child to someone more able to give it a better life experience than can its natural parent? If so, under what conditions may such awards be made in the care and protection area? This paper examines case law for guidelines in the termination of parental rights.[1]

When a parent feels he or she "lost" biological children to another, the result can be one of the most demeaning and traumatic events a court can bring to a person not accused of a crime. Certainly justice at all times seeks to be just. However, in the emotionally charged area of care and protection it is unlikely all parties will feel justice has prevailed, no matter how informed the judgment. This area of law requires the utmost sensitivity. Thus it is very important that the courts understand the standards by which they can terminate parental rights.

What are a child's "best interests," and what makes a natural parent "unfit" to further them? Even though both the "best interests of the child" and "parental unfitness" are abstract concepts, specific aspects of them have become woven into the fabric of our laws protecting children. Massachusetts case law continues to define and refine what the courts understand these concepts to mean, and how these standards apply to the life situations of specific parents and specific children.

This article examines "Care and Protection" case law in Massachusetts as of January 1, 1985. It traces recent developments in the judicial balancing of both standards. It also explores how present case law evolved from traditions which accompanied those settlers who first brought English law and social customs to these shores.

Although guardianships and adoptions are mentioned in this paper, the focus is on G.L. c. 119. This chapter, which contains the statutes pertaining to the "Protection and Care of Children,"[2] sets forth no specific standard for the termination of the parent/child relationship. Guardianship and adoption proceedings have statutory standards. In guardianship proceedings brought under G.L. c. 201, § 5 the standard is "parental unfitness";[3] in adoption proceedings brought under G.L. c. 210, § 5 the

standard is the "child's best interests"; however, G.L. c. 119 does not specify a standard.

Despite the lack of a specific standard defined in G.L. c. 119, a standard *has* developed through case law. From the decisions themselves it can be seen that the courts have considered the following questions. Would either "parental unfitness" or the child's "best interests" be appropriate to G.L. c. 119? Are these standards "not separate and distinct, but cognate and connected"?[6] Are these merely two ways of reaching the same conclusion, or are much different results obtained according to which is used? Might it matter in what order they are applied as standards?

Although the article shows the specific progress Massachusetts courts have made in trying to resolve these questions as of Jan. 1, 1985, they continue to wrestle with the issue. To begin this survey of case law, Justice Kaplan's opinion in *Little Wanderers* (1975) (and Justice Hennessey's dissent) highlight the issues and provide a direction for the other cases we are to examine later on in this article.

B. Little Wanderers Case:

Petition of New England Home for Little Wanderers to Dispense With Consent to Adoption (Little Wanderers) is an involuntary adoption case brought under G.L. c. 210, § 3 which permits adoption without the parent's consent when a child has been placed for the purposes of adoption in a licensed child-care agency for a period of a year. However, although not strictly a care and protection case, *Little Wanderers* has an aspect to it most relevant to G.L. c. 119 actions.

Until the Supreme Judicial Court decided *Little Wanderers,* (May 5, 1975), no firm guidelines existed in Massachusetts care and protection cases. The established practice has been to adapt the "best interests of the child" standard of adoption proceedings (G.L. c. 210, § 3) and the "unfit parent" standard of guardianship proceedings (G.L. c. 201, § 5) to cases as they came along. It had long been evident that "best interests" and "unfit parent" were standards important to care and protection decisions, but it took *Little Wanderers* to establish the relationship of the two standards explicitly:

> Our result, therefore, is that the tests "best interests of the child" in the adoption statute and "unfitness of the parent" in the guardianship statute reflect different degrees of emphasis on the same factors, that the tests are not separate and distinct but cognate and connected. [7]

Finding in *Little Wanderers* that the two standards were essentially two ways of saying the same thing, the Massachusetts Supreme Judicial Court rejected the mother's contention that there must be proof of parental unfitness before an involuntary adoption could be ordered. Justice Kaplan affirmed the trial judge's decision. An adoption in the child's best interests justified separating the child permanently from its mother.[8]

The *Little Wanderers* decision's significance to care and protection hearings (mandated by G.L. c. 119, § 24) was soon felt. Since all care and protection hearings concern whether a child should remain with its current parents or guardians, and since a decision to remove the child might bring it into pre-adoptive placement under the care of a state agency, the concern of fit parents easily can be imagined. *Little Wanderers* showed how an involuntary adoption could result from a parent's voluntary and temporary placement of a child in foster care. The high court affirmed that the trial judge correctly used her "experience and judgment" to separate parent and child:

> without a finding of unfitness or the existence of strong ties between the child and the prospective adoptive parents, based entirely upon the judge's belief that adoption would be in the child's best interests.[9]

If a child can be separated from its parents permanently upon a judge's finding that its "best interests" are better served through being raised by someone other than its current parent or guardian, is this not an undermining of the declaration of "policy and purpose" expressed by G.L. c. 119, §1? Might a proliferation of this practice create new ways to "weaken and discourage family life" in the sincere attempt to "strengthen and encourage" it?

An examination of *Little Wanderers,* unfortunately, points more to the former than to the latter. Although the trial judge did not find the mother unfit, the justification for approving the adoption petition without the mother's consent was reached in part, because she "took an unrealistic approach to her problems and never worked out a practical way to implement her plans for herself or the child."[10]

The record shows no evidence that she neglected or abused her child, but ample evidence exists that she changed her mind frequently and was hard to work with. Although the mother's lack of job, missed appointments, and voluntary placement of the child with the Home were not factors sufficient to find her an unfit parent, the court considered these as evidence of her instability and of her intent that others care for the child.

Since the court considered the child to have been in the "care and custody" of the Home, removing it from the mother met the statutory guidelines for involuntary adoptions in the "best interests of the child" under such circumstances.[11]

Justice Hennessey's dissent saw the situation differently. He contended that "parental unfitness" would have better served both the interests of the mother and the facts of the case:

> The majority opinion equates best interests under §3 with unfitness and thus assumes that the parent suffers no adverse effect by being held subject to the best interests standard with respect to the need for her parental consent to an involuntary adoption. I disagree.[12]

Disagreeing with the majority's view that the "best interests" standard and the "unfit parent" standard are merely two ways of saying the same thing, Justice Hennessey felt an injustice resulted from the majority's application of an inappropriate standard. He considered whether the woman would have "lost" her child had she not placed it in the Home while she got the rest of her life together.[13]

He cited several indicia of the placement's temporary nature: the mother's weekly support payments made on behalf of the child; the child's ten-month residency at the Home being short of the placement "for more than one year continuously prior to petition" required by G. L. c. 210, § 3; the lack of evidence showing psychological bonding to the prospective adoptive parents; the lack of any compelling urgency that the adoption occur:

> Since I perceive the best interests standard to be less protective of parental rights and since I do not see

this child as having been shown to be within the care and custody of the Home, I would deny the petition to dispense with parental consent to adoption unless the parent has been shown unfit, a finding not supported by the facts here.[14]

In the end, the mother lost her child. However, although *Little Wanderers* has never been specifically overruled, the "unfit parent" standard (which the dissent sets forth as more protective of the rights of parent and child) has subsequently become the standard for deciding care and protection cases in Massachusetts brought under G.L. c. 119 § 24.

C. The "Unfit Parent" in the Historical Perspective:

In the first footnote to his dissent, Justice Hennessey states:

I do, however, agree with the majority in so far as it suggests that unfitness is apparently an emerging concept and that it is unlikely that a finding of unfitness would today be exclusively limited to the special requirements of the earlier statutory and common law such as repeated drunkenness, prostitution, insanity or desertion. Nevertheless, the definition of unfitness, although in flux, is not the equivalent of best interests; unfitness is a concept which, in the absence of care and custody in the child care agency within the meaning of § 3 should be reckoned with in terms of a parent's right to be with his or her child. [15]

Justice Hennessey here suggests "unfitness" is an "emerging concept." He contrasts the present law (with its more general wording) to the predecessor statute (which, in being more specific, was less flexible in its application) to indicate that standards and statutes are in a continual state of evolution to adapt to changes in society.

However, the concept of parental unfitness is no stranger to Massachusetts law in the area of the care and protection of children. Therefore, before looking forward with Justice Hennessey and the majority of the Supreme Judicial Court to the examination of how this standard has become established since *Little Wanderers* (parts D and E of the article), a brief historical survey reveals the focus on parental unfitness in the gradual development of Massachusetts law.

The purpose and policy statements of G.L. c. 119, § 1 merely echo the profound emphasis American society has placed on the family since the earliest settlements. Our forebears at Common Law viewed the family as a unit bound together by a mixture of contract and property law.[16] Some early excesses, particularly in regard to the "child as property," are frequently noted. For example, before the Norman invasion, Anglo-Saxon parents held the power of life and death over their children; an unweaned child could be killed with impunity; a child below the age of seven could be sold.[17]

Although time has moderated the concept of "child as property", vestiges of this ancient family right have survived. The first settlers had strong feelings about the subservience of women, servants and children. William Perkins, a preeminent Puritan minister wrote:

In the good man or master of the famalie resteth the private and proper government of the whole household, and he comes not unto it by election, as it falleth out in other states, but by the ordinance of God, settled even in the order of nature. The husband rules over the wife, parents over their children, masters over their servants.[18]

Perkins expressed ideas which were certainly not original with him, but which were representative of the time and of the intellectual climate which spawned the collective mind of the earliest settlers of Massachusetts shores. Other writers went even further, and one of them, Sir Robert Filmer, ardently put forth the paterfamilial model as justification for the divine right of the British King:

I see not how the children of Adam, or any man else, can be free of subjection to their parents. And this subordination of the children is the foundation of all regal authority ... We find them (the duties of fathers and kings) to be all one, without any differences at all but only in the latitude and extent of them. As the Father over one family, so the King as Father over many families, extends his care to preserve, feed, clothe, instruct and defend the whole Commonwealth.[19]

Early settlers in Plymouth might have had trouble accepting a monarch meeting Filmer's description; however, without doubt the Puritan father would have felt it his God-ordained duty to rule the household and to make sure each member knew its place. The colonists firmly believed that the family would "surmount the hardships of a wilderness to flourish and grow as nature and God intended, uniting with church and state to create a Christian Commonwealth."[20]

Despite these lofty ideals, it was not long before the Great and General Court found it necessary to reinforce the social order through restrictive legislation aimed at improving the quality of Puritan family life. An easy and frequent target for such social correctives was the parent whose child's observed behavior at home, at church or in school indicated an upbringing at variance with community expectations.

For example, it passed a law in 1642 which required parents to teach their children (and any other dependents living in the household) to read, to write and to engage in a trade.[21] The law placed on the parent the responsibility for training a self-supporting, socially useful child which would take its proper place in adult society.

Biblical prohibitions, became part of the statutes. *Leviticus* 20.9 states: "Anyone who curses his father or his mother shall be put to death." In keeping with an old Testament world view, the Great and General Court, in 1646, passed the following law, which reads in pertinent part:

If a man have a stubborn or rebellious son of sufficient years of understanding, viz. sixteen, which will not obey the voice of his father or the voice of his mother, and that when they have chastened him will not harken unto them, then shall his father and mother, being his natural parents, lay hold on him and bring him to the magistrates assembled in the Court and testify to them by sufficient evidence that this their son is stubborn and rebellious and will not obey their voice and chastisement, but lives in sundry notorious crimes. Such a son will be put to death.[22]

Although no records exist of this penalty actually being enforced, there is no doubt that those who passed the law regarded the child as a piece of personal property belonging to parents who were

subject to legal sanctions if the child proved defective or was improvidently used.[23]

Throughout early Massachusetts law there are similar statutes which require parents to insure that their children become productive adults. God required that the father make sure children he sired would be productive, and the Great and General Court made laws to insure he lived up to his responsibility to God and to society. Parents had the legal duty to educate their biological offspring. Were there a breach of this duty, the town could collect damages from the negligent parent.[24]

To make sure that no cases of "parental unfitness" went unrecognized and unredressed, in 1675 the Great and General Court created the "tithingmen." These were public officials, chosen by town selectmen, who were charged with the inspection of families within a town's boundaries.[25] If their investigations uncovered parents whose actions endangered their children's health, safety or morals, the tithingmen informed the parents that if unsatisfactory situations remained unremedied, the custody and services of those children could be lost.

It is significant to note (for the purposes of this article) that virtually the only intrusion colonial courts made into family life came in such instances of unfit parenting.[26] Not only could parents lose custody of children raised under conditions which failed to meet the Court's approval, but children of parents who received relief from the town could also be put to work:

> 7th December, 1641: It is enacted that those that have relief from the towns and have children and do not employ them, that then it shall be lawful for the township to take order that those children shall be put to work in fitting employment according to their strengths and abilities or placed out by the towns.[27]

In 1646 the Great and General Court enacted the following:

> Every township, or such as deputed or order the prudentials thereof, shall have the power to present to the Quarter Court all idle and unprofitable persons, and all children who are not diligently employed by their parents, which court shall have the power to dispose of them for their own welfare and improvement of the common good.[28]

So much for the "good olde days!"

From the above sampling of colonial law, it can be seen that were it in the *best interest of society* that a child be separated from its parents, the courts found a moral duty to terminate the parental relationship. The society's goal was to transform children into self-sustaining adults who went to church and obeyed the laws. Where their parents were unable to fulfill this social goal, the courts took the kids from the unfit parents and gave custody to others more suited. Such family realignment was sanctioned by a Massachusetts that put the best interests of society at large before any rights individuals had to behave at variance with the norm.

The process of "putting out" was widespread and continued in Massachusetts until the mid-nineteenth century.[29] Not only could rude, stubborn and unruly children be placed with another family, but also poor and destitute children could be placed with adults who would teach them more productive ways. Children removed from their natural families were not supposed to impose a financial burden on those with whom they were placed. A trade-off was seen. Their own families would benefit from not having to support them, and their new families would benefit from the gainful employment of the child.[30]

In an America that still sanctioned slavery the child was an economic asset assignable to whomever who would insure its most productive use. Our modern view of the child in need of care and protection developed in the middle of the last century. It did not come chiefly from disenchantment with the practice of employing the child of unable parents. Rather, the wave of immigration flooded the marketplace with cheap adult labor which greatly diminished the value of the working child.[31]

At this point a subtle shift took place in the way a child in need of care and protection was viewed. "Putting out" declined and "adoption" (a practice unknown at Common Law) became a matter before the Massachusetts courts:

> The true genesis of our adoption laws seems to lie in the increasing concern for the welfare of neglected and dependent children which became apparent at many points in this country beginning about 1849. Our statutes, therefore, took an immediate and radical departure from a basic concept of the Roman law in that the primary concern of our laws was the welfare of the child rather than the concern for the continuity of the adoptor's family.[32]

Previous laws bound members of families together through a mixture of contract and property-like ties. These were perceived as inadquate to meet the growing numbers of destitute individuals, detached from any family units, who were in need of care and protection. Adoption became a viable way of caring for children in a society which no longer had a viable economic place for their services.

Justice Kaplan's opinion in *Little Wanderers* traces the development of standards for adoption in Massachusetts:

adoptions with the consent of parents were recognized in the Commonwealth by 1851; by 1853 consent was dispensed with if the parents were "insane"; in 1859 no consent was necessary if the parents had "willfully deserted and neglected to provide for the proper care and maintenance ... for one year."[33]

The above developments, Justice Kaplan notes, form the basis for that which is now codified in G.L. c. 210, § 3 under which *Little Wanderers* was brought. He points out that it was not until 1953 that the following was included by G.L. c. 210, § 3A:

> an independent proceeding, prior to adoption proceeding proper, at which it could be determined whether parental consent was to be necessary for the adoption. Its purpose was to facilitate and expedite the process of adoption of children being held in temporary foster care.[34]

At these proceedings "parental unfitness," a quality colonial courts could easily discern, became much more difficult to define.

For example, courts have had difficulty distinguishing between a child's neglectful parent and one who was "lovingly poor". In *Commonwealth v. Dee,* 222 Mass. 184, 110 N.E. 2d 287 (1915), a four year old boy, the oldest of a widow's two children, succeeded in having his lawyer draw such a distinction. He remained with his mother despite the Commonwealth's attempt to declare her unfit because she was poor.

Justice Kaplan's opinion also noted that in *Consent to Adoption of a Minor,* 345 Mass. 705, 189 N.E.2d 505 (1963), the Supreme Judicial Court held that a finding of "unsuitability," without a finding of "willful desertion" or "neglect for a year", was not an adequate basis for a decree dispensing with parental consent.[35] The following year G.L. c. 210, § 3 was broadened to include grounds other than "willful desertion" and "neglect for a year" in determining parental unsuitability "if the court finds that the best interests of the child will be served by placement for adoption."[36]

In 1972 "ability, capacity and fitness" were added to "readiness ... to assume parental responsibility."[37] Also, a "presumption" was established that "the best interests of the child" would be served by dispensing with the need for parental consent when the child had been placed in the custody of the department or agency for more than one year.[38] [We will see that this "presumption," which is central to future adoption cases, is found by the Massachusetts Supreme Judicial Court to be unconstitutional in *Petition of Department of Social Services to Dispense with Consent to Adoption,* 389 Mass. 793, 803, 452 N.E.2d 497, 503 (1983).]

Today, the involuntary adoption statute G.L. c. 210, § 3 looks to the child's "best interests," and not to "parental unfitness," when considering the adoption of a child in an agency's custody. However, it must be remembered that this applies only to adoption petitions brought by those who already have custody. It is vital to distinguish this from the care and protection statute G.L. c. 119, §§ 23-29 which applies to children whose guardians (usually parents) are not providing appropriate care and protection. Here, on the children's behalf a petition is presented to the court in the hope of securing proper services so that they may be placed in the custody of a child-care agency.

Bringing this historical overview together, we see how in pre-nineteenth century Massachusetts the courts would not have any problem in relieving a mother of a child she appeared ill-equipped to raise. The court viewed such an action as helping the mother, the child and the couple who would "use" the child in a more productive way. However, in an age where children are not looked upon as bringing economic benefits, providing a child for one able to engage it in productive circumstances is neither the thrust of our social practice nor of our laws.

D. Developing the Standard: May 5, 1975 to May 7, 1981

Convinced that the Home already had custody of the child, the majority saw that *Little Wanderers* could be decided without remand for further finding. However, had the Home not been found to have custody there would have been no doubt but that all justices would have agreed that only upon the mother's being found unfit to parent her child could such a separation be justifiable historically, morally or legally:

> In invoking the "best interests of the child" the Legislature did not intend to disregard the ties between the child and its natural parent, or to threaten a satisfactory family with loss of children because by reason of temporary adversity they are placed in foster care. A parent cannot be deprived unless some affirmative reason is shown for doing so such as a finding of a serious problem with that parent, or of a separation so long as to permit very strong bonds to develop between the child and the prospective adoptive parent.[39]

As we look forward from this case, there are certain difficulties in surveying the development of decisional law in the care and protection area. It has not evolved systematically, and a survey is hard to do without being either too pedantic or too facile. Hopefully, though, this report can find a middle ground. There is a definite "period" for

the development of the "unfit parent" standard which begins with *Little Wanderers* and ends with *Petition of the Department of Public Welfare to Dispense with Consent to Adoption,* 383 Mass. 573, 421 N.E. 2d 28 (1981) when on May 7 Justice Liacos held:

> It is now clear that the unfitness standard must be applied whenever the State seeks to terminate parents' rights to the custody of their minor children, whether the State proceeds under the care and protection statute (G.L. c. 119, §§ 23-29), the guardianship statute (G.L. c. 201, § 5), or the adoption statute (G.L. c. 210, § 3).[40]

This section covers the six year period in which the "unfit parent" became the established standard for terminating parental custodial rights in Massachusetts care and protection cases.

Petition of the Department of Public Welfare to Dispense with Consent to Adoption, 371 Mass. 651, 358 N.E.2d 794 (1976) established that (on the evidence presented in a proceeding brought under G.L. c. 210, § 3) it was better for a child to remain with the prospective adoptive parents than it was to return the child to its unfit natural mother. Justice Kaplan's opinion cited criteria similar to those he noted in *Little Wanderers:* child lived with foster parents since shortly after birth, separation from them would be unduly traumatic, and it was established that the child could thrive in the foster home.[41]

However, he noted that even when a child-care agency clearly has custody and parental consent to adoption is *not* required by statute, it is proper for the court to take into consideration whether the natural parent would be fit to further the best interests of the child. Here the mother was examined and found to be currently unfit:

> she appeared to be incapable of facing up in any practical way to the day-to-day problems of raising the child if it should be given over to her, and damage to the child could be foreseen if that were done. *Little Wanderers* is authority for affirmance here.[42]

In Re Custody of a Minor, 5 Mass. App. Ct. 741, 370 N.E.2d 712 (1977) brings the "unfitness standard," previously held appropriate to the separation of parent and child in adoptions, into the care and protection area. Accordingly, it forms an important turning point in the development of case law. Justice Armstrong holds that the "parental unfitness" test applicable to cases brought under G.L. c. 210, § 3 also applies to care and protection proceedings brought under G.L. c. 119, §24:

> (quoting *Little Wanderers*) "A parent cannot be deprived (custody of a child) unless some affirmative reason is shown for doing so such as a finding of a serious problem with that parent, or of a separation so long as to permit very strong bonds to develop between the child and the prospective adoptive parents." While the *Little Wanderers* case arose in a different statutory context from the present one, we agree that the foregoing rule is equally applicable to proceedings brought under G.L. c. 119, § 24 as was this one.[43]

When should the unfitness standard be applied? What if a parent is found fit at the time of the petition, but unfit at the time or trial? Or vice versa? Justice Armstrong held that "unfitness at the time of trial" was the governing factor:

> We therefore conclude that the judge was right in deciding the case on the basis of conditions prevailing at the time he decided it, regardless of the absence of those conditions when the petition was brought.[44]

In a subsequent holding in *Cennami v. Department of Public Welfare,* 5 Mass. App. Ct. 403, 363 N.E.2d 539 (1977), Justice Armstrong helps clarify the status of substitute parents in situations where their right to have custody of a particular child is challenged:

> Thus, the Cennamis' custody of the child has not been one of mere naked possession, forbidden by law, rather their substitute parental relationship to the child, which spanned virtually the entire two years of the life of the child, had been and continues to be neither unlawful nor improper. This relationship is one which has been recognized and protected in our law, even as against the rights of the child's natural parents.[45]

> In any proceeding involving the custody of a child concerns of res judicata must inevitably give way to an overriding concern for the welfare of the child.[46]

Unless the child is shown to be endangered, there is no need to transfer custody to the Department; however, where such danger exists, the Commonwealth must do so to preserve the best interests of the child.

The swirl of litigation surrounding the short life of Chad Green brought some helpful guidelines on "endangerment." Chad's parents sought to establish a right to treat their son's acute leukemia by unconventional methods. The adequacy of these plans was challenged in a series of cases which received national attention:

> It is ... well established ... that the parental rights ... do not clothe the parents with life and death authority over their children ... This court has stated that the parental right to control of a child's nurture is grounded not in any "absolute property right" which can be enforced to the detriment of the child, but rather is akin to a trust, "subject to ... (a) correlative duty to care for and protect the child, and ... (terminable) by (the parents') failure to discharge their obligations."[47]

Gone are the days when the Anglo-Saxon father held life and death control over the fate of his infant children. *In Re Custody of a Minor,* 375 Mass. 733, 379 N.E.2d 1053 (1978) gave Chief Justice Hennessey (who began his new position on January 21, 1976) the opportunity to balance Chad's family's right to privacy against the state's obligation to protect defenseless minor children domiciled within its borders:

> While recognizing that there exists a "private realm of family life which the state cannot enter,"...we think that family autonomy is not absolute, and may be limited where, as here, "it appears that parental decisions will jeopardize the health or safety of (their) child."[48]
>
> In these circumstances the evidence supported the judge's findings that the parents' refusal to continue with chemotherapy amounted to an unwillingness to provide the type of medical care which was necessary and proper for their child's well-being. Where, as here, the child's very life was at stake, such a finding is sufficient to support an order removing legal custody from the parents, even though the parents are loving and devoted in all other aspects.[49]

> Where, as here, the child's very life is threatened by a parental decision refusing medical treatment, this State interest clearly supercedes parental prerogatives.[50]

Out of this emerges a type of "unfitness" exhibited by loving parents whom the state determines not to be acting in the medical best interests of their ill child. Such a youngster may be lawfully removed from their custody. The child may receive whatever the court determines he would want were he educated enough to select the treatment:

> In a case like this one, involving a child who is incompetent by reason of his tender years, we think that the substituted judgment doctrine is consistent with the "best interests of the child" test.[51]

In *Petition of the Department of Public Welfare to Dispense with Consent to Adoption,* 376 Mass. 252, 381, N.E.2d 565 (1978) two boys, under state guardianship, had special needs which required their separate placement. Their unfit parents tried to place both boys with a maternal aunt. The court supported the plans the Department made for the boys, and opposed those advocated by the parents. Using reasoning similar to that of the previous case, Chief Justice Hennessey held:

> (the) State may not intrude into the heart of the family relationship "for other than substantial reasons" ... thus in the context of this application ... we have stated that it is necessary to show that the parents "have grievous shortcomings or handicaps that would put the child's welfare in the family milieu at hazard." ... Where, as here, such a finding is amply warranted by the evidence, it can hardly be questioned that the state has the power to intervene to protect the children involved.
>
> Where the State enters a family situation to protect the interests of the child, the task is not simply to find an accommodation between the rights of the individual parents and the interests of society .... The rights and needs of the child must be considered as well .... Accordingly, in such circumstances, the balance to be struck is more complex in nature ... and involves a task to which the doctrine of least restrictive alternatives should not be uncritically applied.[52]

The opinion agrees in theory with the doctrine of a "least restrict alternative" placement of children; however, it is clearly proper for the court not to adopt the "least restrictive alternative" presented by the parents.[53] Concerning the court's disregard for psychiatric testimony offered in support of the boys' placement with the relative, Chief Justice Hennessey held:

> We do not think that the judge abused his discretion by refusing to give the expert testimony conclusive effect in this case.... (I)t is well settled that evidence is not binding on the judge simply because it is offered by an expert.[54]

In Re Custody of a Minor (No. 1), 377 Mass. 876, 389 N.E. 2d 68 (1979) expresses a vitally important principle bearing directly upon the court's role in care and protection cases. A mother, with a long history of mental instability and prior neglect of her children, was found unfit to care for her newborn child. Chief Justice Hennessey took the position that the court did not have to wait for her to injure the baby before it could intervene and provide care:

> The court need not wait until it is presented with the maltreated child before it decides the necessity of "care and protection." Rather, an assessment of prognostic evidence derived from an ongoing pattern of parental neglect or misconduct is appropriate in the determination of future fitness and the likelihood of harm to the child...Such evidence, particularly where unrebutted by more recent proof of parental capacity, provides a satisfactory basis for a finding of current parental unfitness.[55]

The court refused to make "clear and convincing evidence" the standard for removing a child in endangering circumstances. Instead, it mandated both a close study of the evidence presented and an entering of detailed findings of fact. Obviously, the court did not wish to sanction unwarranted invasions of family rights, nor did it want to establish such a high level of proof of endangerment that injury could predictably happen to the child while the higher burden of proof was being met:

> We prefer to take the position that the personal rights implicated in proceedings of this character require the judge to exercise the utmost care in promulgating custody awards. Such care, in our view, demands that the judge enter specific and detailed findings demonstrating that close attention has been given the evidence and that the necessity of removing the child from his or her parents has been persuasively shown. Moreover, we do not limit this requirement merely to cases where the ultimate outcome involves the loss of custody by a parent. In all cases of child

neglect, including those where a disposition depriving a parent of custody is adjudged unnecessary ... we think it well advised that a judge make specific findings of fact.[56]

Chief Justice Hennessey in the case of *In Re Custody of a Minor* (No. 2) 378 Mass. 712, 393 N.E. 2d 379 (1979) enforced the requirement of "specific findings of fact" set forth in the previous case.[57] The court removed a child from a psychologically troubled mother. The case was reversed and remanded for further findings. The information before the court did not meet the mandate for specificity handed down in *In Re Custody of a Minor (No. 1.):*

In that case (No. 1.) we held that courts need not wait until they are presented with an already maltreated child before they decide the necessity of care and protection. Rather, the State's interest in protecting children from suffering and harm at the hands of their parents may properly be preventative as well as remedial.[58]

A child's interests are presumed to be best served in the stable and continuous environment of its own family... Accordingly, State intervention is justified only when parents are shown to be incapable of fulfilling their duties as parents. This does not mean that the State is free to intrude upon families simply because their households fail to meet the ideals approved by the community. Neither does it authorize State intervention simply because the parents embrace ideologies or pursue lifestyles at odds with the average. Rather, it is incumbent upon the State to prove that the parents suffer from "grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard."[59]

The place of the "tithingmen" is distanced now both by time and by a considerably less rigid governmental philosophy![60]

In *Department of Public Welfare v. J.B.K.,* 379 Mass. 1, 393 N.E.2d 406 (1979) Justice Abrams held there is constitutional entitlement to an attorney for all indigent parents in proceedings to dispense with consent to adoption brought under G.L. c. 210, §3(b), and that costs for such appointed counsel are to be bourne by the Commonwealth.[61]

When Chad Green's parents left the state with the boy in violation of a court order in *In Re Custody of a Minor* (No. 3), 378 Mass. 732, 393 N.E.2d 836 (1979), Chief Justice Hennessey's opinion reiterates previous holdings in this matter. However, this case is primarily notable for its underscoring the unhappy fact that no matter how courts may rule, if parents take matters into their own hands by removing a child from the jurisdiction, there is little any court can do to protect the child. Chad died shortly thereafter in Mexico. Some attributed his death to arsenic poisoning from the laetrille administered him in his parents' attempt to treat his illness by unconventional means.[62]

Petition of Worcester Children's Friend Society to Dispense with Consent to Adoption, 9 Mass. App. Ct. 594, 402 N.E.2d 1116 (1980) illustrates the way the courts began to use previously established "tools" such as "present unfitness" and "detailed findings of fact" to process cases. The child care agency brought a G.L. c. 210, §3 action to effect a child's adoption without the mother's consent. The case was reversed and remanded by Justice Perretta because she could not find any indication in the facts presented to the court to show that the mother was either currently mentally ill or currently unable to take care of the child herself.[63]

Bezio v. Patenaude, 381 Mass. 563, 410 N.E.2d 1207 (1980) is deserving of a paper in and of itself; however, we are only concerned here with Justice Liacos' holding that a natural parent should be denied custody only if unfit to further the welfare of the children. A lesbian mother's custody of her minor children was unsuccessfully challenged by her ex-husband who tried to find in her avowed homosexuality a reason for the court to declare her an unfit parent:

A finding that a parent is unfit to further the welfare of the child must be predicated upon parental behavior which adversely affects the child. The State may not deprive parents of custody of their children "simply because their households fail to meet the ideals approved by the community ... (or) simply because the parents embrace ideologies or pursue lifestyles at odds with the average." ... In the total absence of evidence suggesting a correlation between the mother's homosexuality and her fitness as a parent, we believe the judge's finding that a lesbian household would adversely affect the children to be without basis in the record.[64]

Petition of Department of Public Welfare to Dispense with Consent to Adoption, 383 Mass. 573, 421 N.E.2d 28 (1981), is an important procedural case. The mother, an inmate at MCI Framingham, gave birth to a daughter who was accepted into temporary foster care by the Department of Public Welfare pursuant to G.L. c. 119, §23A. Problems arose when the the mother challenged the proposed adoption of her child without her consent. The mother contended under the U.S. Constitution (and relevant Massachusetts statutes) that she had to consent to any adoption petition brought under G.L. c. 210, §3.

She also contended that regardless of whether the "best interests" or the "unfit parent" standard were used to obviate her consent, the state must prove its case "beyond a reasonable doubt" or by "clear and convincing evidence." Justice Liacos' opinion agreed that, absent an affirmative showing of the mother's current parental unfitness, she should have a say in any adoption hearing. He found that G.L. c. 119, §23A (which authorized the transfer of custody to the Department of Public Welfare of all minor children born to incarcerated women) was improperly applied to this mother whose child was placed in foster care without her consent.[65]

The mother could have pressed her claim of "current fitness" at a subsequent custody hearing; however, as she was a fugitive from the law at the time, she forefeited her rights by failing to appear. Yet, despite her loss, language in Justice Liacos' opinion may be helpful to other parents:

The resolution of any custody dispute involving a natural parent necessarily begins with the premise that parents have a natural right to the custody of their children..... "The rights to conceive and to raise one's children" are "essential ... basic civil rights of man ... far more precious ... than property rights." ... The interest of parents in their relationship with their children has been deemed fundamental and is constitutionally protected.[66]

(T)he State may not deprive parents of the custody of their children merely because they are poor and cannot offer the child certain material advantages, or because they choose or suffer an unusual life-style. It is not the quality or character of parental conduct per se that justifies State intervention on behalf of an abused, neglected or otherwise endangered child. Rather, it is the fact of the endangerment itself. As parens patriae the State does not act to punish misbehaving parents; rather, it acts to protect endangered children.[67]

Concerning the requisite standard of proof, Justice Liacos sought a middle ground. He joined the "extra measure of evidentiary protection" mandated in *In Re Custody of a Minor (No. 1)* to the caution expressed in *In Re Custody of a Minor (No. 2)* that urged a shying away from an unrealistically high standard which might result in danger to the child before a court order could separate parent and child:

We perceive no appreciable difference between the requirements that a showing be clear, convincing, or persuasive. Our use of the term persuasive in the past was designed to underscore the distinction between the appropriate level of proof and proof "beyond a reasonable doubt." We believe that the requirement of a persuasive showing, coupled with the high degree of harm that must be demonstrated, adequately protects parental rights under G.L. c. 210, §3 while not unduly burdening the ability of the state to act.[68]

In Re Custody of a Minor, 383 Mass. 595, 421 N.E.2d 63 (1981) involves a fifteen-year-old boy's desire to remain with his foster family instead of returning to a mother whose many problems led her to be found unfit. Justice Liacos gives great weight to the boy's wishes:

(I)t has long been the law of Massachusetts that the preferences of children of sufficient maturity be considered .... The judge's findings persuade us that a forced reuniting of mother and son would only result in additional harm. Moreover, we have doubts whether an order committing Dom to the custody of the respondent could be enforced.[69]

Significant to this survey, we note that these last two cases were decided on May 7, 1981. In them the "unfit parent" is clearly set forth in opinions of Justice Liacos as the overriding decisional standard for the termination of parental rights in all cases brought under the adoption, guardianship, and care and protection statutes. In *In Re Custody of a Minor,* Justice Liacos holds:

Today, in *Petition of the Department of Public Welfare to Dispense with Consent to Adoption,* ...we set forth the appropriate statutory standards against which State attempts to deprive natural parents of the custody of their minor children must be measured..."(T)he unfitness standard must be applied...whether the State proceeds under the care and protection statute (G.L. c. 119, §§23-29), the guardianship statute (G.L. c. 201, §5), or the adoption statute (G.L. c. 210, §3)."[70]

E. Refining the Standard: May 7, 1981 to January 1, 1985

Today, it is well established that once a child care agency has legal custody, the child's "best interests" rules its placement. Likewise, it is firmly held that only by an affirmative showing of parental unfitness can a child be removed from a natural parent and adopted by another against that natural parent's will.

Gone now are the fears that parents might lose custody of a child were it to be placed temporarily in a foster care placement while they get other aspects of their lives together. No longer do Massachusetts parents have to fear that what happened to the mother in *Little Wanderers* might happen to them. No longer is there the danger that courts might "put out" a child to the custody of others who might provide it with more advantages. For any of this to happen today, the natural parent must first be found presently "unfit".

The remainder of this survey examines those cases since 1981 which serve to refine "unfitness" as an operational term in the care and protection cases brought before the Massachusetts courts.

The major thrust of decisions since 1981 has been to secure the protection of the rights of all parties to a termination proceeding. In *Petition of the Department of Social Services to Dispense with Consent to Adoption,* 384 Mass. 707, 429 N.E.2d 685 (1981), Justice Abrams held the following to be that organization's role:

In termination proceedings the department's professional responsibility is to protect the best interests of the child — to strengthen and encourage family life..., as well as, in some instances, to require "a partial or complete severance of the parent-child relationship."[71]

Parental terminations must be based on findings of fact which relate to the current capacity of the parent(s) to function as custodians of their children.

Appeal of Care and Protection of Two Minors, 12 Mass. App. Ct. 86, 421 N.E. 2d 780 (1981), concerns both the timeliness of reports and the standing of foster parents in care and protection hearings. The court requires current and clear findings of fact.[72] Only with all interested parties having "done their homework" can judges make informed decisions. Cases not updated with fresh findings will be remanded. In addition, foster parents are held to be valuable sources of insight into the child:

There was no error in permitting the foster parents of the children to participate in the proceedings subject to the control and supervision of the court. In this type of case, a court may gain great assistance from such participation, although no constitutional right to such participation may exist.[73]

1982 brought many new developments in the care and protection area before Massachusetts courts. Among these were a consideration of the appropriate levels of proof, further refining "unfitness," and consideration of how the State should treat the medical needs of a terminally ill child within its care.

Petition of Catholic Charitable Bureau to Dispense with Consent to Adoption, 13 Mass. App. Ct. 936, 430 N.E.2d 1245 (1982), an involuntary adoption case brought under G.L. c. 120, §3 centered on a mother's attempt to be found presently fit to further the welfare and best interests of her child. The court found her unable to assume the parenting role without substantial support services, that she had rejected such services in the past, and was unlikely to receive them positively in the present.[74] Additionally, it was found inadvisable to remove the child from the foster parents to whom it had become psychologically bonded.[75]

Petition of New Bedford Child and Family Service to Dispense with Consent to Adoption, 385 Mass. 482, 432 N.E.2d 97 (1982) involved the denial of the agency's petition (brought under G.L. c. 210, §3) and the awarding of custody to the child's unwed father.[76] Justice Nolan's opinion cited *Stanley v. Illinois* 405 U.S. 645, 652 (1972) that a father has a "cognizable and substantial" interest in the care, companionship and custody of his illegitimate children; *Levy v. Louisiana,* 391 U.S. 68 (1967) that the law has not refused to recognize those family relationships unlegitimized by a marriage ceremony; *Bezio v. Patenaude,* 381 Mass. 563, 410 N.E.2d 1207 (1980) that an unusual life style does not automatically translate into parental unfitness, and that:

> Natural parents should be denied custody only if they are unfit to further the welfare of their children.[77]

The father was not to be presumed unfit merely because he did not marry the child's mother. As a natural parent, he could be denied the custody of a child whose paternity he acknowledged only by the same finding of unfitness by which any other natural parent would be so judged.

Santosky v. Kramer, 455 U.S. 745, 71 L.Ed. 599 (1982) effectively set aside the presumption in G.L. c. 210, § 3 that the best interests of a child would be served through an uncontested adoption once that child had been in the custody of a child care agency for more than a year.[78] We have previously examined how *Little Wanderers* appears to have rushed such a child to adoption, and will examine shortly a case handed down on August 1, 1983 in which the Massachusetts Supreme Judicial Court cites *Santosky* to declare that presumption unconstitutionally violative of a parent's due process rights.

Justice Liacos's decision in *In Re Custody of a Minor,* 385 Mass. 697, 434 N.E.2d 601 (1982) presents a line of thinking important to setting forth the state's custodial duties toward a terminally ill infant in its care. As in the Green cases, the parents had been found unfit; however, unlike Chad's parents, these had abandoned their child, which had severe birth defects. The state, having custody of the child, subsequently mandated that no heroic measures be taken to save its life.[79]

Many interested parties strenuously opposed this decision.

Although this case raises all sorts of medical and social ethics questions, it doesn't give us answers; however, Justice Liacos's opinion (from which the excerpts below are taken) does provide precedent for dealing with similar questions which undoubtedly will arise in the future:

> The juvenile court, charged with determining proper physical and medical procedures for a child within its jurisdiction, may decide that some types of care are inappropriate... (W)hen medical evidence indicates that it is advisable to withhold particular courses of treatment, the court is empowered to enter an order proscribing or terminating those procedures, as well as to order the administration of appropriate medical treatment.[80]
>
> Contrary to what some of the parties to this case suggest, the issue presented here is not one of "right to life." In a "no code" case, the question is not of life or death but the manner of dying and what "measures are appropriate to ease the imminent passing of an irreversibly, terminally ill patient in light of the patient's history and condition."[81]
>
> Thus, the fact that the parties to the legal proceeding previously initiated come to agreement, while it is to be given deference, neither defeats the jurisdiction of the court in a case such as this nor binds it to accept their position.[82]

Until October 19, 1983 when paragraph (b) of section 3 of chapter 210 of the General Laws was amended to allow a judge to hear simultaneously a petition filed under this paragraph and any other pending case or cases involving custody or adoption of the same child, *Adoption of a Minor,* 386 Mass. 741, 438 N.E.2d 38 (1982) was a nemesis of sorts for Massachusetts probate judges.[83] If there was an active care and protection case, there could be no adoption against the consent of a natural parent.[84] However, now that this case has been over-ruled by amending the above-statute, care and protection proceedings can happen simultaneously with other adoption or custody matters — and be heard by the same judge.

The court in *Petition of the Department of Social Services to Dispense with Consent to Adoption,* 15 Mass. App. Ct. 916, 443 N.E.2d 905 (1983) held that parental unfitness is a primary consideration, but that in termination of parental rights proceedings other factors may be considered as well:

> A petition to dispense with parental consent to adoption is not adjudged on the basis of parental unfitness as measured in the abstract, but rather by reference "both to (the parents') character, temperament, capacity, and conduct, and to the welfare of the child" ...The judge correctly based his decision on a consideration

of the personal qualities of the natural parents, the deficiencies in the home environment they had provided, the child's particular needs, and the measurable improvement in all aspects of the child's development after placement in a foster home. All were considerations relevant to establishing parental unfitness and the best interests of the child, issues which in the context of a G.L. c. 210 § 3 petiton "are not separate and distinct but cognate and connected."[85]

By the time this case was resolved on January 7, 1983, a child could be removed from its natural parents only by an affirmative showing of unfitness. The above-mentioned considerations had to be looked at by the court in its determination of what would be in the child's best interests. The "cognate and connected" language by which Justice Kaplan linked the "unfit parent" and the "best interests" standard in *Little Wanderers* still holds.

Building on this understanding, *Freeman v. Chaplic,* 388 Mass. 398, 446 N.E. 2d 1369 (1983) considers the rights of unfit parents to choose the surrogate parents with whom their children are to live. Justice Liacos's opinion observes that where a mother was determined to be unfit, the fit surrogate of her choice should be honored over a fit surrogate of someone else's choice. The court determined that the continuity of positive feelings between mother and child would flow from such an arrangement.[86]

Custody of a Minor, 389 Mass. 755, 452 N.E.2d 483 (1983) highlights the difficulties inherent in making a custody decision between a heretofore unfit parent and the fit substitute parent who has been caring for the child during the time of the natural parent's unfitness. Justice O'Connor's opinion noted that the trial judge's disapproval of the mother's lifestyle appeared to have been an important factor in his decision:

> His focus on the mother's unconventional behavior, including her frequent moves from place to place, her unusual residences, unorthodox religion, vegetarianism, adherence to holistic medicine, communal living, and nonmarital cohabitation with men, cast doubts on whether he gave sufficient recognition to the principle that "(t)he State may not deprive parents of custody of their children... simply because the parents embrace ideologies or pursue lifestyles at odds with the average."[87]

Justice O'Connor dismissed the petition, sending the matter to the Family and Probate Court to be reargued there. Based on the foregoing, the mother might be expected to argue she is currently fit to further the best interests of the child, that "endangerment" and not "life-styles at odds with the average" should be considered, and that unless she is found currently to be unfit as a parent, she must be awarded custody of her child.

Petition of the Department of Social Services to Dispense with Consent to Adoption, 389 Mass. 793, 452 N.E.2d 497 (1983) involves a single mother of four who is found fit to raise two of her children, but unfit to raise the others. Chief Justice Hennessy's opinion affirmed the decision of Judge Ginsburg of the Probate Court that the Department of Social Services had demonstrated by "clear and convincing evidence" that the mother was currently unfit to parent retarded twins. It found that the termination of her parental rights would best serve the interests of the children.[88]

Judge Ginsburg's supplementary findings made it clear that he had not relied on the presumption that it is in the best interests of children (in the care of a child care agency for more than a year) to be put up for adoption without the parent's consent:

> We agree with the mother's arguments. Under *Santosky,* the statutory presumption is unconstitutional. Nevertheless, the mother's rights were not violated in this case. The judge ... did not rely in any way on this statutory presumption in reaching his conclusion.[89]

The year 1984 brought several important developments in the area of the care and protection of children. Eleven cases bear mentioning. Although only one specifically involves an action brought under G.L. c. 119, § 24, all show aspects of the "unfit parent/best interests of the child" balance.

To bring this article current as of January 1, 1985, a composite picture of existing case law can be drawn. Five of these cases deal with "custody," one with "revocation of adoption," one with "adoption," and four with the "dispensing of consent to adoption."

In *Custody of Three Minors,* 17 Mass. App. Ct. 969, 458 N.E.2d 761 (1984), a mother appealed a judgment finding her minor children in need of care and protection, and the awarding of permanent custody to the DSS. Affirming the judgment, the court found the children's improved behavior in foster care indicated their earlier need for care and protection. The DSS retained custody; however, the court noted such placement did not preclude proceedings based on changes in conditions as provided for in G.L. c. 119 § 26.[90]

In another rescript opinion, conflicting adoption petitions were filed by an out-of-wedlock child's father and its maternal grandparents. *In Custody of a Minor (No. 1),* 17 Mass. App. Ct. 1016, 460 N.E.2d 611 (1984), the Probate Court, Middlesex County, granted the grandparents' petition. The Appeals Court held the trial court's failure to make an express finding of the father's parental unfitness was "fatal." As in the case of a "lawful" father, an affirmative showing of unfitness is required to sever the link with the biological parent.[91]

In a different case with a similar name, *Custody of a Minor (No. 1),* 391 Mass. 572, 463 N.E. 2d 324 (1984), a mother filed a petition for review and redetermination of the needs of a child previously placed in the permanent custody of the DSS. Justice Lynch concluded it was proper for the Department to request a consolidation of the review and redetermination hearing with a pending probate court action to dispense with the mother's consent to adoption. The simultaneity of these proceedings was within the chief administrative justice's inherent authority, and the consolidation was a procedural matter and not a substantive one.[92]

In *Custody of a Minor (No. 2),* 392 Mass. 719, 467 N.E.2d 1286 (1984), (a proceeding on a petition for care and protection of a minor child brought by the Department of Public Welfare) Justice Liacos found the trial judge disregarded any evidence of current parental unfitness, and uncritically adopted a psychologist's opinion concerning the child's attachment to her foster parents. The Supreme Judicial Court held the trial judge's findings insufficient to support the lower court's conclusion that the child should be com-

mitted to the permanent custody of the department.

Justice Liacos found it improper for the judge to have terminated parental visits without making specific findings demonstrating that parental visits would be harmful to the child or to the public welfare. He held that the trial judge did not abuse his discretion in excluding the testimony of the child's grandmother, because although she attended the proceedings, she was not a party.[93]

In *Care and Protection of Three Minors,* 392 Mass. 704, 467 N.E.2d 851 (1984), Justice Lynch found that in a care and protection proceeding under G.L. c. 119, § 24, the trial judge was correct in finding that the mother of three children was a "disorganized, immature, irresponsible, inconsistent person whose inadequacies as a parent have deprived her children of the basic physical needs of food, clothing, shelter and basic emotional needs." These findings were "clear and convincing evidence" to support his conclusion that she was currently unfit to care for her children and should not have their custody.[94]

However, he found the judge's findings deficient which considered neither the importance of preserving the sibling relationship, nor the possibility that the children's best interests would be served by placing all three with their paternal grandparents. He ordered that the department be given additional guidance concerning the children's eventual placement and visitation by family members.[95]

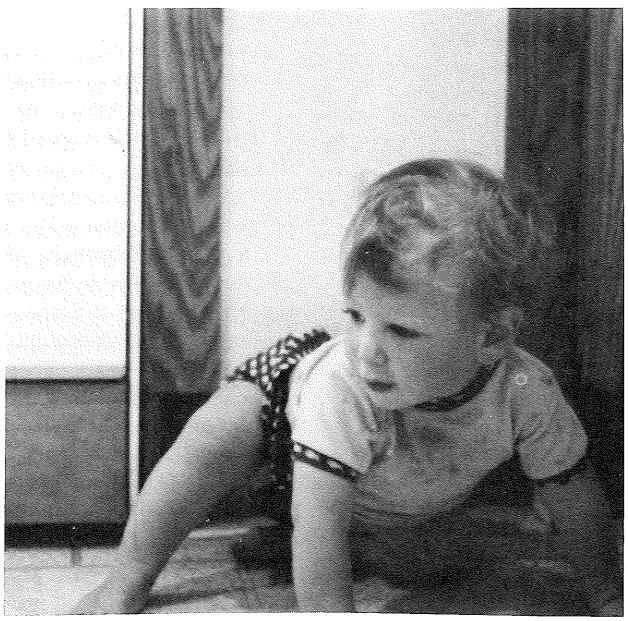
In *Petition for Revocation of Judgment for Adoption of a Minor,* 393 Mass. 556, 471 N.E.2d 1348 (1984), a grandmother petitions for the revocation of a judgment concerning the adoption of her minor grandchild by foster parents. The Supreme Judicial Court's opinion issued by Justice Abrams found the record adequate to support Suffolk Superior Court Judge Mary B. Muse's determination that it was not in the child's best interest to revoke the adoption. The court found no merit in the grandmother's claim that the filing of a guardianship petition made her a party entitled to notice of the adoption proceeding. Judge Muse ordered that the grandmother's visitation rights would continue after the adoption.[96]

In *Adoption of a Minor,* 17 Mass. App. Ct. 993, 459 N.E.2d 140 (1984), foster parents petitioned for the adoption of a minor child. The Probate Court, Middlesex County, denied the petition and allowed the biological mother's petition for custody. The foster parents appealed. The Appeals Court held that the standard of the best interests of the child was properly applied, and that the findings were not erroneous. If foster parents and a natural parent are each fit to be parents, then the court allows the balance to tip in favor of the biological parent. The court went on to say that the mother did not have to be found "fit" because the court was satisfied by finding "the biological mother could not be found unfit."[97]

In *Petition of the Department of Social Services to Dispense with Consent to Adoption,* 16 Mass. App. Ct. 607, 453 N.E. 2d 1236 (1983), the trial judge found clear and convincing that the father, who had deserted the child at birth, was unfit. Deciding that the child's best interests would be served by allowing the department's foster parents (who had been caring for the child since shortly after birth) to adopt it, he waived the requirement that the father consent to the adoption.

At the Appeals Court level, Justice Brown vacated the decree, remanded the case, and made the following observations:

> We recognize that the lengthy separation of a biological parent and child and a corresponding growth in the ties between the child and foster parents may in some circumstances indicate that a change in the custodial status would be seriously detrimental to the child, with the result that the biological parent should be deemed not fit to care for the child ... but "(i)n resolving this issue we are guided by the underlying premise that natural parents have a fundamental right to custody of their children." *Petition of the Department of Social Services to Dispense with Consent to Adoption,* 389 Mass. 793, 799 (1983). Mere failure to exercise custodial rights in the past, particularly where a parent has voluntarily relinquished custody 'for appropriate reasons' (citation omitted), does not support a conclusion that such a parent is unfit to further the welfare of the child." *Bezio v. Patenaude,* 381 Mass. 563, 577 (1980) ... These principles must be viewed in conjunction with the Supreme Judicial Court's oft-repeated statement that "(p)recipitate attempts to force adoption over parental objection simply because foster care has occurred are not consistent with the law and must be avoided." *Petition of the New Bedford Child and Family Service to Dispense with Consent to Adoption,* 285 Mass. 482, 490 (1982) quoting from *Petition of the New England Home for Little Wanderers to Dispense with Consent to Adoption,* 367 Mass. 631, 646 (1975).[98]



The DSS asked the Supreme Judicial Court to grant further appellate review. Justice Liacos agreed with Justice Brown's findings for the father, vacated the trial judge's decree and remanded the case for entry of further orders consistent with his opinion in *Petition of the Department of Social Services to Dispense with Consent to Adoption,* 391 Mass. 113, 461 N.E.2d 186 (1984):

> We have previously stated that "natural parents may not be deprived of the custody of their minor children in the absence of a showing that they 'have grievous shortcomings or handicaps that would put the child's welfare in the family milieu much at hazard,' " *Petition of Department of Public Welfare to Dispense with Consent to Adoption,* 383 Mass. 573, 590 (1981), quoting *Petition of the New England Home for Little Wanderers To Dispense with Consent to Adoption,* 367 Mass. 631, 639 (1975). We have not however, recognized "a per se rule that prospective adoptive foster parents, who have become a minor child's psychological parents, shall automatically prevail in a custody dispute over a natual parent." *Petition of the Department of Public Welfare to Dispense with Consent to Adoption,* supra at 591 n.16.[99]
>
> In cases such as the present one ... we believe it is error to base the allowance of a petition to dispense with parental consent on a finding that the child would be hurt by being returned to the natural parent. If the parent has the ability, capacity, fitness and readiness ... we believe that a petition to dispense with consent should be denied.[100]
>
> Although the judge expressly made the required conclusion of unfitness, his findings ... do not support that conclusion.[101]

In *Petition of the Department of Social Services to Dispense with Consent To Adoption,* 392 Mass. 696, 467 N.E.2d 861 (1984) (on appeal from a decree pursuant to G.L. c. 210, § 3, dispensing with the need for a mother's consent to the adoption of her child) Justice Wilkins wrote that the Massachusetts Supreme Judicial Court declined to adopt the standard of proof "beyond a reasonable doubt" for the purpose of determining parental unfitness. He found that the department had demonstrated by "clear and convincing evidence" that the mother was currently unfit to provide for the best interests of the child.[102]

In *Petitions of the Department of Social Services to Dispense with Consent to Adoption,* 18 Mass. App. Ct. 120, 463 N.E.2d 1187 (1984), in proceedings to dispense with the parents' consent to the adoption of two minor children (taken from the parents four years earlier pursuant to a court order and placed in foster homes), evidence of the serious continuing emotional problems affecting both parents and children warranted the conclusion of Judge Rodgers (Hampden Division of the Probate and Family Court Department) that the parents were currently unfit to further the welfare and best interests of the children.[103]

With the final case, *Petition of the Catholic Charitable Bureau of the Archdiocese of Boston, Inc. to Dispense with Consent to Adoption,* 18 Mass. App. Ct. 656, 469 N.E.2d 1277 (1984), emerges a concept, latent in the case law, which bears important consideration. In a proceeding by a social service agency seeking to dispense with the need for a mother's consent to the adoption of her child, a finding that the mother was unfit to care for the child was not precluded by the fact that the agency had returned the custody of a second child to her.

If it can be shown by clear and convincing evidence that a parent is *unable* to care for a particular child, that parent can be found *unfit.*[104]

F. Commentary and Analysis — 1985

Case law has established that before parent and child can be separated permanently, clear and convincing evidence must show that parent currently unfit to further the particular child's welfare and best interests. Only when a judge finds specific evidence of parental unfitness may a parent lose custody to a social service agency, or have its consent to the child's adoption after foster placement dismissed. There is no legal way for a parent, who is *not unfit,* to be deprived permanently of the custody and companionship of its own child.

Thus, the concern expressed in the opening scenario (i.e., of a fit parent losing custody to one who can give its child more in life) is not likely to haunt care and protection proceedings in the Massachusetts of 1985. No more will the footsteps of tithingmen enter homes of marginal parents, examine the uprightness of family members, and put-out children to the custody of community members who can put them to more productive use than did their own backsliding parents. However, it took from 1675 to 1975 for this practice to be seen as fundamentally unjust.

Througout this article it has been necessary to keep in mind that care and protection matters only concern the Court's removal of a child from its parents or guardians, and its placement with a state-licensed child care agency. The focus has not been on what happens after the state takes custody. However, case law examined as far shows that adoptions are intertwined with care and protection matters. Accordingly, to discuss the future of care and protection in Massachusetts, we must concern ourselves also with the future of adoption here.

The first consideration to mention is an adoption matter that directly impacts on G.L. c. 119. For children older than "toddlers," courts now allow social service agencies to put them in "open adoptions" where they maintain contact with their biological families. Through use of "open adoptions," courts can diminish much of the anxiety surrounding the future of the child. Natural parents may lose custody, but not the right to visit their children.

When deciding *Petition for Revocation of a Judgment for Adoption of a Minor,* 393 Mass. 556, 562, 471 N.E. 2d 1348,1353 (1984), Judge Mary B. Muse was also careful to preserve the visitation rights of a grandmother after her grandchild was adopted.[105] Other judges share this concern. Today's judges are careful to preserve the visitation rights of grandparents (and of parents) who are fit enough to be visited, but not fit to have the child's permanent custody.

In a conversation on December 31, 1984, Judge Muse explained the concept of "open adoption" to this writer. She made an analogy to child visitation in a divorce where courts have increasingly been asked to consider the rights of the non-custodial parent and of the grandparents. The Legislature has made its opinion known on the issue of presumed joint custody and of grandparent visita-

tion.[106] Where in a divorce, the non-custodial parent may visit with a child of the marriage, so too in adoptions the courts are now ordering the child-care agencies to set up plans for visitation between child and biological parent after the adoption.

A second consideration to note as we look forward is the growing consensus that "unable" means "unfit." Children often get into care and protection situations because of their parents' inability, or unwillingness, to provide for their children's most basic human needs.

During foster placement two things frequently happen: 1) the child becomes psychologically bonded to the foster parents who then want to adopt it; 2) the parent, without the burden of child-care, becomes cured of earlier personal deficiencies.

It becomes a delicate matter for the courts when the loving foster parents want to adopt the child and the natural parent, whose situation has improved, wants the custody of the child returned. All things being equal, we have seen in *Adoption of a Minor,* 17 Mass. App. Ct. 993 (1984), that the balance tips in favor of the biological parent. However, a caveat need be mentioned now that "unable" is increasingly synonymous with "unfit to further the welfare and the best interests of the child."

When advocating the position of the biological parents in "Dispense with Consent" (G.L. c. 210, § 3) matters, some lawyers feel it is getting easier for expert witnesses (social workers, psychologists, psychiatrists who represent the interests of the social service agencies) to make the natural parents appear "unable and therefore unfit." It is not uncommon for parents, risking the permanent loss of their children, to have difficulty getting along amiably with the professionals who relate to their kids.

"An unfit parent," one observed, "is somebody who doesn't get along with her kids' psychiatrist and social worker." [107]

In a decision issued on August 13, 1984 in the *Care and Protection of Three Minors, 467 N.E.2d 851, 861 (1984),* Justice Lynch included these observations concerning the Department of Social Services:

> In either an adoption or a custody proceeding, the department enjoys virtually unrestricted discretion in determining matters of parental fitness and child custody. It "is extraordinarily influential in its capacity to interfere with family relationships." Petition of the Dep't of Social Services to Dispense with Consent to Adoption, 384 Mass. 707, 712, 429 N.E.2d 685 (1981). One commentator has said, "the courts play a minimal role in exercising the state's care and protection policy. The real locus of decision making is within [the department], and the individual who tends to be the ultimate decision maker there, is the case worker." Campbell, the Neglected Child, 4 Suffolk U.L.Rev. 632, 645-646 (1970). As a critic more recently said, "[t]he paternalistic justification for this broad discretion that the professionals and not the parents always know what is best for children — underlies most of what is wrong with the present system. Thus, reform that fails to end the blind deference to professionals will be inadequate." R.R. McCathren, Accountability in the Child Protection System: A Defense of the Proposed Standard Relating to Abuse and Neglect, 57 B.U.L. Rev. 707, 781 (1977).
>
> B.U.L. Rev. 707, 781 (1977).

Non-lawyer professionals frequently adopt the "zealous advocacy" model on the witness stand. Even though it has no place in a proceeding where the best interests of the child are the focus of all that takes place, the "I win / you lose" model of the criminal session can slip into a care and protection, or an adoption, proceeding if safeguards are not diligently taken and sustained.

Even though Chief Justice Hennessey has observed (note 54):

> (I)t is well settled that evidence is not binding on the judge simply because it is offered by an expert...

there is still a temptation for an overworked judge with a crowded docket to take at face value the expert testimony of a non-lawyer professional who has been called by a social service agency to find the unfitness the law demands with respect to the capacity of a parent who wants a child's custody returned. Such a witness may testify to a different type of "unfitness" than that which brought the child into the custody of the agency through a G.L. c. 119 proceeding.

For example, in a recent unpublished decision in Suffolk Superior Court a child care agency sought to dispense with a father's consent to the adoption of his ten year old son. The father sought to regain custody, claiming he was currently fit. He believed that he had the "present ability, capacity and readiness" to assume parental responsibilities. At the time the boy entered foster care, the father's drinking problem affected his ability to care for the boy. But when he sought to regain custody, the father had not taken a drink in two years, maintained a good job upon which he could support a

family, and had developed a plan for having a housekeeper to meet the child after school when the single father worked.

His request for custody was denied. In a carefully reasoned opinion, the court found that the boy had special needs due to past deprivations, that the father failed to recognize the boy's severe emotional problems, that much psychiatric work needed to be done on a continuing basis, that the father recognized the boy loved his foster mother, that the boy's own mother's desertion of the family augmented the child's need for maternal love, that the boy was making good progress in the foster family, that the boy's father was "unable" to meet the special needs of this particular child — therefore, the father was "unfit".

The father's consent was not needed for his son to be adopted by the family in whose custody he had been placed by the social service agency for six years. The court, however, preserved the father's visitation rights by ordering an "open adoption." The child care agency was ordered to set up a visitation schedule. The father left the proceedings feeling he had not totally lost his son. He had been found "unable and therefore unfit" to raise his son, but was not found unfit to have visits with his son on a regular and continuing basis.

The son's best interests were preserved. Nobody "won" and nobody "lost."

As we look toward what may emerge from the case law of 1985, the following observations might be kept in mind. First, many children who come to the court's attention through matters brought under G.L. c. 119, § 23-26 are eventually adopted by those who care for them as foster parents. Second, determining parental unfitness is a two-part stage.

On the preliminary care and protection level a social service agency rescues the child from an endangering home situation. The parent must be shown to be unfit before the child can remain in state care. Upon this showing, the state places the child in foster care where experience shows adoption often results when the child and the new family integrate their lives.

At the next level, G.L. 210, § 3, parental unfitness must be shown by current clear and convincing evidence for the court to dispense with the natural parent's consent to the adoption. At this level, there is a different focus on what makes parents unfit.

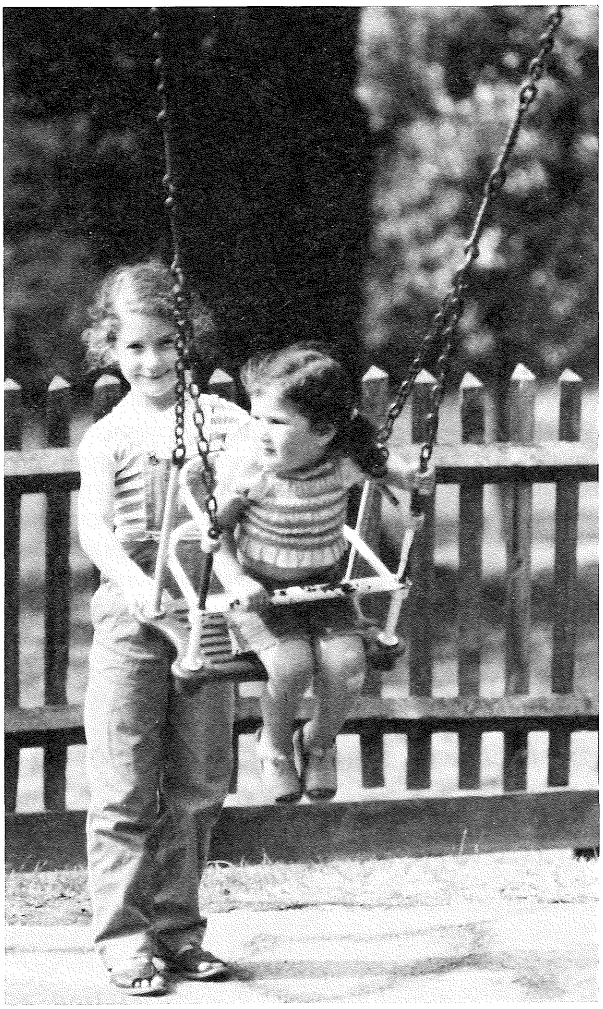
As shown in the previously given unpublished case, unfitness on the G.L. c. 119 level might be based on such facts as "chronic alcoholism" or "failure to provide the basic physical needs of the child". On the G.L. 210 level, unfitness might be seen as the parent's inability to deal with the "severe emotional needs" that result from the scars of the child's earlier years.

Parental unfitness must be found at *both* stages to separate parent from child. However, the court may highlight different evidence of "unfitness" when the social service agency brings a care and protection proceeding on behalf of the child under G.L. c. 119, and when later on under G.L. c. 210 it seeks to transfer care and protection to an adoptive parent.

When it brings a child under the care and protection of a social service agency, the court looks more to "endangerment." While considering a petition to dispense with a parent's consent to adoption, the court is more inclined to highlight a parent's inability to meet what expert testimony (and the judge's observations) has determined to be the child's special needs.

Today, children who are old enough to have memories of their natural parents and grandparents, are finding their rights to continue these vital family contacts preserved by Massachusetts courts. An important aspect of the "open adoption" is that by minimizing the "winner take all" adversarial stance, the court sets a tone, by decree, from which the healing and rebuilding of family relationships can begin in the best interests of the child.

In this manner, we embark into the care and protection decisions of 1985 with the best interests of the child preserved. May they stay that way both now and in the time to come.



G. Footnotes:

1) G.L. c. 119, § 1 *Policy of Commonwealth Defined*

It is hereby declared to be the policy of this commonwealth to direct its efforts, first, to the strengthening and encouragement of family life for the protection and care of children; to assist and encourage the use by any family of all available resources to this end; and to provide substitute care of children only when the family itself or the resources available to the family are unable to provide the necessary care and protection to insure the rights of any child to sound health and normal physical, mental, spiritual and moral development.

The purpose of this chapter is to insure that the children of the commonwealth are protected against the harmful effects resulting from the absence, inability, inadequacy or destructive behavior of parents or parent substitutes, and to assure good substitute parental care in the event of the absence, temporary or permanent inability or unfitness of parents to provide care and protection for their children.

2) G.L. c. 119, *Section Headings* relating to care & protection petitions

§ 23. Department to Provide Foster Care, Group Care or Temporary Shelter Care of Children, When

23A. Care of child born to inmate of, or whose mother is committed to, Jail or House of Correction.

24. Boston, Bristol, Springfield, and Worcester Juvenile Courts, etc., Powers and Duties as to Children.

25. Same subject. Hearing, etc.

26. Same subject. Hearing procedure; Order of Commitment, etc.

27. Same subject. Appeals.

28. Same subject. Orders for Payment for Support, etc.

29. Same subject. Persons Appearing for Certain Children.

3) G.L. c. 201, § 5. *Minors; custody and education; marriage; effect.* The guardian of a minor shall have the custody of his person and the care of his education, except that the parents of the minor, jointly, or the surviving parent shall have such custody and said care unless the court otherwise orders. The probate court may, upon the written consent of the parents or surviving parent, order that the guardian shall have such custody; and may so order if, upon a hearing and after such notice to the parents or surviving parent as it may order, it finds such parents, jointly, or the surviving parent, unfit to have such custody; or if it finds one of them unfit therefor and the other files in court his or her written consent to such order....

4) G.L. c. 210, § 3. Consent not required in certain cases.

(a) Whenever a petition for adoption is filed by a person having the care or custody of a child, the consent of the persons named in section two, other than that of the child, shall not be required if: (i) the person to be adopted is eighteen years of age or older, or if (ii) the court hearing the petition finds that the allowance of the petition is in the best interests of the child, as defined in paragraph (c).

(b) The department of social services or any licensed child care agency may commence a proceeding, independent of a petition for adoption, in the probate court of Suffolk county or any other county in which said department or agency maintains an office, to dispense with the need for consent of any person named in section two to the adoption of a child in the care and custody of said department or agency. Notice of such proceeding shall be given to such person in a manner prescribed by the court. The court shall issue a decree dispensing with the need for said consent or notice of any petition for adoption of such child subsequently sponsored by said department or agency if it finds that the best interests of the child as defined in paragraph (c) will be served by said decree. Pending a hearing on the merits of a petition filed under this paragraph, temporary custody may be awarded to the petitioner. A petition brought pursuant to this paragraph may be filed and a decree entered notwithstanding the pendency of a petition brought under chapter one hundred and nineteen or chapter two hundred and one regarding the same child. The chief administrative justice of the trial court may, pursuant to the provisions of section nine of chapter two hundred and eleven B, assign a justice from any department of the trial court to sit as a justice in any other department or departments of the trial court and hear simultaneously a petition filed under this paragraph and any other pending case or cases involving custody or adoption of the same child.

(c) In determining whether the best interest of the child will be served by granting a petition for adoption without requiring certain consent as permitted under paragraph (a), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other person named in section two to assume parental responsibility and shall also consider the ability, capacity, fitness and readiness of the petitioners under paragraph (a) to assume such responsibilities.

In determining whether the best interests of the child will be served by issuing a decree dispensing with the need of consent as permitted under paragraph (b), the court shall consider the ability, capacity, fitness and readiness of the child's parents or other persons named in section two of chapter two hundred ten to assume parental responsibility, and shall also consider the plan proposed by the department or other agency initiating the petition.

If said child has been in the care of the department or a licensed child care agency for more than a year, in each case irrespective of incidental communications or visits from his parents or other person named in section two, irrespective of a court decree awarding custody of said child to another and notwithstanding the absence of a court decree ordering said parents or other persons to pay for the support of said child there shall be a presumption that the best interests of the child will be served by granting a petition for adoption as permitted under paragraph (a) or by issuing a decree dispensing with the need for consent as permitted under paragraph (b).

Note: the "presumption" was held to be unconstitutional in *Petition of the Department of Social Services to Dispense with Consent to Adoption,* 389 Mass. 793, 452 N.E.2d 497 (1983).

5) G.L. c. 119, § 24. Boston, Bristol, Springfield, and Worcester Juvenile Courts, etc., Powers and Duties as to Children. The Boston juvenile court, the Worcester juvenile court, the Bristol juvenile court, and the Springfield juvenile court or the juvenile sessions of any district court of the commonwealth, except the municipal and district court located within the territorial limits of said juvenile courts, upon the petition of any person alleging on behalf of a child under the age of eighteen years within the jurisdiction of said court that said

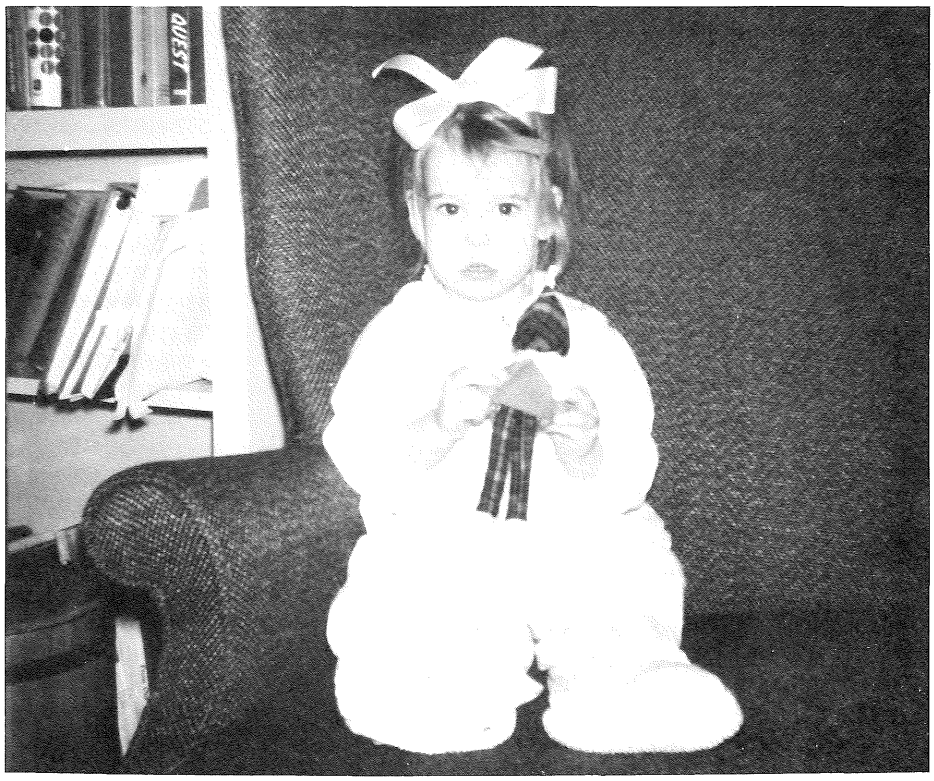
child is without: (a) necessary and proper physical or educational care and discipline or; (b) is growing up under conditions or circumstances damaging to a child's sound character development or; (c) who lacks proper attention of parent, guardian with care and custody, or custodian or; (d) whose parent, guardian or custodian is unwilling to provide any such care, discipline or attention and may issue a precept to bring such child before said court, shall issue a notice to the department, and shall issue summonses to both parents of the child to show cause why the child should not be committed to the custody of the department or other appropriate order made. If after reasonable search no such parent can be found, summons shall be issued to the child's lawful guardian, if any, known to reside within the commonwealth, and if not, to the person with whom such child last resided, if known. If, after a recitation under oath by the petitioner of facts of the conditions of the child who is the subject of the petition, the court is satisfied that there is reasonable cause to believe that the child is suffering from serious abuse or neglect, or is in immediate danger of serious abuse or neglect, and that immediate removal of the child is necessary to protect the child from serious abuse or neglect, the court may issue an emergency order transferring custody of a child under this section to the department or to a licensed child care agency or individual described in clause (2) of section twenty-six. Said transfer of custody shall be for a period not exceeding seventy-two hours, except that upon the entry of said order, notice shall be given to either or both parents, guardian with care and custody, or other custodian, to appear before said court. The court at this time shall determine whether such temporary custody should continue until a hearing on the merits of the petition of care and protection is concluded before said court. Upon the issuance of the precept and order of notice the court shall appoint a person qualified under section twenty-one, to make a report to the court under oath of an investigation into conditions affecting the child. Said report shall then be attached to the petition and be a part of the record. The jurisdiction of the Boston juvenile court of the subject matter of this section shall be extended to the territorial limits of Suffolk County. Any child may be committed to the department under this section without a hearing or notice with the consent of the parent or parents or guardian.

6) *Petition of New England Home for Little Wanderers to Dispense with Consent to Adoption,* 367 Mass. 631, 641, 328 N.E.2d 854, 860 (1975).
7) *Id.*
8) *Id.* at 642, 328 N.E.2d 862.
9) Chemerinsky, *Defining the "Best Interests": Constitutional Protections in Involuntary Adoption,* 18 J. Family Law 79, 92 (1979-80).
10) See: Note 6.
11) *Petition of New England Home for Little Wanderers to Dispense with Consent to Adoptions,* 367 Mass. 631, 642, 328 N.E.2d 854, 862 (1975).
12) *Id.* at 647, 328 N.E.2d 863.
13) *Id.* at 650, 328 N.E.2d 865.
14) *Id.*
15) *Id.* at 647, 328 N.E.2d 864.
16) Hayes, *Adoption and Termination Proceedings in Wisconsin: Straining the Wisdom of Solomon,* 66 Marquette Law Review, 439, 441 (1983).
17) McGough, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes,* 27 Emory Law Review, 209 (1978).
18) Perkins, *Christian Oeconomie* (London, 1609), p. 164.
19) Laslet, ed., *Patriarcha and Other Political Works of Sir Robert Filmer* (Oxford, 1949), p. 57.
20) Bremner, ed., *Children and Youth in America: A Documentary History* (Cambridge, 1970), Vol. I., p. 28.
21) N. B. Shurtleff, ed., *Records of the Governor and Company of the Massachusetts Bay in New England (1628-1686),* 5 vols. (Boston, 1853 - 1854), p. 8; hereafter cited as *Mass. Records.*
22) *Mass. Records,* III (1854), 101.
23) Bremner, supra at 28.
24) *Mass. Records,* IV (1854), 240.
25) *Id.*
26) Hayes, supra, at 442; 2 J. Kent, *Commentaries on American Law,* at 189.
27) Pulsifer, ed., *Records of Colonial New Plymouth: Laws 1623 - 1682,* (Boston, 1861) 38.
28) *Mass. Records,* II (1853), 180.
29) Chemerinsky, supra, at 83.
30) Areen, *Intervention Between Parent and Child: A Reappraisal of State's Role in Child Neglect and Abuse Cases,* 63 Geo. Law Journal 887 (1975) note 2 at 901.
31) Chemerinsky, supra, at 83.
32) Huard, *The Law of Adoption: Ancient and Modern,* 9 Vanderbilt Law Review 743 (1956) note 22, at 748.
33) *Petition of New England Home for Little Wanderers to Dispense with Consent to Adoption,* 367 Mass. 631, 637, 328 N.E.2d 854, 858 (1975).
34) *Id.*
35) *Id.*
36) *Id.* at 638, 328 N.E.2d 859.
37) *Id.* at 639, 328 N.E.2d 859.
38) *Id.;* see: note 4. for text of "presumption".
39) *Id.* at 641, 328 N.E.2d 861. [contrast: Petition of Dept. Social Services to Dispense with consent to Adoption, 391 Mass. 113, 119, 461 N.E.2d 186, 190 (1984).]
40) 383 Mass. 651, 594, 421 N.E.2d 28, 37 (1981).
41) 371 Mass. 651, 656, 358 N.E.2d 794, 798 (1976).
42) *Id.*
43) 5 Mass. App. Ct. 741, 745, 370 N.E.2d 712, 715 (1977).
44) *Id.* at 749, 370 N.E.2d 544.
45) 5 Mass. App. Ct. 403, 412, 363 N.E.2d 539, 545 (1977).
46) *Id.* at 409, 363 N.E.2d 544.
47) 375 Mass. 733, 748, 379 N.E.2d 1053, 1063 (1978).
48) *Id.* at 737, 379 N.E.2d 1056.
49) *Id.* at 752, 379 N.E.2d 1065.
50) *Id.* at 755, 379 N.E.2d 1066.
51) *Id.* at 753, 379 N.E.2d 1065.
52) 376 Mass. 252, 265, 381 N.E.2d 565, 572 (1978).
53) J. Goldstein, A. Freud, & A. Solnit, *Beyond the Best Interests of the Child* (New York 1979), 53-64.
54) 376 Mass. 252, 269, 381 N.E.2d 565, 575 (1978).
55) 377 Mass. 876, 882, 389 N.E.2d 68, 73 (1979).
56) *Id.* at 885, 389 N.E.2d 75.
57) 378 Mass. 712, 393 N.E.2d 379 (1979).
58) *Id.* at 714, 393 N.E.2d 384.
59) *Id.* at 718, 393 N.E.2d 387.
60) see: note 25.
61) 379 Mass. 1, 6, 393 N.E.2d 406, 409 (1979).
62) 378 Mass. 732, 742, 393 N.E.2d 836, 846 (1979).
63) 9 Mass. App. Ct. 594, 600, 402 N.E.2d 116, 1121 (1980).
64) 381 Mass. 563, 580, 410 N.E.2d 1207, 1216 (1980).
65) 383 Mass. 573, 581, 421 N.E.2d 28, 32 (1981).

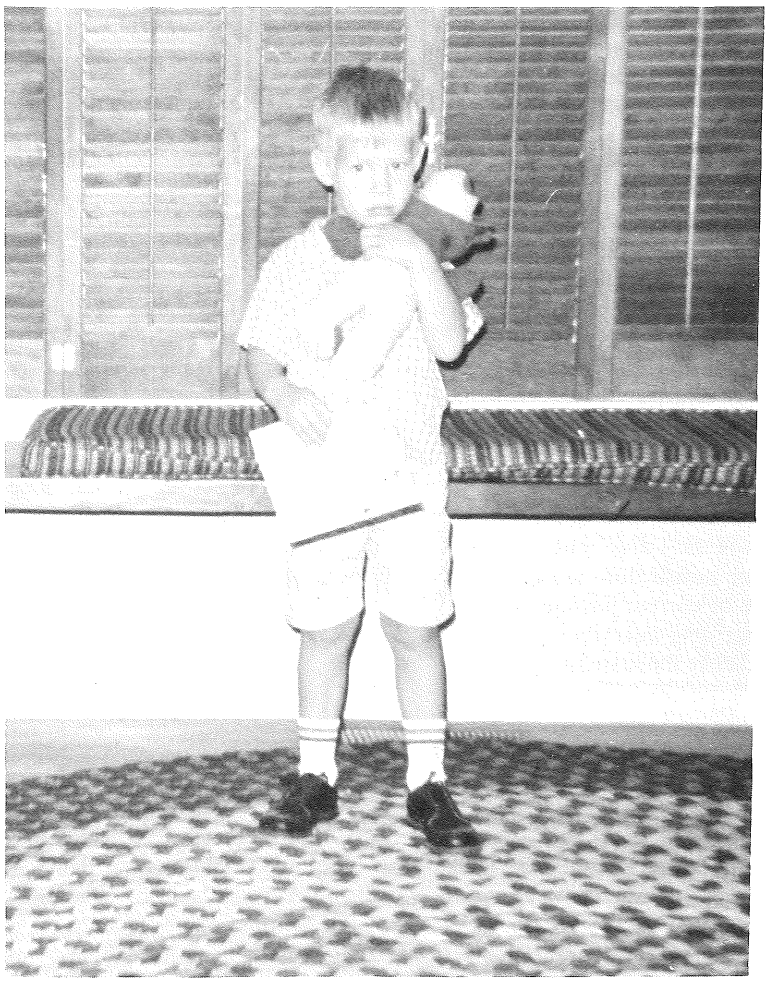
66) *Id.* at 587, 421 N.E.2d 36.
67) *Id.* at 591, 421 N.E.2d 38; contrast, *Commonwealth v. Dee,* 222 Mass. 184, 110 N.E.2d 287 (1915).
68) *Id.* at 592, 421 N.E.2d 39.
69) 383 Mass. 595, 602, 421 N.E.2d 63, 67 (1981).
70) *Id.* at 600, 421 N.E.2d 66.
71) 384 Mass. 707, 711, 429 N.E.2d 685, 688 (1981).
72) 12 Mass. App. Ct. 86, 88, 421 N.E.2d 780, 782 (1981).
73) *Id.*
74) 13 Mass. App. Ct. 936, 937, 430 N.E.2d 1245, 1246 (1982).
75) *Id.* at 938, 430 N.E.2d 1247.
76) 385 Mass. 482, 487, 432 N.E.2d 97, 100 (1982).
77) *Id.* at 490, 432 N.E.2d 102.
78) see: notes 4 and 38.
79) 385 Mass. 697, 699, 434 N.E.2d 601, 603 (1982).
80) *Id.*
81) *Id.* at 608.
82) *Id.* at 609.
83) "Nemesis" in that some practitioners felt "best interests of child" not served when disposition of case elongated by unnecessary hearings.
84) Decision seems protective of those parental rights *Little Wanderers* indicated as necessary to preserve.
85) 15 Mass. App. Ct. 916, 917, 443 N.E.2d 905, 906 (1983).
86) 388 Mass. 398, 408, 446 N.E.2d 1369, 1376 (1983).
87) 389 Mass. 755, 767, 452 N.E.2d 483, 492 (1983).
88) 389 Mass. 793, 800, 452 N.E.2d 497, 502 (1983).
89) *Id.* at 803, 452 N.E.2d 503.
90) 17 Mass. App. Ct. 969, 970, 458 N.E.2d 761, 762 (1984).
91) 17 Mass. App. Ct. 1016, 1017, 460 N.E.2d 611, 612 (1984).
92) 391 Mass. 572, 463 N.E.2d 324 (1984).
93) 392 Mass. 719, 726, 467 N.E.2d 1286, 1291 (1984).
94) 392 Mass. 704, 712, 467 N.E.2d 851, 857 (1984).
95) *Id.* at 715, 467 N.E.2d 859.
96) 393 Mass. 556, 562 at note 11., citing 392 Mass. 704, 718 (1984).
97) 17 Mass. App. Ct. 993, 995, 459 N.E.2d 140, 142 (1984).
98) 16 Mass. App. Ct. 607, 609, 453 N.E.2d 1236, 1237-8 (1983).
99) 391 Mass. 113, 118, 461 N.E.2d 186, 190 (1984).
100) *Id.* at 119, 461 N.E.2d 190.
101) *Id.* at 121, 461 N.E.2d 191.
102) 392 Mass. 696, 700, 467 N.E.2d 861, 864 (1984).
103) 18 Mass. App. Ct. 120, 128, 463 N.E.2d 1187, 1193 (1984).
104) 18 Mass. App. Ct. 656, 663, 469 N.E.2d 1277, 1282 (1984).
105) see: note 96.
106) see: "Shared Legal Custody" G.L. c. 208, sec. 31. "Grandparents" G.L. c. sec. 39D.
107) 392 Mass. at 703, 467 N.E.2d 461.

H. Cases Consulted:

1. *Petition of New England Home for Little Wanderers to Dispense with Consent to Adoption,* 367 Mass. 631, 328 N.E.2d 854 (1975).
2. *Commonwealth v. Dee.,* 222 Mass. 184, 110 N.E.2d 287 (1915).
3. *Consent to Adoption of a Minor,* 345 Mass. 705, 189 N.E.2d 505 (1963).
4. *Petition of Department of Social Services to Dispense with Consent to Adoption,* 389 Mass. 793, 452 N.E.2d 497 (1983).
5. *Petition of Department of Public Welfare to Dispense with Consent to Adoption,* 371 Mass. 651, 358 N.E.2d 794 (1976).
6. *In Re Custody of a Minor,* 5 Mass. App. Ct. 741, 370 N.E.2d 712 (1977).



7. *Cennami v. Department of Public Welfare,* 5 Mass. App. Ct. 403, 363 N.E.2d 539 (1977).
8. *In Re Custody of a Minor,* 375 Mass. 733, 379 N.E.2d 1053 (1978).
9. *Petition of the Department of Public Welfare to Dispense with Consent to Adoption,* 376 Mass. 252, 381 N.E.2d 565 (1978).
10. *In Re Custody of a Minor* (No. 1.), 377 Mass. 876, 389 N.E.2d 68 (1979).
11. *In Re Custody of a Minor* (No. 2.), 378 Mass. 712, 393 N.E.2d 379 (1979).
12. *Department of Public Welfare v. J.B.K.,* 379 Mass. 1., 393 N.E.2d 836 (1979).
13. *In Re Custody of a Minor* (No. 3.), 378 Mass. 732, 393 N.E.2d 836 (1979).
14. *Petition of Worcester Children's Friend Society to Dispense with Consent to Adoption,* 9 Mass. App. Ct. 594, 402 N.E.2d 1116 (1980).
15. *Bezio v. Patenaude,* 381 Mass. 563, 410 N.E. 2d 1207 (1980).
16. *Petition of Department of Public Welfare to Dispense with Consent to Adoption,* 383 Mass. 573, 421 N.E.2d 28 (1981).
17. *In Re Custody of a Minor,* 383 Mass. 595, 421 N.E. 2d 63 (1981).
18. *Petition of Department of Social Services to Dispense with Consent to Adoption,* 384 Mass. 707, 429 N.E.2d 685 (1981).
19. *Appeal of Care and Protection of Two Minors,* 12 Mass. App. Ct. 86, 421 N.E. 2d 780 (1981).
20. *Petition of Catholic Charitable Bureau to Dispense with Consent to Adoption,* 13 Mass. App. Ct. 936, 430 N.E.2d 1245 (1982).
21. *Petition of New Bedford Child and Family Service to Dispense with Consent to Adoption,* 385 Mass. 482, 432 N.E.2d 97 (1982).
22. *Stanley v. Illinois,* 405 U.S. 645, 31 L.Ed. 2d 551, 92 S.Ct. 1208 (1982).
23. *Levy v. Louisiana,* 391 U.S. 68, 20 L.Ed. 2d 436, 88 S.Ct. 1509 (1967).
24. *Santosky v. Kramer,* 455 U.S. 745, 71 L.Ed. 2d 599, 102 S.Ct. 1388 (1982).
25. *In Re Custody of a Minor,* 385 Mass. 697, 434 N.E.2d 601 (1982).
26. *Petition of Department of Social Services to Dispense with Consent to Adoption,* 15 Mass. App. Ct. 916, 443 N.E.2d 905 (1983).
27. *Adoption of a Minor,* 386 Mass. 741, 438 N.E.2d 38 (1982).
28. *Feeman v. Chaplic,* 388 Mass. 398, 446 N.E.2d 1369 (1983).
29. *Custody of a Minor,* 389 Mass. 755, 452 N.E.2d 483 (1983).
30. *Petition of Department of Social Services to Dispense with Consent to Adoption,* 389 Mass. 793, 452 N.E. 2d 497 (1983).
31. *Petition of Department of Social Services to Dispense with Consent to Adoption,* 16 Mass. App. Ct. 607, 453 N.E.2d 1236 (1983); 391 Mass. 113, 461 N.E.2d 186 (1984).
32. *Custody of Three Minors,* 17 Mass. App. Ct. 969, 458 N.E.2d 761 (1984).
33. *Adoption of a Minor,* 17 Mass. App. Ct. 993, 459 N.E.2d 140 (1984).
34. *Custody of a Minor (No. 1),* 17 Mass. App. Ct. 1016, 460 N.E.2d 611 (1984).
35. *Custody of a Minor (No. 1),* 391 Mass. 572, 463 N.E.2d 324 (1984).
36. *Petitions of the Department of Social Services to Dispense with Consent to Adoption,* 18 Mass. App. Ct. 120, 463 N.E.2d 1187 (1984).
37. *Custody of a Minor (No. 2),* 392 Mass. 704, 467 N.E.2d 1286 (1984).
38. *Care and Protection of Three Minors,* 392 Mass. 704, 467 N.E.2d 851 (1984).
39. *Petition of Department of Social Services to Dispense with Consent to Adoption,* 392 Mass. 696, 467 N.E.2d 861 (1984).
40. *Petition of the Catholic Charitable Bureau of the Archdiocese of Boston, Inc. to Dispense With Consent to Adoption,* 18 Mass. App. Ct. 656, 469 N.E.2d 1277.
41. *Petition for Revocation of a Judgment for Adoption of a Minor,* 393 Mass. 556, 471 N.E.2d 1348 (1984).



Laker Airways v. Sabena Belgian: The Death Knell of the Traditional Concepts of Jurisdiction in International Law

By John J. Masiz

I. Introduction

In March, 1984, the U.S. Court of Appeals for the District of Columbia decided the case of *Laker Airways v. Sabena Belgian World Airways.*[1] In this case, the court ruled that the U.S. had jurisdiction to apply U.S. antitrust law against foreign defendants whose alleged anti-competitive conduct occurred outside of the U.S.[2] In making this ruling, the court refused to honor British blocking legislation designed to frustrate the application of the American antitrust laws.[3] By reaching its decision, the *Laker* court ushered in a new era in antitrust law.[4] The case clearly illustrates that a nation can no longer effectuate its commercial interests at the expense of another.[5] Instead, international antitrust cases must be decided multinationally.[6]

Specifically, *Laker* considered two issues. First, the court examined whether the extraterritorial application of U.S. antitrust laws exceeded the jurisdictional scope of U.S. courts.[7] Second, the court examined whether the anti-suit injunction issued by the District Court was proper.[8] The purpose of this paper is to focus more narrowly on the first issue. By developing the Laker court's reasoning regarding jurisdiction, the erroneousness of current jurisdictional concepts regarding international antitrust should be clearly illustrated.

II. Facts of Laker

A. Business Background

Laker Airlines was incorporated under English law and it began routine transatlantic flights in 1977.[9] Laker hoped to gain a sizable share of the transatlantic business by pricing far below its competition.[10] Laker's prices were low because they provided air service without amenities.[11] The established transatlantic carriers perceived Laker as a threat to their market shares.[12] In 1977 these established carriers, all members of the International Air Transport Association, agreed to set prices and predatorily drive Laker out of the marketplace.[13] It should be noted that the air fare for transatlantic flights is controlled by the International Air Transport Association.[14] This group meets annually to establish air fares for its member airlines.[15] Before the air fares can go into effect, they must be approved by the national governments of the individual carriers.[16]

In 1981, the devaluation of the pound sterling vis-a-vis the American dollar signaled the end of Laker Airlines.[17] Laker's DC-10 airplanes were financed with U.S. dollars by American banks and McDonnell Douglas Finance Corporation.[18] The English currency devaluation increased the debt service for Laker's loans.[19] Laker ran into repayment difficulties and was unable to reschedule repayment of its loans.[19] Laker Airlines was forced into liquidation in early 1982.[20]

B. Litigation Background

In 1982, Laker Airline's liquidator (Laker) filed an antitrust action against Pan American Airways, Trans World Airways, McDonnell Douglas Corp., McDonnell Douglas Financing Corp., British Airways, British Caledonia Airways, Lufthansa and Swissair.[21] Laker alleged predatory behavior on the part of the defendants in violation of U.S. antitrust laws.[22] Soon thereafter British Caledonia, British Airways, Lufthansa and Swissair sought and received an interlocutory injunction from the High Court of Justice in England.[23] This interlocutory injunction prohibited Laker from maintaining its antitrust suit in U.S. courts.[24]

Upon hearing of the interlocutory injunction, Laker entered the U.S. District Court of the District of Columbia and obtained a temporary restraining order.[25] This temporary restraining order prevented the American defendants from entering the English courts.[26] Laker also filed a new antitrust action against KLM Royal Dutch Airlines and Sabena Belgian.[27] Along with filing the new antitrust action, Laker obtained a temporary restraining order against KLM and Sabena Belgian.[28] This temporary restraining order had the same provisions as the one issued against the American defendants.[29]

In the interim, the English High Court of Justice ruled on the substantive questions behind the interlocutory injunction which it had issued against Laker.[30] The High Court found that both British Caledonia and British Airways were subject to U.S. antitrust law since they did business in the U.S.[31] Further, the High Court noted that the Bermuda II Treaty was not violated by the United States' antitrust jurisdiction.[32] The British government then invoked the British Protection of Trading Interests Act.[33] The English Court of Appeals, following the government's action, issued a permanent injunction against Laker.[34] This permanent injunction was designed to prevent laker from obtaining U.S. antitrust relief against British Airways and British Caledonia.[35]

C. Status of Litigation

At the time of the decision by the U.S Court of Appeals, District of Columbia Circuit, the British Court of Appeals had granted a permanent injunction against Laker regarding British Caledonia and British Airways.[36] In addition, the British court was still considering the substantive questions behind the preliminary injunction obtained by Lufthansa and Swissair against Laker.[37] Finally, the U.S. District Court had amended its temporary restraining order against the American defendants, KLM and Sabena Belgian, into a preliminary injunction.[38]

III. Historical Development of the Extra-Territorial Application of American Antitrust Laws

A. American Banana Co. v. United Fruit Co.

1. Facts

American Banana was one of the first cases to rule on the extraterritorial application of the Sherman Act.[39] In this case, both the plaintiff and the defendant were American corporations engaged in the production and importation of bananas from Central America to the United States.[40] In order to control the price of bananas, United Fruit allegedly engaged in predatory practices and price fixing.[41] American Banana Co. refused to conspire with United Fruit Co.[42] Subsequently, American Banana's plantations were confiscated by the Costa Rican government and then sold to United Fruit.[43] American Banana Co. alleged that United Fruit precipitated the Costa Rican action in direct contravention of the United States antitrust laws.[44]

2. Reasoning

The Supreme Court, in deciding on the extraterritorial application of the Sherman Act, adopted a territorial view.[45] The court stated that a statute operated only in the territory over which the governing body had legitimate power.[46] The Act of State doctrine also appeared to play a role in the court's decision.[47] The Supreme Court postulated that the law of the country where the act occurred determined whether that act was lawful.[48] Thus, the Court found that, because the plantations were legitimately administered by the Costa Rican government, United Fruit Company's action was beyond the jurisdiction of the United States' antitrust laws.[49]

B. United States v. Aluminum Company of America

1. Facts

American Banana, which represents one of the most conservative approaches to the extraterritorial application of the U.S. antitrust laws, was gradually modified until the decision in *Alcoa* was reached.[50] *Alcoa* represents one of the most expansive views in the area of extraterritorial jurisdiction.[51] This case began when Aluminum Company of America, utilizing a two step process, attempted to secure a monopoly position in the aluminum market.[52] The first step consisted of binding power companies to contracts that did not allow them to provide electrical power to other potential aluminum producers.[53] In its second step Alcoa formed a Canadian corporation in order to secretly participate in a foreign cartel.[54] As a member of the cartel, Alcoa, through its Canadian subsidiary, agreed to limit its exportation of aluminum to the foreign markets.[55] In exchange, the foreign manufacturers agreed to refrain from exporting to the U.S. The Department of Justice learned of this agreement and brought an antitrust action against Alcoa.[56]

2. Reasoning

In deciding this case, Judge Learned Hand developed the "effects" doctrine of jurisdiction.[57] The effects doctrine stated that a country had jurisdiction over any individual, (foreign or otherwise), who engaged in conduct prohibited by and effecting that country.[58] Clearly Congress had prohibited corporations from forming cartels and controlling prices of goods in the U.S. market.[59] Therefore, under the effects doctrine, Alcoa was liable for monopolistic activity even though that activity had occurred in a foreign country and had not violated foreign law.[60]

3. Comments

The effects doctrine formulated in Alcoa has been widely criticized.[61] It was thought to be inconsistent with the jurisdictional principles of nationality and territoriality propounded by international law.[62] In addition, the effects doctrine increased the likelihood of conflict between the American antitrust laws and the economic regulations of other nations.[63] Finally, courts have felt that this doctrine failed to consider the principles of comity.[64] Therefore, courts that decided cases subsequent to *Alcoa* have generally retreated from the transnational jurisdiction that *Alcoa* propounded.[65]

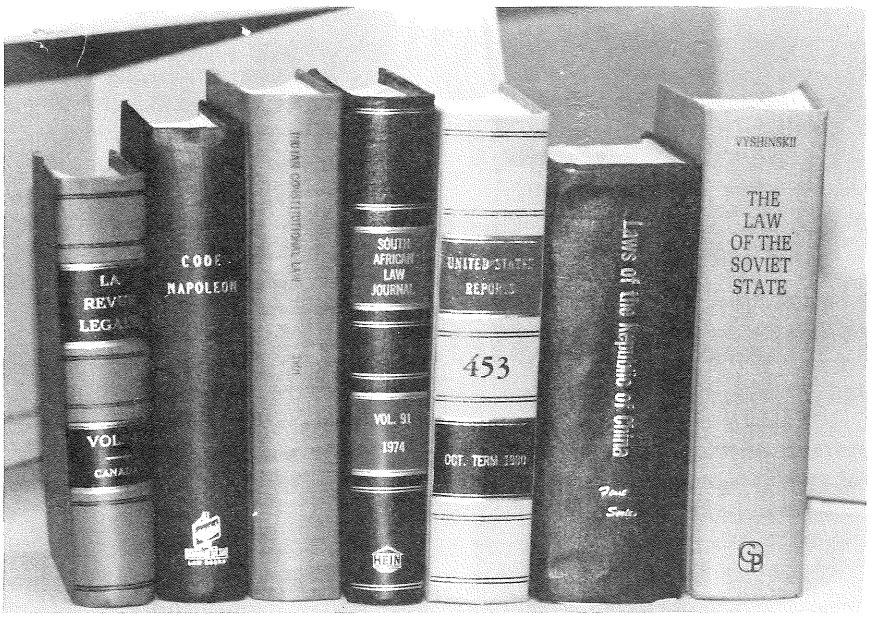
C. Timberlane Lumber Co. v. Bank of America, N.T. & S.A.

1. Facts

In 1976 the U.S. Court of Appeals struck a balance between *American Banana* and *Alcoa.*[66] The *Timberlane* decision established a test designed to protect the international antitrust concerns of Congress and a foreign state's concerns over its sovereignty.[67] Timberlane Lumber Co. is an Oregon partnership which, in 1971, purchased a lumber mill in Honduras.[68] The mill was purchased using loans from a Honduran bank that was wholly owned by the Bank of America Corporation.[69] Timberlane intended to import lumber from this mill into the United States.[70] This operation created substantial competition for the other Honduran lumber mill owned by Caminals, a Honduran national.[71] In an effort to close down Timberlane, Caminals persuaded the Bank of America subsidiary to foreclose on Timberlane's Honduran mill.[72] Timberlane offered to buy the bank's interest outright.[73] However, the bank instead sold its interest to Caminals who closed the mill and paralyzed the Timberlane operations.[74] Timberlane filed an antitrust action against the Bank of America Corp. for the actions of its wholly owned branch in Honduras.[75]

2. Reasoning

In *Timberlane,* Judge Chow acknowledged the concerns which other countries have in the regulation of trade.[76] These foreign interests might



conflict with the interest and application of U.S. antitrust laws.[77] In order to strike a balance between potentially polar goals, Judge Chow posited a tripartite analysis.[78] The first step of this analysis examined the effect (actual/intended) on commerce.[79] Next the court determined whether that effect on commerce was sufficiently large to cause a "cognizable" injury.[80] Finally, the court balanced the magnitude of the effects on commerce and interest of America vis-a-vis the interests and effects in other nations.[81] To aid in the balancing of this last step, *Timberlane* provided the following factors to be considered:

> "(a) the degree of conflict with foreign law or policy;
> (b) the nationality or allegiance of the parties and the locations or principal places of business of the corporations;
> (c) the extent to which enforcement by either state can be expected to achieve compliance;
> (d) the relative significance of effects on the U.S. as compared with the effects elsewhere;
> (e) the extent to which there is explicit purpose to harm or effect American commerce;
> (f) the foreseeability of such effort;
> (g) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad."[82]

Utilizing this tripartite analysis, the *Timberlane* court found that it did have jurisdiction to extraterritorially apply U.S. antitrust laws.[83]

3. Comments

The *Timberlane* decision has been regarded generally as striking the proper balance between the jurisdictional retrenchment of *American Banana* and the jurisdictional overreach of *Alcoa*.[84] This has been accomplished by the direct inclusion of foreign policy and act of state considerations into a balancing test designed to determine jurisdiction.[85] The *Timberlane* test was thought to prevent unnecessary infringement of a foreign state's sovereignty.[86] It did this by prohibiting the extraterritorial jurisdiction of U.S. antitrust laws in circumstances where the effects on American commerce are minimal compared with the foreign state's interests.[87] In addition, the *Timberlane* test protected American interests by insuring jurisdiction when the anti-competitive effect on American commerce was significant.[88]

Problems with *Timberlane* exist. Foreign nations feel that the balancing process unduly favors the foreign state who performs the balancing.[89] U.S. courts feel that the complexity of the balancing test makes it unusable except in limited circumstances.[90] In addition, because there is no specified weight for each of the balancing test factors, courts can conclude any way that they wish.[91] Finally, in order to perform the *Timberlane* balancing test, a significant quantity of discovery must first occur.[92] *Timberlane* did not mention instances where the discovery itself is repugnant to foreign sovereigns.[93] Thus, the *Timberlane* balancing test has failed to alleviate the tensions between U.S. and foreign countries over the extraterritorial application of U.S. antitrust laws.[94]

IV. Reasoning of Laker Airways

Judge Wilkey's reasoning in *Laker* was dispositive on two issues. One issue concerned the propriety of an anti-suit injunction granted by the U.S. District Court against Sabena Belgian and KLM. This consideration is outside the scope of this paper. The second issue explored by the court was the jurisdictional validity of the extraterritorial application of the U.S. antitrust laws. In ruling that U.S. law was applicable, the court engaged in a four step process which is described below.

A. Concurrent Jurisdiction

In its first step of analysis, the U.S. Court of Appeals found that both England and the United States had jurisdiction.[95] In reaching this finding the court first examined the contacts which resulted in U.S. jurisdiction.[96] The court determined that the defendants participated in American commerce.[97] Since the defendants' actions effected U.S. commerce, the U.S. courts had territorial jurisdiction.[98] Territorial jurisdiction allows a state to regulate "conduct outside its territorial boundary which has or is intended to have a substantial effect within the territory."[99] The alleged anti-competitive actions of the defendants subjected them to the jurisdiction of American antitrust laws.[100]

The *Laker* court then examined the British bases of jurisdiction. Judge Wilkey found that Britain had territorial jurisdiction since some of the alleged predatory acts of the defendants occurred in England.[101] However, Britain's main contention centered on nationality.[102] Laker Airways was incorporated under English law.[103] Further, the airline was considered a British national for the purposes of litigation.[104] Thus, Britain had jurisdiction based on the nationality of Laker who was the plaintiff in the U.S. courts. Because of this, both the United States and Britain

had concurrent jurisdiction over Laker Airways.[105]

B. Paramount Nationality

In its next step of analysis, the U.S. Court of Appeals examined the issue of paramount nationality. The theory of paramount nationality was advanced by the defendants in order to protest American jurisdiction.[106] This theory contended that when two nations have jurisdiction over a defendant, the country of nationality has superior jurisdiction.[107] In evaluating this theory, Judge Wilkey determined that paramount nationality was unknown in international law.[108] Further, this court found that territorial jurisdiction superceded national jurisdiction.[109] Therefore, U.S. courts did have jurisdiction to apply American antitrust laws. [110]

C. Comity

The U.S. Court of Appeal's third step of analysis centered on a discussion of comity.[111] Comity was defined as "the degree of deference that a domestic forum must pay to the act of a foreign government not otherwise binding on the forum."[112] Even so, the *Laker* court propounded that a nation was not obligated to enforce foreign interests that conflicted with interests of the domestic forum.[113] In this case, principles of comity were not violated by the application of U.S. antitrust laws.[114] The court felt that the failure to apply U.S. law would have allowed the defendants to evade punishment after causing significant injury.[115]

In addition, Judge Wilkey found that the English courts should have granted comity to the U.S.[116] This finding was based on two occurrences. First, the case was filed in U.S. Courts prior to the initial involvement of the British.[117] Second, since the only goal of the British Protection of Trading Interests Act was to prevent legitimate claims from being litigated, the British court's interest should have deferred to the American courts.[118] Therefore, Judge Wilkey felt that the English courts maintenance of jurisdiction amounted to their violation of the comity principle.[119]

D. Balancing of Interests Test

The final step of the court's analysis consisted of a discussion concerning the applicability of the *Timberlane* Balancing Test.[120] The court decided that this test was inapplicable.[121] In general a balancing test is unusable when a court must balance the vital national interests of the U.S. and the U.K. to determine which interests predominate.[122] Further, the Appeals Court felt that U.S. Courts were bound to enforce U.S. antitrust law since Congress considered it of national importance.[123] Therefore, balancing test or not, antitrust laws must be enforced.

V. Analysis of Laker

A. Limits of the Timberlane Balancing Test

The reasoning of the *Laker* court portrayed the limits of the *Timberlane* Balancing Test.[124] Theoretically this balancing test was designed to reassure foreign states that U.S. antitrust laws would not impinge unnecessarily on their sovereignty.[125] In practice, the U.S. courts have rarely found that the interests of the foreign state superceded U.S. interests.[126] In reality, the U.S. courts have returned to the effects doctrine of *Alcoa,* being unable to apply the balancing test of *Timberlane.*[127] This retreat occurred because of the balancing test's complexity.[128] Also, the Appeals Court correctly pointed out that it would have been foolhardy for the U.S. courts to claim jurisdiction under the guise of a balancing test, since in this case the interests of both nations were substantially effected.[129] Realizing this, Judge Wilkey correctly refrained from applying the balancing test.[130]

Further, the *Laker* analysis correctly displayed the impropriety of allowing courts to balance national interests.[131] In these cases, factors such as foreign relations, national policy and national regulation are intimately connected with the jurisdictional issue.[132] These factors are not only outside the scope of judicial reasoning, but are also essentially politically related.[133] Since the executive branch defined allowable jurisdiction in section 40 of the Foreign Relations Act, it is incumbent on this governmental branch to actively participate in the balancing process.[134] To carry efficiency even further, the balancing of national interests should occur through intergovernmental negotiations on a case by case basis.[135] In this way, the sovereigns of involved nations would be able to decide the least offensive approach for resolving jurisdictional conflicts.[136] At any rate, the court was correct in determining that national interests should not be balanced by the courts.[137]

In returning to the effects test of *Alcoa,* the *Laker* court illustrated the erroneous perceptions which foreign courts have toward this test.[138] The *Alcoa* effects test is a two stage test which analyzes whether the defendant intended to effect U.S. imports and exports and whether the defendant actually effected U.S. commerce. [139] Jurisdiction is acquired only when these two criteria are satisfied.[140] This test of intent plus actual injury satisfies the requirements for jurisdiction under international law.[141] Thus, the facts and complications of *Laker* mandated the application of the effects doctrine and not the balancing test.[142]

B. Protection of Trading Interests Act

The U.S. Appeals Court deficiently analyzed England's invocation of the Protection of Trading Interests Act. [143] *Laker* indicated that the British legislation was designed to frustrate legitimate American concerns.[144] While this may be so, Judge Wilkey failed to grasp Britain's message.[145] The Protection of Trading Interests Act places American interests in the same position that the extraterritorial application of U.S. antitrust law places the British interests.[146] Perhaps the British are trying to show the Americans that in cases where concurrent jurisdiction exists, it is necessary to abandon unilateral adjudication.[147] Instead, multinational coordination should be employed to decide the case.[148] This could result in better international cooperation.[149]

C. Act of State Doctrine

In deciding *Laker* the Court of Appeals failed to discuss the Act of State doctrine.[150] The act of state doctrine requires a sovereign state to respect the acts of another government done within that government's own territory.[151] In *Laker,* act of state problems potentially arose in two areas.[152] The first occurred when the British invoked the Protection of Trading Interests Act.[153] However, since the British legislation was designed to take effect outside of British territory,

it fell beyond the scope of the act of state doctrine and perhaps needed no discussion.[154]

The other act of state problem concerned the alleged predatory pricing activity of the defendants.[155] Factually, the International Air Transport Association must have approved any airline's proposed price change.[156] Further, before any price change could go into effect, it must have been authorized by the foreign states of the individual carriers.[157] Did the ratification of the air fares constitute a state action or did it fall outside the scope of the act of state doctrine by dealing with international commerce? This very issue illustrated the degree of entanglement of both private and public action which effected both domestic and international commerce.[158] Thereafter, the failure of *Laker* to analyze this issue constituted a serious deficiency in the reasoning of the case.[159]

VI. Conclusion

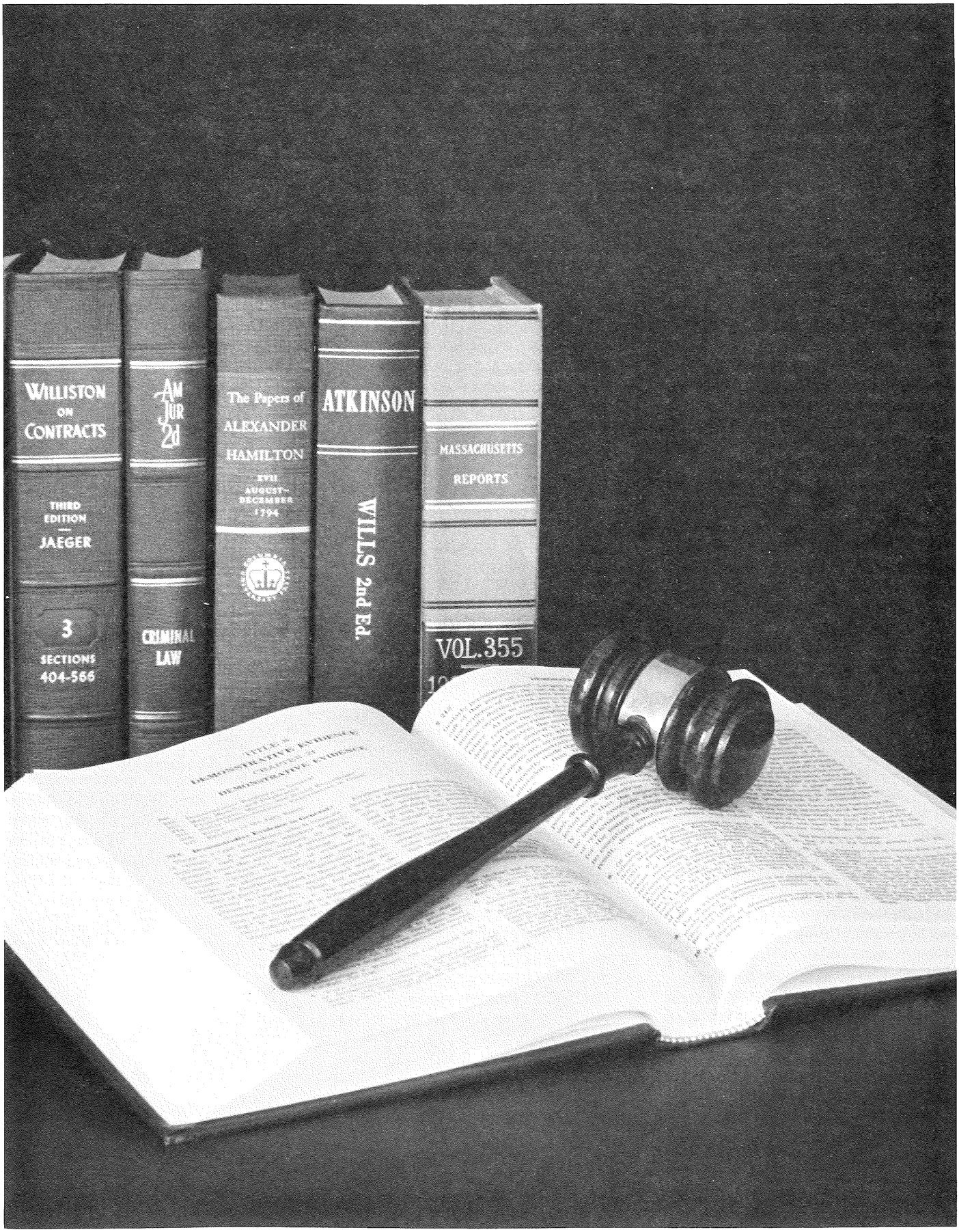
The conflict between America and Britain in the case of *Laker Airways* occurred at two levels.[160] At the surface was the jurisdictional conflict over the extraterritorial application of U.S. antitrust laws. However, the core of this conflict concerned the antiquated notion of territorial jurisdiction in antitrust cases which denied the reality of economic integration and global trade.[161] In the future, it is imperative that international cooperation through a multinational regulatory organization resolve the jurisdictional problems surrounding transnational corporations, national and international antitrust law.[162] Until this organization is formed, the U.S. courts, as illustrated by the decision in *Laker,* should apply the effects test and not the balancing test in resolving international antitrust problems.[163] Although the use of the effects test would create a furor abroad, it satisfies international law. Further, unlike the balancing test, the U.S. courts are able to apply it.[164] Perhaps, if the world is extremely outraged at the extraterritorial application of U.S. antitrust laws, the much needed multinational regulatory organization will come into existence that much faster.

VII. Footnotes

1) 731 F.2d 909 (D.C. Cir. 1984)
2) *Id.* at 955-956.
3) *Id.*
4) This case ushered in a new era not by the reasoning or holding of the court, but by the inability of this case to conform to the realities of international commerce; specifically, international economic interrelation.
5) With the world becoming increasingly interrelated, a court that attempts to protect its interests at the expense of other nations will encounter the international furor that the *Laker* court has.
6) *See Infra* note 162.
7) 731 F.2d at 915-916.
8) 731 F.2d at 915-916.
9) 73 F.2d at 916. Laker Airways began as a charter service in 1966 but did not move into scheduled transatlantic service until 1977. It was this move into the scheduled service area that made Laker a threat to the other airlines.
10) 731 F.2d at 917.
11) *Id.* Laker's air fares were as little as one-third of its nearest competitor.
12) *Id.* At its zenith, Laker was carrying one out of seven scheduled air passengers between the U.S. and England.
13) 731 F.2d at 917. All of the major airlines are members of the International Air Transport Association.
14) *Supra* note 13.
15) 731 F.2d at 917.
16) 731 F.2d at 916-917. The I.A.T.A. meets annually to establish fixed fares for air carriage which are implemented after authorization by national governments of the individual carriers.
17) 731 F.2d at 917.
18) *Id.*
19) *Id.* A large segment of Laker's revenues was in pounds, but most of its debts were in dollars. The widening gap between the value of the pound and the value of the dollar destroyed Laker's cash flow.
20) 731. F.2d at 917. It is interesting to note that the creditors of Laker were primarily Americans who were seeking satisfaction for their loans through a British appointed liquidator in an American court, using American law against both foreign and American defendants.
21) 731 F.2d at 917-918.
22) *Id.*
23) 731 F.2d at 918.
24) *Id.* Initially, only the English defendants obtained this relief. However, shortly thereafter, Swissair and Lufthansa obtained the same relief. This occurred so quickly that Laker was unable to prevent it from happening by using the U.S. District Courts.
25) 731 F. 2d at 918-919. Laker was afraid that the American defendants, in an effort to avoid U.S. antitrust laws, would seek relief in English courts.
26) 731 F.2d at 918-919.
27) *Id.*
28) *Id.*
29) *Id.* The reasoning of the District Court, in issuing the temporary restraining orders, was an attempt to preserve its jursidiction in the antitrust matter. The actions of the British defendants, Swissair and Lufthansa was in effect robbing the U.S. courts of jurisdiction.
30) 731 F.2d at 919.
31) *Id.* Here, jurisdiction can be thought of in two possible ways. First, by doing business in the U.S., the defendants could be thought to have voluntarily subjected themselves to the application of U.S. law. Second, by conducting business with the U.S., the actions of these foreign defendants had an effect on American commerce. If those actions violated U.S. law then they could be subjected to U.S. law.
32) 731 F.2d at 919. The Bermuda II Treaty was signed by England and the U.S. It attempted to regulate air traffic and commerce between the two nations.
33) *Id.* The British Protection of Trading Interests Act is blocking leglislation whereby the British government attemps to render the extra-territorial application of U.S. antitrust law ineffective.
34) 731 F.2d at 920. Once the British government invoked the Act, the court then enforced it by changing the preliminary injunction into a permanent injunction.
35) *Id.*
36) 731 F.2d at 920-921.
37) *Id.*
38) *Id.*
39) 213 U.S. 347 (1908). *See* Mirabito and Friedler, *The Commission on the International Application of the U.S. Antitrust Laws: Pulling in the Reins?,* 6 Suffolk Trans. L.J. 1, 14 (1982). Swan, *International Antitrust: The Reach and Efficacy of United States Law,* 63 OR. L. Rev. 177, 196 (1984).
40) *Id.* at 354.
41) *Id.* United Fruit was attempting to establish monopolistic control over the banana industry. Allegedly, United Fruit bought out some companies, gained controlling interests in others and closed

some in order to satisfy its goods.
42) *Id.* American Banana was allegedly approached by United Fruit. United Fruit demanded that American Banana follow its price lead. American Banana refused.
43) *Id.* To accomplish this purpose the Costa Rican government acted through some of its nationals. However, the course of events can be seen as United Fruit pressuring the Costa Rican government to act through its nationals for the benefit of United Fruit.
44) 213 U.S. at 354-355.
45) 213 U.S. at 356-357. *See* Mirabito and Friedler, *The Commission on the International Application of the U.S. Antitrust Laws: Pulling in the Reins?,* 6 Suffolk Trans. L.J. 1, 14 (1982). (Discussion about the territorial approach taken regarding the scope of the Sherman Antitrust Act).
46) 213 U.S. at 357.
47) Swan, *International Antitrust: The Reach and Efficacy of United States Law,* 63 OR. L. Rev. 177, 196 (1984). (The Act of State Doctrine plays its part in the Holmesian tradition of the territorialist dogma).
48) 213 U.S. at 357-359. *See* Baugh, *Recent Decisions, Coastal States Marketing v. Hunt,* 16 Vand. L. Rev. 623, 633 (1983).
49) 213 U.S. at 357-359. *See* Shenefield, *Thoughts on Extraterritorial Application of the U.S. Antitrust Laws,* 52 Fordham L. Rev. 350, 360 (1983).
50) *See* Shenefield, *Supra* note 49 at 361. *See also,* Mirabito and Friedler, *Supra* note 45 at 14.
51) *Supra* note 50.
52) 148 F.2d 416, 422-424 (2nd Cir. 1945).
53) *Id.* Electrical power is essential in producing aluminum. This stage, however, is outside the scope of consideration for this paper.
54) *Id.* Alcoa formed the corporation in Canada and most of the directors for this Candian corporation were also directors for Alcoa. The *Alcoa* court found that the Canadian corporation was independent of Alcoa, but was able to attribute its actions to those of Alcoa.
55) 148 F.2d at 440.
56) 148 F.2d at 421.
57) *See* Shenefield, *Thoughts on Extraterritorial Application of the United States Antitrust Laws,* 52 Fordham L. Rev. 350, 362 (1983). Kestenbaum, *Antitrust's Extraterritorial Jurisdiction: A Progress Report on the Balancing of Interest Test,* Stan. J. Int. L. 311, 313 (1983), Picciotto, *Jurisdictional Conflicts, International Law and the International State System,* 11 Int. J. of Soc. Law 11, 18 (1983).
58) 148 F.2d at 443. "Any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."
59) 148 F.2d at 444.
60) *Id.*
61) *See* Zenith Radio Corp. v. Matsushita Electrical Industrial Corp., 494 F. Supp. 1161, 1188-1189 (E.D. Penn., 1980), SAGE International LTD v. Cadillac Gage Co., 534 F. Supp. 896, 905 (E.D. Mich, 1981), *See also* Shenefield, *Supra* note 49 at 362.
62) *See Supra* note 61.
63) Mirabito and Friedler, *Supra* note 45 at 15, Shenefield, *Supra* note 49 at 362.
64) *Id.*
65) *See* U.S. v. Mitchell 553 F.2d 996, 1001 (5th cir., 1977), Sage International v. Cadillac Gage Company, 534 F. Supp. 896, 905 (E.D. Mich., 1981), Zenith Radio Corp. v. Matsushita Electric Industrial Co., 494 F. Supp. 1161, 1179 (E.D. Penn., 1980). *See also* Kestenbaum, *Antitrust's Extraterritorial Jurisdiction: A Progress Report on the Balancing of Interests Test,* 35 Stanford J. of Int. L. 311, 319 (1983).
66) *See* Mirabito and Friedler, *Supra* note 45 at 15.
67) SAGE International v. Cadillac Gage Co., 534 F. Supp. 896, 904-905 (E.D. Mich., 1981), Montreal Trading LTD v. Amax Inc., 661 F.2d 864, 869 (10th Cir. 1981), Hunt v. Mobil Oil, 550 F.2d 74 (2nd Cir. 1977). *See,* Doud and Eichelbergen, *"Act of State Doctrine: An Emerging Corruption Exception in Antitrust Cases?,"* 59 N.D. L. Rev. 455, 462 (1984).
68) 549 F.2d 597, 603-605 (9th Cir. 1977).
69) *Id.*
70) *Id.*
71) *Id.*
72) *Id.*
73) *Id.*
74) *Id.*
75) *Id.*
76) 549 F.2d at 605. Discussion about the Act of State Doctrine.
77) 549 F.2d at 605-606.
78) 549 F.2d at 613-614.
79) *Supra* note 78.
80) *Supra* note 78.
81) *Supra* note 78.
82) *Supra* note 78.
83) 549 F. 2d at 616.
84) *Supra* notes 66 and 67.
85) *See Supra* note 67.
86) Kestenbaum, *Antitrust's Extraterritorial Jurisdiction: A Progress Report on the Balancing of Interests Test,* 35 Stanford J. of Int. L. 311, 319 (1983).
87) 549 F.2d at 611-613. This was the intended purpose of the tripartite test.
88) *Supra* note 87.
89) Picciotto, *Jurisdictional Conflicts, International Law and the International State System,* 11 Int. J. of Soc. L. 11, 26 (1983).
90) *See* Swan, *International Antitrust: The Reach and Efficacy of United States Law,* 63 OR. L. Rev. 177, 204 (1984). Kestenbaum, *Supra* note 86 at 325.
91) *See* 731 F.2d at 946-953, Kestenbaum, *Supra* note 86 at 336.
92) Blythe, *The Extraterritorial Impact of the Antitrust Laws: Protecting British Trading Interests,* 31 Am. J. Comp. L. 99, 109 (1983).
93) *See* Pain v. United Technologies Corp., 637 F.2d 775, 787, 788-91 (D.C. Cir., 1980). Discussion about international discovery with references to the Hague Evidence Convention and its tripartite method of obtaining evidence abroad.
See also Supra note 92.
94) Tensions have continued to date. This has resulted in the development and application of blocking legislation by many countries.
95) 731 F.2d at 921.
96) 731 F.2d at 922-926.
97) 731 F.2d at 922.
98) 731 F.2d at 926.
99) 731 F.2d at 922. *See* Pacific Seafarers Inc. v. Pacific Far East Line, Inc., 404 F.2d 804, 814-815 (D.C. Cir. 1968), Strassheim v. Daily, 221 U.S. 280 (1911).
100) 731 F.2d at 926.
101) 731 F.2d at 926.
102) *Id.*
103) *Id.* Specifically, Laker Airways was incorporated under Jersey law.
104) 731 F.2d at 926.
105) 731 F.2d at 926.
106) 731 F.2d at 934.
107) 731 F.2d at 935.
108) *Id.*
109) *Id.*

110) 731 F.2d at 935-936.
111) 731 F.2d at 937-945.
112) 731 F.2d at 937.
113) *Id.* Obligation of comity expires when the strong public policies of the forum are violated by the foreign act.
114) 731 F.2d at 938. The action before the U.K. courts is specifically intended to interfere with and terminate Laker's U.S. antitrust suit. Therefore, comity should not be accorded.
115) 731 F.2d at 938.
116) 731 F.2d at 939-940.
117) *Id.*
118) *Id.*
119) *Id.*
120) F.2d at 948.
121) *Id.* Balancing approach is unsuitable when courts are forced to choose between a domestic law designed to protect domestic interests and a foreign law calculated to thwart the implementation of the domestic law in order to protect foreign interests.
122) 731 F.2d at 948-949.
123) 731 F.2d at 949.
124) It showed the limits of the Timberlane balancing test by this court's inability to apply it to determine which nation if any had a superior interest in the outcome. *See,* Shenefield, *Supra* note 57 at 367, Blythe, *Supra* note 92 at 125.
125) *See* Dowd and Eichelberger, *"Act of State Doctrine: An Emerging Corruption Exception In Antitrust Cases?,"* 59 N.D.L. Rev. 455, 462 (1984).
126) Kestenbaum, *"Antitrust's Extraterritorial Jurisdiction: A Progress Report on the Balancing of Interests Test,"* 35, Stanford J. of Int. L. 311, 336 (1983). *But See* Montreal Trading LTD v. Amax Inc., 661 F.2d 864, 869-871 (10th Cir. 1981). Holding in this case did establish that the interests of the foreign country were greater than the U.S. interests.
127) FTC v. Compagnie de Saint-Gobain-Pont-A-Mousson, 636 F.2d 1300, 1316 (D.C. Cir. 1980), Call Carl Inc. v. B.P. Oil CORP., 391 F.Supp. 367 (D. Maryland, 1975), Domanicus American Bohio v. Gulf and Western Industries, 473 F.Supp. 680, 689 (S.D. N.Y. 1979).
128) *Supra* note 90.
129) 731 F.2d at 948.
130) To do so in this instance would have proved to the world that the U.S. was determined to get jurisdiction regardless of the international consequences. *See* Industrial Investment Development Corp. v. Mitsui & Co. LTD, 671 F.2d 876, 884 (5th Cir. 1982). District court should not apply antitrust laws to foreign actors if it violates comity or international law.
131) *See* Blythe, *The Extraterritorial Impact of the Antitrust Laws: Protecting British Trading Interests,* 31 Am. J. Comp. L. 99, 117 (1983), Kestenbaum, *"Antitrust's Extraterritorial Jurisdiction: A Progress Report on the Balancing of Interests Test,"* 35 Stanford J. of Int. Law 311, 337 (1983), Dowd and Eichelbergen, *"Act of State Doctrine: An Emerging Corruption Exception In Antitrust Cases?,"* 59 N.D. L. Rev. 455, 459 (1984). *See Also* Mannington Mills Inc. v. Congoleum Corp. 595 F.2d 1287, 1296 (3rd Cir. 1979).
132) *Supra* note 131.
133) Kestenbaum, *Supra* note 131 at 337. Comments made to the U.S. by the Attorney General of Australia that the balancing of national interests is a political function.
134) *See,* Mannington Mills Inc. v. Congoleum Corp., 595 F.2d 1287, 1293 (3rd Cir. 1979). Shenefield, *Supra* note 49 at 366.
135) Shenefield, *Supra* note 49 at 367-369. Picciotto, *Supra* note 57 at 27.
136) This is assuming that the sovereigns would be willing to sit down and reach an agreement. One model could be the agreement between the U.S. and Australia set out in Kestenbaum at 345.
137) The scope of national interest balancing seems best left to the executive branch to balance. *See Supra* notes 133, 134.
138) Blythe, *Supra* note 131 at 109-111.
139) U.S. v. Scophony Corp., 333 U.S. 795, 802 (1948), U.S. v. Fernandez, 496 F.2d 1294, 1296 (5th Cir. 1974), U.S. v. Mitchell, 553 F.2d 996, 1001 (5th Cir. 1977). *Accord,* Supra notes 58, 127. Foreign courts generally regard this test as being only a single stage.
140) Swan, *Supra* note 47 at 199.
141) Swan, *Supra* note 47 at 199, Kestenbaum, *Supra* note 131 at 313. Judge Hand assumed that effects in the U.S. were sufficient for jurisdiction. Nevertheless, he propounded a test of intent plus effects to avoid international complications. *See* Hoffman Motors v. Alfa Romeo 244 F.Supp. 70, 75 (E.D. N.Y., 1965), Hitt v. Nissan Motor Co. 399 F. Supp. 838, 853 (S.D. Fla., 1975).
142) It could be argued that since the balancing test was too complicated, the court fell back on the *Alcoa* effects test.
143) It appeared that the U.S. court took an incensed attitude toward this piece of British legislation. The tone of analysis seems to revolve around this feeling only.
144) *Supra* note 117, 118 and 119.
145) *See* Blythe, *Supra* note 131 at 117, Picciotto, *Supra* note 57 at 26-27. Shenefield, *Supra* note 49 at 367-369.
146) *Supra* note 145.
147) *Supra* note 145.
148) *Supra* note 145, *See* Kestenbaum, *Supra* note 131 at 345.
149) This would result as a natural outcome of improved communication and understanding resulting from increased bilateral and multilateral negotiations.
150) Comity was discussed, but the principle of comity differs from the Act of State Doctrine.
151) Dominica Americana Bohio v. Gulf and Western Industries, 473 F.Supp. 680, 689 (S.D. N.Y., 1979), International Association of Machinists and Aerospace Workers v. Organization of the Petroleum Exporting Countries, 649 F.2d 1354, 1358 (9th Cir. 1980), Clayco Petroleum Corp. v. Occidental Petroleum Corp., 712 F.2d 404, 406 (9th Cir. 1981), *See* Hunt v. Mobil Oil, 550 F.2d 68, 74 (2nd Cir. 1977).
152) 731 F.2d at 915-916.
153) *Id.*
154) *See Supra* note 151.
155) 731 F.2d at 915-916.
156) 731 F.2d at 915.
157) 731 F.2d at 915.
158) The *Laker* case involves multi-governmental action, international regulatory board action, and multi-national corporate action and its affects on both international commerce and domestic commerce of all the involved nations. It shows that international trade and finance has become very interrelated and needs a supra-national body to regulate it.
159) Analysis of this issue would have further highlighted the inability of the U.S. or any court from handling cases this complex, involving multi-faceted national interests.
160) Shenefield, *Supra* note 49 at 354.
161) *Supra* note 160.
162) Picciotto, note 57 at 12. Blythe, note 131 at 117.
163) 731 F.2d at 955-956.
164) *Supra* notes 128, 140 and 141.


WILLISTON ON CONTRACTS
THIRD EDITION
JAEGER
3
SECTIONS 404-566
AM JUR 2d
CRIMINAL LAW
The Papers of ALEXANDER HAMILTON
XVII AUGUST-DECEMBER 1794
ATKINSON
WILLS 2nd Ed.
MASSACHUSETTS REPORTS
VOL.355

WHITE COLLAR CRIME: A PROSECUTOR'S VIEW

by Joseph M. Jones

* *Joseph M. Jones*

Suffolk University Law School, J.D. 1974; Georgetown University Law School, L.L.M. 1981. From 1977 through 1984 Mr. Jones served as a trial attorney with the Criminal Section, Tax Division, United States Department of Justice, Washington, D.C. Mr. Jones is presently with the Office of Special Litigation, Tax Division, United States Department of Justice. While at the Department of Justice, Mr. Jones has been awarded a 1984 Attorney General's Special Commendation Award and was awarded a Tax Division Outstanding Attorney Award in 1981 and 1984.

The opinions expressed herein are those of the author and are not necessarily those of the United States Department of Justice.

Introduction

In 1907 sociologist Edward Alsworth Ross forwarned that a new kind of criminal was at large; "one who picks pockets with a railway rebate, murders with an adulterant instead of a bludgeon, burglarizes with a 'rake off' instead of a jimmy, cheats with a company prospectus instead of a deck of cards, or scuttles his town instead of his ship".[1] In short, beware of the fellow in the white starched collar. Today the spectre of white collar, or "economic" crime prevades every component of our "high tech", high stakes, consumer oriented society. Major manufacturing industries, banking institutions, investment houses and the government itself have all spawned major criminal prosecutions in the past decade.

A white collar crime prosecution raises issues encompassing traditional notions of the purpose and scope of the criminal law, as well as equally venerable concepts of economic liberty and noblesse oblige. On the one hand, Americans historically take a dim view of crime, whatever its source and whomever the perpetrator.[2] Empirical data demonstrates that the average citizen fully realizes the true harm wrought by white collar crime and advocates its vigorous prosecution and punishment. Yet, we maintain a special place in our folklore for the rugged individualist, the risk-taking entrepreneur who achieved material success through a combination of hard work, blarney, and gall, or the "little guy" who challenged the "system." Are the "crimes" with which he is charged merely the unavoidable by-product of a vigorous, free market society, [3] or do such activities, in the aggregate, pose a real threat to the basic fabric of trust and confidence upon which our economic and political systems are based?

The prosecutor is faced with a host of practical problems in the investigation and trial of a major white collar offense. The prosecution will be required to secure and extract evidence of the fraud from a myriad of complex transactions, often involving hundreds of persons and tens of thousands of documents. It is likely that the perpetrators structured the transactions in a manner designed to leave no trail, *e.g.*, the use of subordinates as unwitting pawns, dummy business entities and extra-territorial operations. Having acquired this evidence, the case must be made understandable to the jury.

Finally, sentencing raises the question of whether white collar defendants, as a group, are to be sentenced using different standards and assumptions than are imposed upon the "traditional" or "street" criminal. Is the white collar criminal to be treated with leniency because of his past material achievements and the potential that he can again be a highly productive citizen? Or is his antisocial behavior to be viewed as *more* reprehensibile because he enjoyed so many of the benefits of the system whose rules he violated?

This article will discuss these issues from the personal perspective of the writer. The voluminous literature in the area has been reviewed primarily to provide a structure for the opinions expressed here, which are based primarily upon observation and experience. Thus, these

views are subjective, with all the limitations that implies.

I. The Problem

Current definitions of white collar crime illustrate its pervasiveness. Criminal fraud usually comes to mind as the major component of any definition. Businesses [4], consumers [5] investors[6], and the government itself [7] can all be the victims of the crime where the essential motivation is economic. Violations of environmental regulations and health and safety laws also harm broadbased groups. Thus, white collar crime has traditionally been defined primarily in economic terms: "the violation of the criminal law by a person of the upper socio-economic class in the course of his occupational activities". [8] However, such a definition fails to include crimes in which the acquisition of power or influence is the ultimate goal. Moreover, there is usually some actual or implied relationship between the perpetrator and the victims of white collar crime, *e.g.* the seller and buyer of goods, the parties to a government contract, the industrial plant and its employees or the surrounding community, the elected official and the public. Thus, the most complete definitions are those which describe the whiter collar crime as one which entails a breach of trust by nonviolent, deceitful means. [9] However, such a broad definition has been criticized as moving the focus of white collar crime prosecutions away from the upper level offender.[10]

A casual review of the newspapers over time uncovers example after example of the variety and magnitude of white collar crime. Securities[11] and tax [12] cases appear frequently, with the fraud resulting in hundreds of millions of dollars in losses to either the investors, the United States Treasury, or, in the case of a fraudulent tax shelter, both.[13] Both E.F. Hutton and General Electric recently pled guilty to massive fraud charges. The brokerage firm admitted to engaging in a sweeping check kiting scheme involving millions of dollars. General Electric, the nation's sixth largest defense contractor, pled guilty to 108 counts of defrauding the Air Force out of $800,000 on a nuclear missle warhead contract.[14] The financial community is rife with instances of involvement by some of its most stellar members in extensive money laundering operations.[15] Crime by computer appears to be the wave of the future.[16]

Perhaps even more disturbing is the rise in convictions of public officials. Over the past three years we have seen the first indictment and conviction of a sitting federal judge[17], as well as a congressman.[18] The investigation of corruption within the Environmental Protection Agency resulted in the conviction of one official and the resignation of several others, including the Administrator, Anne Burford.[19] Other noteworthy federal prosecutions included election fraud[20], state corruption[21] and the solicitation of a bribe by a federal prosecutor.[22]

It is difficult to measure the total harm to society wrought by white collar crime, particularly because injury to intangibles such as consumer trust or confidence in public officials cannot be quantified.[23] What is clear is that in terms of pure volume, the resulting financial losses or direct physical injury to persons flowing from white collar crime far surpasses that resulting from street or "traditional" crime.[24] Financial losses from the 1973 Equity Funding securities fraud case alone (some $2 billion) were greater than the losses from all street crime in the United States for that one year.[25] Losses to the United States Treasury from tax evasion are estimated at one hundred billion dollars, a figure which tripled in the past decade.[26] The Department of Justice has suggested that the cost to the federal government of fraud and abuse exceeds $10 billion,[27] while the House Judiciary Subcommittee on Crime concluded that white collar crime costs the community fifty times as much as street crime.[28] Although more difficult to measure, the physical harm inflicted upon the public by environmental crimes, or health and safety violations, is likely to be far greater than that which is the result of street crime.[29]

Perhaps even more invidious is the psychological damage of white collar crime. Pervasive lawlessness in a major industry or basic structural component of society such as the tax or political systems undermines fundamental public confidence. However rough and tumble the actual operation of these systems may be, there are certain basic rules imposed upon all participants. White collar crime is so malignant because, unlike the street criminal who functions on the periphery of the community, the white collar criminal operates as part of the economic or political systems. The white collar criminal is "society's most dangerous foe, more redoubtable by far than the plain criminal, because he sports the livery of virtue and operates on a titanic scale".[30] If those who disregard these rules, thereby gaining an unfair advantage over the rest, do so with impunity, distrust and cynicism are the inevitable result.

Despite the constant public attention given to the seriousness of street and violent crime, the public views certain types of white collar crime as being more serious than many offenses associated with force or violence, *e.g.*, robbery and burglary.[31] Surveys indicate that a manufacturer of unsafe automobiles is regarded as worse than a mugger, and a businessman who illegally fixed prices was more blameworthy than a burglar.[32] One study found respondents more willing to hand out prison sentences to embezzlers than to looters or burglars,[33] while another found that two white collar offenses (securities fraud and embezzlement) were thought to be as deserving of a prison sentence as bank robbery.[34] Although certain "interpersonal" violent crimes or those involving serious property loss are viewed as the most serious,[35] this empirical evidence clearly indicates that "immoral acts committed by Establishment figures are viewed as much worse, by and large, than Anti-Establishment figures".[36]

II. Addressing the Problem

The scope and pervasiveness of white collar crime dictate that it be a high priority of law enforcement. Indeed, white collar crime investigations and prosecutions have commanded an increasing share of prosecutorial resources on the federal level.[37] However, many of the unique problems of a white collar crime prosecution are not solved by merely expanding the numbers of prosecutors.

Paradoxically, a major fraudulent scheme may be difficult to detect. Indeed, the victims themselves are likely to be unaware of the injury. "The Internal Revenue Service doesn't know it has been defrauded, the consumer lacks knowledge that he overpaid as a result of price fixing, the competition seldom realizes it lost a profitable contract because of an illegal payment and the cancer victim rarely learns that an unsafe drug consumed long ago was car-

cinogenic."[38] In 1975 authorities uncovered Gulf Oil's Bahamian slush fund through which the corporation had funneled some $12.3 million in largely illegal political contributions. The investigators determined that while eleven executives had direct knowledge of this fund, only two were still with Gulf; six had retired and three had died.[39] A sophisticated price fixing agreement will be designed to operate so that price adjustments ostensibly are made in response to external market factors, thus disguising the collusion.[40] The successful computer criminal literally may not leave a trace of evidence of the crime.[41] In a public corruption case all the parties to the transaction benefit and the crime may surface only by chance.[42]

In the typical street crime the number of participants is kept to a minimum and the duration of the crime limited as much as possible, all in the name of avoiding detection. Conversely, in the well planned financial crime a large number of participants and the longevity of the scheme may lead to the same desired result. Former Associate Attorney General and present United States Attorney of the Southern District of New York Rudolph (Rudy) Giuliani has stated, "[t]here are certain kinds of white collar criminals who use complexity in the same way that organized crime uses *omerta* to conceal what they are doing."[43]

Even if the scheme is recognizable, the mere task of uncovering all of the necessary evidence may be overwhelming. In one securities prosecution involving a $52 million *Ponzi* type operation used to support a web of 53 corporations, the government introduced summary testimony of some 10,000 hours of accounting work on tens of millions of corporate documents.[44]

The difficulty of the prosecutor's task is increased ten-fold if a substantial corporation is involved either as the site of the activity or as a principal in the crime.[45] In today's society business corporations wield vast power and their conduct dramatically affects the financial interests, property and lives of the citizenry. Illegal conduct by corporations can thwart major societal policies such as protecting consumers, promoting a more healthy environment and fostering competition.[46] This potential was recognized over sixty years ago by Justice Brandeis when he warned that as corporations become larger and more powerful, the threat of "industrial absolutism" becomes more acute.[47]

A corporation does not act of its own volition; the officers, directors and employees commit the corporate entity to a certain course of conduct. Similarly, white collar crimes are not crimes of passion, but are the product of deliberate, conscious planning, organization and action over months or years. A complex combination of factors may induce the corporation to move beyond vigorous economic competition into "deviant" corporate behavior.[48] Essentially, the critical point of departure comes when the culturally approved goal of economic success prevails over all other considerations, including normative behavioral standards for achieving that goal.[49] Once this occurs, the corporate structure and group dynamics combine to trivialize any particular individual's role in the larger conspiracy (thereby negativing individual responsibility)[50], as well as to insulate the individual from external considerations which might persuade him to abandon the group activity.[51] The group develops courage by acting collectively.[52] This kind of cohesiveness among the conspirators, when combined with the tendency of the public to view organizations as more substantial, solid, secure and therefore more trustworthy than individuals, makes for an imposing criminal actor.[53] Empirical studies show clearly that offenses committed by or on behalf of a substantial organization involve significantly greater sums of money, are committed more frequently and are of a longer duration than those crimes where the organizational element is lacking.[54]

If the prospect of such a corporate juggernaut were not enough, white collar criminals are increasingly utilizing banking or other financial facilities in foreign countries to further insulate their operations from detection and investigation. So-called tax havens,[55] most often located in the Caribbean and possessing strict business and bank secrecy laws, are used to launder illegally earned income to hide assets,[56] often through the creation of bogus corporations. The prosecutor whose targets have utilized such means of deception and obfuscation will face serious problems in merely physically locating witnesses and documentary evidence.[57]

III. The Investigation

Faced with adversaries who are armed with such a panoply of defenses, what measures can the resourceful prosecutor use to fully investigate and, when warrented, prosecute the white collar criminal? Initially, it is advantageous to have investigators and prosecutors with specialized training. Federal law enforcement agencies such as the Internal Revenue Service and Federal Bureau of Investigation have, over the past decade, increasingly focused on more sophisticated white collar schemes.[58] The Department of Justice in Washington, D.C. maintains offices staffed with prosecutors who work exclusively in the areas of public corruption,[59] tax fraud[60] and major domestic and international fraud.[61] Many United States Attorney's offices maintain, in addition to highly skilled general prosecutors, economic crime specialists who work exclusively in this area.

As noted above, white collar crime cases rarely come to light in the same manner as a bank robbery or assault. While the occasional investigation may be precipitated by public events such as the financial collapse of a company, the prosecutor usually begins the investigation with, at best, little more than strong indications, with some corroboration, that criminal activity has occured. The prosecutor must make his or her case by identifying, locating and cultivating witnesses, being thorough and creative in drafting the grand jury subpoenaes and then being willing to share with the investigating agents the tedium of culling the relevant facts from thousands of documents.

Ultimately, the most useful quality a prosecutor can possess is a relentless curiosity. He or she should have an almost insatiable interest in the twists and turns of the alleged scheme and the relationships formed between the alleged perpetrators. By probing these areas the prosecutor's knowledge will extend beyond mere facts to the true nature and essence of the criminal operation. As noted more fully below, such a perspective is invaluable when presenting the case to a jury.

Among the most fruitful investigative techniques are search warrants and the use of undercover or informant witnesses. Because white collar crimes such as fraud and tax evasion are com-

mitted and/or are covered up through the use of documents, search warrants are increasingly useful in securing evidence which at least sets out the structure and techniques used by the perpetrators. Courts recognize that property descriptions in these search warrants will necessarily be somewhat broader than those used in investigations of street crime. A description of each item sought is impossible when the documents relevant to the scheme number in the tens of thousands.[62] In such instances, a generic description is permissible.[63]

As discussed above, white collar crimes are noted for the cohesion of the perpetrators and the extent to which the full magnitude of the fraud may be known only to insiders.[64] Thus, the development of evidence through informants or undercover operations is a virtual necessity, as these persons may literally be the only witnesses to the crime. For example, a two-year federal investigation of the New York City Housing Authority recently culminated in the arrests of twenty-one persons on bribery and corruption charges stemming from some $230,000 in alleged payoffs within the agency's multi-million dollar repair and maintenance program.[65] The case was cracked with the help of an outside contractor who, tired of demands for bribes from persons within the agency, agreed to be "wired" *i.e.,* wear a concealed tape recorder, while dealing with those individuals. On the strength of this and other evidence four contractors were indicted. However, the indictment remained sealed because the indicted contractors agreed to cooperate with the ongoing investigation. In a parallel investigation by state authorities, the inquiry initially focused on a superintendent within the housing agency. Once sufficient evidence implicating him had been gathered, he was approached by investigators and ultimately agreed to "flip", *i.e.,* cooperate in return for possible leniency. A video camera hidden in the fan in the superintendent's office recorded the subsequent payoffs.[66]

The government's agreement to recommend leniency or to forego prosecution in exchange for a witness' cooperation is invariably used at trial by defense counsel to attack the witness' credibility. As can be seen in the above example, the careful prosecutor will take certain steps to protect the witness (and the case) from this line of questioning. The prosecutor will endeavor to build a case against the individual and then approach him or her from a position of strength. All contacts by the informant with the targets should be recorded or carefully memorialized and the informant's testimony at trial should be corroborated to the fullest extent possible.

The need for access to evidence in offshore tax havens has spawned much recent litigation, with federal prosecutors enjoying increased success in prying open these heretofore closed doors. Letters Rogatory, traditionally used to secure records in friendly foreign jurisdictions,[67] have recently been used to secure records from such well-known tax havens as the Grand Cayman Islands.[68] The extent to which this particular case was a Pyrrhic victory remains to be seen, since the initial decision by the Cayman Court of Appeals allowing production in response to the Letters Rogatory encouraged the Grand Cayman government to negotiate a mutual assistance treaty with the United States. The treaty facilitates the acquisition of records, but only in narcotics investigations.[69]

Another line of cases holds that the government, under certain circumstances, may require a criminal target to sign a consent directing an offshore recordkeeping entity (usually a bank) to turn over certain documents.[70] A grand jury subpoena seeking records located in the offshore bank is served on a domestic branch of the bank or on a branch in a country such as Canada with whom the United States has a mutual assistance treaty. Ordinarily, the offshore bank would be prohibited from producing the records by the law of the offshore country. The consent executed by the target absolves the foreign bank of any liability under those laws. The forced execution of the consent does not violate the target's right against self-incrimination, because it is the bank, not the target, that is producing the records. Further development of this kind of case law will significantly reduce the attractiveness of these tax havens.

As the investigation develops, the prosecutor must concentrate on the statutes under which charges might properly be brought. The prosecutor will rely to some extent on the venerable fraud[71], tax evasion[72] or conspiracy statutes.[73] Conspiracy is particularly useful, because what is punishable is the *agreement* to commit the crime, whether or not the scheme was implemented. The prosecutor may choose more recently enacted statutes which focus on particular problems, *e.g.,* international bribery,[74] money laundering[75] or the target's *modus operandi* through a statutory scheme like RICO.[76] Recent legislation has broadened the government's jurisdiction and increased the penalties for certain kinds of white collar crime, including credit card fraud,[77] computer offenses,[78] government pro-

gram fraud,[79] bank fraud and bribery,[80] and fraudulent mail order schemes.[81] Maximum fine levels of all federal criminal offenses committed after December 31, 1984 have been dramatically increased.[82]

One question that may arise in the context of choosing the proper statutes under which to charge is why the government prosecutes an individual for what is disparagingly referred to as a "peripheral" or "secondary" offense, *e.g.,* tax evasion, in addition to or rather than the "main" or "primary" offense, narcotics sales. The Al Capone case is perhaps the best known prosecution of this type.[83] However, it should be remembered that the crimes such as tax evasion are serious in and of themselves. It may be impossible or unduly burdensome to prove the underlying crime, such as when the witnesses are unavailable due to intimidation by the perpetrators of the criminal scheme. A tax case which is provable primarily through documents[84] may be the prosecutor's only recourse. It would be particularly inequitable to encourage the government to charge one individual with the evasion of tax from a legitimate business, while prohibiting the bringing of tax charges against, for example, a narcotics smuggler who not only operated an illegal business but then failed to report his ill-gotten gains.

IV. The Indictment

Ultimately, the prosecutor must decide whether to seek an indictment. In the personal experience of the writer, this is never a decision which is made lightly. Prosecutors know full well the substantial impact of an indictment and subsequent trial on the accused. The nonmeritorious case receives a quick burial, both because of the clear ethical violations in bringing such a prosecution[85], but also because there are simply too many strong cases waiting to be developed.[86] Because the judicious exercise of prosecutorial discretion is expected by the public as well as the bar judiciary, the acquittal of a criminal defendant is always damaging to the credibility of the prosecutorial agency.

This is not to say that even a significant percentage of acquittals are the result of an erroneous decision to prosecute. There is an important difference between a weak case and a tough case. Prosecutions such as *Abscam* fall into the category of cases which, while involving significant, difficult issues, simply cry out to be brought to the public's attention. Under these circumstances, if the result is an acquittal, the prosecutor will have acted responsibly and ethically, with the jury having simply disagreed with the prosecutor's view that guilt had been proved beyond a reasonable doubt.

The prosecutor may determine for a variety of reasons, that prosecution is not appropriate. In its place there may be substituted civil "self help"[87] or civil settlement combined with remedial reforms.[88] However, unless there has been a parallel civil investigation (with the attendant pitfalls)[89], F.R.Crim.P. 6(e) (grand jury secrecy) may prevent government attorneys associated with the civil aspects of the case from utilizing the evidence gathered by the grand jury.[90] This makes for an especially inefficient use of governmental resources.

V. Trial

After indictment, discovery and resolution of the pre-trial motions, trial will commence. Trial of a white collar case before a jury presents the prosecutor with a unique set of challenges. The jury will likely be presented with a defendant who is clean cut, successful, a family man[91], the holder of a responsible job and perhaps a business or community leader. The defendant probably has never been "in trouble" before. He may be accused of violating certain statutes, such as the tax laws, which many jurors do not view with robust infatuation.[92] The jurors will hear a skilled defense counsel articulate plausible defenses such as that the defendant's bookkeeping system is in error, or that the representations made to investors were made in good faith, that the defendant has suffered enough by the loss of his business, and that the law is so complex that an army of lawyers could not have understood it, much less the average businessman. The defendant will present an assemblage of impressive character witnesses who stand ready to vouch for the defendant's good character and reputation for truthfulness.[93] Finally, the jury will hold the government to an appropriately high standard of conduct in the manner in which both the investigation and trial are handled. It is this jury that must be convinced beyond a reasonable doubt that the defendant specifically intended to violate the law.

Despite these factors, empirical data indicate that jurors have no great conceptual difficulties in convicting a white collar defendant.[94] Americans appear to feel that crime, in whatever form, deserves punishment.[95]

In preparing for trial the prosecutor will face two major tasks. The first is to present the evidence in a measured, concise, common sense manner which is both understandable to the jury and accurately portrays the complexity of the scheme. Basic themes need to be stressed during the opening statement and reiterated throughout the presentation of the evidence and again during closing argument. In preparing the case for trial the prosecutor must avoid a presentation of the evidence and again during closing argument. In preparing the case for trial the prosecutor must avoid a presentation which assumes a certain level of understanding on the part of the jury. After a two or three year investigation, followed by six months of pretrial sparring during which the facts of the case are often at issue, it is sometimes difficult to remember that the jurors come to the case knowing nothing about the facts. The case must be presented in this light.

Lawyers who try cases before juries tend to agree on four things. The first is that juries approach their task with the deepest solemnity and intention of discovering the truth and doing the right thing. Second, every fact presented to a jury will be remembered by at least one juror and will thus be a part of the deliberations. Third, juries as a whole understand human nature. Fourth, juries almost always make the correct decision.

It is the third of these truisms which is pertinent to the prosecutor's second major task: explaining to the jury *why* the defendant committed the crime. Why would an individual with so many advantages in life risk it all? Although a jury, after reviewing all of the evidence, may be convinced that the defendant intentionally violated the law, this writer's perception is that they still want to know why; what were the defendant's motives, what drove him to commit acts which seem so inconsistent with his past achievements?

To answer this question the prosecutor must endeavor to know the defendant, his strengths, weaknesses and motivation. A thoroughly investigated case may, when analyzed correctly, provide

some answers. In an income tax prosecution, for example, the government should have secured detailed financial records stretching back five years or more. This reconstruction of the defendant's financial history presents a uniquely intimate view of his comings and goings, likes and dislikes. Such information, plus the reflections of witnesses, give the prosecutor an intimate view of a man he or she may not even meet until the first day of trial. No doubt the defendant has reflected upon the character and motivation of the prosecutor with equal intensity, as he or she personifies the grave threat to the defendant's way of life. Thus, these two adversaries approach the trial with inbred, subjective,

fervent impressions of one another. As the trial unfolds, this relationship may develop, in the most subtle, unspoken way, into the kind known by persons who have shared equally a traumatic or emotional experience. Ultimately, of course, the ends which each individual seeks in the trial are so divergent that they are, at the trial's end, pure adversaries again.

The answer to the question, "Why did he do it?", is often simple greed, whether for money, power, or both. Jurors, with their understanding of human nature, know that untramelled greed can distort and ultimately warp the values and character of even the strongest individual.

VI. Sentencing

The sentencing decision by the court,[96] as the culmination of the criminal justice process, involves consideration of all the issues discussed above. The court will consider all of the traditional purposes of sentencing: retribution against the defendant, incapacitation of the defendant for the protection of society, rehabilitation, and deterrence, both of the individual offender as well as others who might contemplate similar activities.[97] Although conventional wisdom suggests that, because of the white collar defendant's educational background and the absence of any violence, the need for rehabilitation and incapacitation is nil,[98] the clearly incorrigible defendent may provide an exception to that rule.[99]

The retribution function has also been criticized as being merely an anachronistic expression of society's revenge.[100] However, others argue persuasively that the public process of accusation, proof, decision and punishment is a form of morality play which gives expression to the minimum standards of conduct which the community has decided are necessary to maintain the social fabric.[101] This common expression of condemnation not only strengthens the community as a whole but also serves to reassure those individuals who have resisted the impulses of greed and self-interest that commonly lead to white collar crime that the society values their restraint and discipline. "In the end, then, our system of criminal justice aspires to dignify the behavior of those who obey the law."[102]

Deterrence remains at center stage, however, because it is, of the four functions of sentencing, the one most likely to be served by the imposition of substantial punishment in white collar crime cases. Beyond one's own moral code, a person is deterred from committing crime two things: 1) the probability of getting caught and, 2) the probability that the sanctions imposed will be substantial.[103] Beyond a certain level, the fruits of crime are not worth the risk.

The fear of sanctions is particularly effective in deterring white collar crime. Most white collar crimes are what might be called "contemplative offenses".[104] A white collar criminal has both the time and intelligence (if not the inclination) to weigh the possibilities of gain against the possibility of detection and punishment. Moreover, the potential white collar criminal has "more" to lose, relatively speaking, than the street criminal: high status and respectability in the community, money, power, lucrative employment and a generally comfortable lifestyle.[105] The need for and value of deterrence in white collar crime has been judicially recognized.[106]

With these factors in mind, courts have wide discretion in both the kind of information which they may utilize in their sentencing decisions and the standards used for imposing a particular sentence.[107] But there is a threshold question which must be answered: should the punishment fit the crime (*i.e.*, the resulting harm) or should the court focus upon the appropriateness of a certain sentence on *this* particular defendant. On the one hand, if the court metes out punishment on the basis of the social harm or blameworthiness of the *offense,* certain white collar offenses deserve more severe punishment than any street crime.[108] "Severity of punishment should be commensurate with the seriousness of the wrong."[109] The public appears to support the view that the punishment should fit the offense.[110] Certainly some deterrence flows from any publicized substantial sentence, whether or not the sentence is appropriate with regard to a particular defendant.[111]

However, if one considers the blameworthiness of the individual defendant, arguments can be made that a life of social and economic productivity and the probable return to that life after the deviation into anti-social behavior warrants leniency.[112] The mere stigma of the conviction, with the inevitable loss of status, employment prospects and the like are said to be punishment enough. Some suggest that the concept of deterrence unfairly imposes upon the defendant sanctions not for what he has done but because of other people's tendencies.[113]

Those that suggest that the punishment should primarily fit the crime itself are, in the writer's view, more persuasive. While the white collar criminal defendant probably does have, at least in a material sense, more to lose because of the conviction, that also means that he has benefited greatly from our economic and social system. Such a violation of the law constitutes "a more deeply reprehensible betrayal of social norms than does the illegal behavior of the ignorant or impoverished".[114] Certainly there may be significant mitigating factors in any individual case, but the general premise that those who have gained the most should suffer the least when faced with the consequences of their conscious acts is both illogical and elitist. Some countries provide penalties for economic crimes which increase in proportion to the seniority of the offender.[115] Moreover, a sentence based primarily on the defendant's particular circumstances leads to the perception by the public of arbitrariness or, worse, favoritism for the well to do. Because deterrence is partially based on the *certainty* of punishment, this perception undermines the primary purpose of sentencing in white collar crime.[116]

Jail is, by far, the most effective deterrent.[117] In this writer's experience, it is the prospect of jail which is the focal point of any plea negotiation. This is because the extent to which any particular sanction is perceived to be severe depends upon how greatly that sanction threatens to disrupt the defendant's life.[118] A white collar criminal's stock-in-trade is money. The possibility of having to pay money to receive a benefit (*i.e.*, disposition of the criminal case) is a routine business transaction. But incarceration with other "criminals" and the changes it would bring are unimaginable. Incarceration disrupts and cuts off not only the defendant's primary familial relationships, but also the business and social contacts and general interaction within the affluent society which were so much a benefit and manifestation of his success.

It has been suggested that fines are the optimal form of criminal sanction, because incarceration wastes both the society's resources (no need for incapacitation or rehabilitation of the defendant) and those of the offender's, who would better serve the community by becoming a productive member of it.[119] Moreover, returning the offender to society will allow him to be in a better position to provide restitution to his victims.[120] While in the case of a corporate defendant there is no choice but to impose a fine,[121] there is little evidence that, in the case of an individual defendant, these benefits flowing from the imposition of fines are actually realized. To the extent they are realized, it is unlikely that the financial gain to society outweighs the deterrence lost by freeing the defendant.

Historically, maximum fines have been very low[122] although this may be changing.[123] Fines are difficult to collect, especially as the size of the fine increases.[124] Even if collected their payment may be perceived by the offender as merely a cost of doing business. The real impact of a fine upon a defendant diminishes over time as his life returns to normal and the fine becomes just another bill to pay.[125] The truly dangerous recidivist will not be incapacitated by a mere fine.[126] Finally, reliance on fines in white collar cases demonstrably discriminates against the poor, once again adversely affecting the public's perception of the fairness of the criminal justice system.[127]

This is not to say that the imposition of fines has no role in white collar crime sentencing. There appears to be a declining marginal utility to incarceration. The imposition of *any* jail sentence is feared. For example, a dramatic increase in the level of deterrence would result from changing the public's perception that no jail will be imposed for white collar crimes to the perception that two years of jail *will* be imposed. There would be a smaller *increase* in the level of deterrence if the perception of the *amount* of the mandatory jail sentence were four years rather than two years. Conversely, there is reason to believe that the level of deterrence directly increases with expected amount of the likely fine.[128]

Thus, it appears that deterrence may be best served by the perceived certainty of jail in all but the most minor offenses, combined with an escalating fine schedule which takes into account the deterrent value, the means of the defendant and, most importantly, the need for restitution to the victims.[129]

Beyond the question of jail versus fine, it has been suggested that courts should also go beyond the usual parameters of sentencing to address the harm wrought in that particular case, *e.g.*, requiring the defendant to give notice and an explanation of the conviction to his victims, relevant community service, avoidance of certain occupations related to the criminal conduct or avoidance of specified locales or persons.[130]

CONCLUSION

White collar crime litigation provides the practitioner with a diverse, contemporary and provocative practice. In any particular case one is likely to encounter issues ranging from intricate problems of evidence and proof to fundamental questions such as the basic philosophy to be employed in sentencing. As the society progresses technologically, the aspiring white collar criminal will also develop his own level of sophistication and cunning in order to take advantage of a more complex and, thus, more vulnerable economic system. Law enforcement agencies must keep pace by refining and improving their investigative techniques and continuing to be innovative in their approach.

Ultimately, it is the legal system itself, while continuing to provide the community with a stable, consistent means of identifying and punishing white collar offenders, which must be adaptable to shifting and possibly conflicting priorities, *e.g.*, punishment verses restitution. In so doing, it will "keep its promise"[131] to promote justice in a changing world.

FOOTNOTES

1) E. Ross, Sin and Society 7 (1907)

2) F. Cullen, R. Mathews, G. Clark, J. Cullen, Public Support for Punishing White-Collar Crime: Blaming the Victim Revisited?, 11 Journal of Criminal Justice 481, 486 (1983).

3) Ilene H. Nagel, John L. Hagen, The Sentencing of White Collar Criminals in Federal Courts: A Socio-Legal Exploration of Disparity, 80 Mich. L.R. 1427, 1443 (1982).

4) Insurance fraud, bankruptcy, bank fraud and embezzlement.

5) Mail order swindle, adulteration of consumables, anti-trust, credit card and computer crime.

6) Securities and investment fraud (Ponzi scheme), commodities, real estate.

7) Federal procurement fraud, tax, false claims and general federal program fraud.

8) August Bequai, White Collar Crime: The Losing War, Case and Comment, September-October, 1977 at 3.

9) Nagel, *supra* n. 3. See also National Priorities for the Investigation and Prosecution of White Collar Crime, Report of Attorney General. (1980) at 5 "White collar offenses shall constitute those classes of non-violent illegal activities which principally involve traditional notions of deceit, deception, concealment, manipulation, breach of trust, subterfuge or illegal circumvention."

This definition is consistent with the FBI's working definition of white collar crime. "Those alleged acts characterized by deceit, concealment, violation of trust and not dependent upon the application or threat of physical force or violence. They are committed to obtain money, property, or services; or to avoid payment or loss of money, property, or services or to secure personal or business advantage." *Id.*

10) David R. Simon, Stanley R. Swart, The Justice Department Focuses on White Collar Crime: Promises and Pitfalls, 30 Crime and Delinquency 107, 109 (1984) "The Department of Justice's definition to include everything obtained illegally without the use of force has obscured the traditional view as involving the 'relatively successful and powerful members of society' ".

11) The largest securities fraud case on record remains the Equity Funding scandal of the early 1970's. Equity Funding was engaged in the sale of life insurance policies and mutual funds. These assets were vastly overstated due to fraudulent corporate practices, *e.g.*, some 60,000 of the total 97,000 life insurance policies were bogus. When the fraud was discovered, the firm went into receivership, with the customers and stockholders suffering losses in excess of $2 billion. More recently, in 1983 the United States Attorneys Office for the Southern District of New York successfully handled the prosecution in the $300 million Drysdale Securities fraud. Manhattan, Inc. at 86, 88 (February, 1985).

A 1982 study indicated that the average securities swindle cost the investors at least $500,000, with twenty percent of the cases resulting in losses exceeding $2.5 million. Stanton Wheeler, Mitchell Lewis Rothman, The Organization as Weapon in White Collar Crime, 80 Michigan Law Review 1403, 1414 (1982).

12) In 1984 Mark Rich pled guilty to tax fraud in excess of $200 million, at the time the largest single tax fraud prosecution. Manhattan, Inc. *supra* n. 11 at 87. In 1985 that honor was acquired by one Edward A. Markowitz, who pled guilty to selling more than $445 million in phony tax shelter benefits to eager investors. Promising write-offs of up to $10 for each dollar invested, Markowitz landed such investors as Woody Allen, Bill Murray and Dick Cavett. The heart of the scheme was the creation of paper losses in government securities and precious metals forward contracts by the use of false documentation and offshore entities in two offshore tax havens. Washington Post, April 26, 1985 p. 1.

13) In the typical fraudulent tax shelter, by the time the bottom drops out (*i.e.*, the deductions are disallowed by the I.R.S.) the monies paid in fees or otherwise "invested" by the taxpayer have been dissipated or moved offshore by the shelter promoters. Thus, the taxpayer/investor loses the funds invested and the promised tax benefits, as well as being liable for the tax deficiency, interest and penalties.

Tax shelters have become a major tax problem. In early 1982 the IRS noted that it had identified 257,000 returns which claimed deductions for illegal tax shelters. Disallowance of these deductions was expected to result in $2.6 billion in additional tax and penalties. In mid-1981 some 136 tax shelter promoters were under criminal investigation. Bulletin on Economic Crime Enforcement, United States Department of Justice, January, 1982 at 5.

14) Interestingly, the only individuals charged were two corporate managers who had been given immunity from prosecution in exchange for truthful testimony, but then allegedly perjured themselves before the Grand Jury. Thus, they were charged not with participating in the underlying scheme but with mak-

ing false statements. Wall Street Journal, March 27, 1985 at 3.

15) Wall Street Journal, March 12, 1985 at 1. E.F. Hutton's involvement in the laundering of millions of dollars in alleged heroin proceeds is discussed. While the brokerage house was not alleged to have violated any criminal laws, it admitted accepting $13 million in small bills during 1982 from an apparently unknown client, most of it delivered in suitcases and gym bags. The money was transferred to Switzerland. Another brokerage house, Merrill Lynch, had earlier refused to transact business with the same depositor when the pattern of large cash deposits became clear. Short of proof that E.F. Hutton employees had knowledge of or were in complicity with those desirous of "laundering" these funds, the financial institution's primary liability in these circumstances would be under the Bank Secrecy Act, 31 U.S.C. § 5313, which generally requires banks and other institutions to file with the I.R.S. a Currency Transaction Report for any cash transaction over $10,000. Hutton *did* comply with the statutory requirements, but the IRS failed to move quickly enough to immediately halt the additional transactions.

Other institutions have been in similar predicaments. In early 1985 the First National Bank of Boston pled guilty to failing to report $1.22 billion in cash transactions with foreign banks. Federal prosecutors alleged that this money included cash being moved by a Mafia family. The bank was fined $500,000. *Id.*

In a related story, the Wall Street Journal reported that some 45 major banks had anonymously approached the Treasury Department to request a "safe harbor" ruling, *i.e.,* immunity from prosecution, if they confessed to failing to file currency transaction reports in connection with huge cash transactions. Wall Street Journal, March 12, 1985 at 3.

16) White Collar Crime: 1983 Update, 21 Criminal Law Review 203, 252. Because of the exponential increase in the use of computers in business and government, fraud and theft through computers is an increasingly difficult problem. It combines large potential profits with minimal risk of apprehension or serious punishment. *Id.* In 1982 the average computer crime "take" was estimated to be about $430,000, in contrast to the average "take" of $19,000 for other types of white collar crime. Also in 1982 the probability of receiving a jail sentence for computer crime was 1 in 10,000. *Id.* at 252 n. 874.

17) In 1983 United States District Judge Harry Claiborne was indicted in the District of Nevada on charges of bribery, fraud, obstruction of justice, and false statements on both his income tax returns and financial disclosure reports. It was alleged that Judge Claiborne had solicited bribes from an individual to influence the outcome of the appeal of that individual's conviction for income tax evasion. The first trial ended with the jury unable to agree on a verdict. The government re-tried Judge Claiborne on only the tax counts. He was convicted and sentenced to two years imprisonment and $10,000 in fines. The appeal is pending.

18) In April of 1983 Congressman George Hansen of Idaho was indicted for submitting four false financial reports of the kid required of all high ranking government officials. See Title 1, Ethics in Government Act, 2 U.S.C. 701-709. Hansen was charged with attempting to cover up the receipt of substantial loans from individuals such as Texas billionaire Nelson Bunker Hunt, as well as failing to report the profits from silver commodities transactions. In early 1984 Hansen was convicted and sentenced to 15 months imprisonment and a $40,000 fine. The appeal is pending.

19) In 1983 Assistant EPA Administrator Rita Lavelle was convicted of perjury and obstruction of justice in relation to certain congressional proceedings.

20) During 1984 the Public Integrity Section, Criminal Division, Department of Justice successfully conducted major election fraud prosecutions in several counties in North Carolina and Pennsylvania. Report to Congress on the Activities and Operations of the Public Integrity Section for 1984, U.S. Dept. of Justice, April, 1985 at 18.

21) In 1983 a former high ranking Kentucky State official and a Kentucky businessman were indicted for their participation in a scheme which channeled Commonwealth of Kentucky Workmen's Compensation Insurance commissions to themselves. The defendants were convicted on two of eight counts. According to a major Kentucky newspaper, the Louisville Corrier-Journal, the Public Integrity Section's long, thorough investigation resulted in "millions of taxpayers' dollars be[ing] saved by reform of the State's insurance buying practices...[T]he light that was shed has helped to bring a welcome change to Kentucky politics in Government." Report to Congress on the Activities and Operations of the Public Integrity Section for 1983, United States Department of Justice, April 1984 at pages 8, 72.

22) In 1983 Assistant United States Attorney Frank Robin, Jr. was convicted of bribery and obstruction of justice for offering to sell confidential grand jury information for $200,000 to an attorney for one of the grand jury targets. Robin was sentenced to ten years in prison plus a $5,000 fine. *Id.* at 15.

23) In National Priorities for the Investigation and Prosecution of White Collar Crime, Report to the Attorney General, United States Department of Justice 1980, the criteria used to prioritize the distribution of prosecutorial resources was as follows: (1) the total amount of direct dollar of property loss; (2) the number of victims involved; (3) any special impact on individual victims; (4) impact on the respect for and trust of public institutions and officials; (5) the ability of potential victims to protect themselves; (6) impact, if any, beyond the direct victims involved; and (7) the history and circumstances of the suspected offender, including connection with other criminal activity.

24) Braithwaite, Challenging Just Deserts: Punishing White Collar Criminals, 73 Journal of Criminal Law and Criminology, 723, 743, 746 (1982).

25) Braithwaite, *supra* n. 24 at 743.

26) Wall Street Journal, April 10, 1984 at 1.

27) Memorandum to All United States Attorneys from D. Lowell Jensen, Assistant Attorney General, Criminal Division, dated December 29, 1981 Re: Consideration of Criminal Fraud in District Law Enforcement Plans, at 4

28) Braithwaite, *supra* n. 24 at 743, quoting Conyers, Dissenting Views: Report of the Judiciary Committee of the House of Representatives on Criminal Code Revision Act of 1980, United States Government Printing Office, 1980.

29) Braithwaite, *supra* n. 24 at 744, 745.

30) Cullen, *supra* n. 2.

31) Braithwaite, *supra* n. 24 at 733, 745. In a 1981 Survey 75 percent of the respondents agreed with the statement that the amount of money lost through white collar crime is more than is lost through street crimes such as robberies, burglaries and thefts. Fifty-five percent agreed with the statement that white collar criminals do more to undermine the morality of our society than do regular street criminals. *Id.* at 488.
32) Changing Morality: The Two Americas: A Time-Louis Harris Poll, Time, June 26, 1969 at 93 (hereafter "Changing Morality").
33) Joint Commission on Correctional Manpower and Training, The Public Looks at Crime and Corrections (1938)
34) Reed and Reed, "Doctor, Lawyer, Indian Chief" Old Rhymes and New on

White Collar Crime, 3 Intl. J. Criminology and Penology 279 (1975)
35) Braithwaite, *supra* n. 24 at 734; See also Cullen, *supra* n. 2 at 486.
36) Changing Morality *supra* n. 32. Surveys in other developed countries reveal a similar point of view. Braithwaite, *supra* n. 24 at 736.
37) There was a substantial increase in the mid 1970's through early 1982. In 1982 the Federal Bureau of Investigation was given concurrent jurisdiction with the Drug Enforcment Administration to investigate and prosecute narcotics offenses, necessitating some shifting of resources away from white collar crime prosecutions.
38) Coffee, Corporate Crime and Punishment: A Non-Chicago View of the Economics of Criminal Sanctions, 419, 442; National Priorities, *supra* n.23 at 34.
39) Braithwaite, *supra* n. 24 at 726 n. 22.
40) *Id.* at 748.
41) White Collar Crime, 1983 update, *supra* n.16 at 252-254.
42) Memorandum, *supra* n. 27.
43) Manhatten, Inc. *supra* n. 11 at 87, 95. "Omerta" is the Sicilian code of silence: silence or death.
44) *United States* v. *Fendler*, Crim. No. 79-1004-R (C.D. Cal. April 80, K. Stanley, ed.), reported in United States Department of Justice Bulletin on Economic Crime Enforcement, July, 1980 at 1.

A *Ponzi* scheme is one in which the initial investors' "profits" are, in fact, moneys collected from subsequent investors. It can operate only so long as there is an increasing supply of fresh investors who, unwittingly, fund their predecessors. Once this flow of money stops the system collapses.
45) Corporate criminal liability, based on the legal fiction that it is a "person" under the law, is originally derived from the rather mundane common law doctrine that masters were criminally liable if their servants created a public nuisance by throwing something out of the house into the street. Later, as private corporations took over the maintenance of roads, their malfeasance in that task was punishable as a public nuisance. The indictment of Ford Motor Company the the State of Indiana in the early 1980's on three counts of reckless homicide indicated that corporations were and are liable under law virtually to the same extent as persons. (Ford was later acquitted by a jury). Thomas J. Bernard, The Historical Development of Corporate Criminal Liability, 22 Criminology 3, 4, 6, 12 (1984).
46) Leigh, The Criminal Liability of Corporations and Other Groups: A Comparative View, 80 Mich. L. R. 1508 (1982).
47) Braithwaite, Enforced Self-Regulation: A New Strategy for Corporate Crime Control, 80 U. Mich. L.R. 1466, 1495 (1982).
48) Albanese, Corporate Criminology: Explaining Deviance of Business and Political Organizations, 12 Journal of Criminal Justice, 11, 14 (1984).
49) Vaughan, Toward Understanding Unlawful Organizational Behavior, 80 Mich. L.R. 1377 (1982).
50) Albanese, *supra* n. 48 at 12.
51) Vaughan, *supra* n. 49 at 1391.
52) Coffee, *supra* n. 38 at 433.
53) Stanton Wheeler, Mitchell Lewis Rothman, The Organization as Weapon in White Collar Crime, 80 Mich. L. Rev. 1403, 1422 (1982).
54) *Id.* at 1411, 1414.
55) A tax haven has been defined as any country having a low or zero rate of tax on all or certain categories of income, and offering a high level of confidentiality to business transactions through strict bank secrecy laws. R. Gordon, Tax Havens and Their Uses by United States Taxpayers - An Overview, p.14, January 12, 1981.
56) "An Analysis of Legal Cases Regarding the Use of Offshore and Foreign Banks and Corporations", United States Senate Permanent Committee on Investigations, p.1 (1981); see also *United States* v. *Baskes,* 442 F. Supp. 322 (N.D. Ill. 1977).
57) Written statement of M. Carr Ferguson, Assistant Attorney General, Tax Division, Department of Justice before the Subcommittee on Oversight of the Committee on Ways and Means, House of Representatives, April 24, 1979 at page 23. In discussing the proliferation of illegal tax shelters, the present Assistant Attorney General, Hon. Glenn L. Archer, Jr., commented "[t]he trans-

actions are often extremely complex; the true facts are disguised and are uncovered only after tedious investigation of multiple entities; and the potential witnesses and documentation are often scattered throughout the United States, or even overseas — frequently in tax haven countries with stringent bank secrecy laws...Evidence in a bank secrecy jurisdiction may be completely out of reach of the Service and our prosecutors. Even when the bank secrecy laws have exceptions for certain crimes, tax fraud often does not receive the favored treatment." Statement of Glenn L. Archer, Jr., Assistant Attorney General, Tax Division, before the Subcommittee on Oversight of the Committee on Ways and Means, United States House of Representatives, concerning abusive tax shelters, page 4, September 28, 1982.

58) See n. 37 *supra*.

59) Public Integrity Section, Criminal Division.

60) Criminal Section, Tax Division.

61) Fraud Section, Criminal Division.

62) *Andresen* v. *Maryland,* 427 U.S. 463, 480-481 n. 10 (1976); (the warrant authorized seizure of, *inter alia,* "books, records, documents, papers, memoranda and correspondence showing or tending to show fraudulent intent and/or knowledge as elements of the crime of false pretense in violation of...[a state statute]; *Sovereign News Co.* v. *United States,* 690 F. 2d 569, 574 (6th Cir. 1982); *United States* v. *Bithoney,* 631 F. 2d 1, 2 (1st Cir. 1980).

63) See n. 62 *supra*; See also *United States* v. *Cook,* 657 F. 2d 730, 734 (5th Cir. 1981); *United States* v. *Bright,* 630 F. 2d 804, 812 (5th Cir. 1980).

64) See generally Braithwaite, *supra* n. 24 at 748, 754, 755.

65) Entrenched Pattern of Graft Outlined, New York Times, March 24, 1985 at 34.

66) *Id.*

67) Letters Rogatory are an official request from one country to another for judicial assistance. *United States* v. *Reagan,* 453 F. 2d 265 (6th Cir. 1971). This request must be made by a United States court to a judicial officer in the foreign country. R. Gordon, *supra* n. 55 at 205. See also Title 28 U.S.C. § 1781. This request may be made independent of a treaty or it may be made on the basis of specific treaty provisions. The execution of a request for judicial assistance by the foreign court is based, in the absence of a treaty, on comity between nations at peace, and as such is discretionary. *Janssen* v. *Belding Cortecilli,* 84 F. 2d 579 (3rd Cir. 1936). Letters rogatory are generally used only as a last resort because courts have recognized that the process is time consuming and expensive, and given the uncertainty of outcome, are hesitant to proceed by Letters rogatory if another method of obtaining evidence is available. *United States* v. *Bank of Nova Scotia,* 691 F. 2d 1384 (11th Cir. 1982), cert. denied____U.S.____, 103 S. Ct. 3086 (1983); See also *In Re Grand Jury (Bank of Nova Scotia),* 740 F. 2d 817 (11th Cir. 1984, cert. denied ____ U.S. ____, 105 S. Ct. 78 (1985).

In addition to being extremely cumbersome, other problems arise with Letters rogatory. As with a treaty, the foreign government is not required to comply with the request if the alleged offense is not one recognized as criminal under the laws of the foreign state. *Id.* This limitation emphasizes the underlying problem that tax evasion may not be a crime in all countries.

68) *United States* v. *Lemire,* 720 F. 2d 1327 (D.C. Cir. 1983); see also *United States* v. *Steele,* 685 F. 2d 793 (3rd Cir. 1982) (Letters Rogatory to Bermuda).

69) Wall Street Journal, September 13, 1984 and 1985. The United States has other mutual assistance treaties with such countries as Switzerland and Canada.

70) See *United States* v. *Ghidoni,* 732 F. 2d 814 (11th Cir. 1984).

71) See gen Title 18, United States Code.

72) 26 U.S.C. Sections 7201, 7206 (1) and 7203.

73) 18 U.S.C. 371, Conspiracy to Commit an Offense or Defraud the United States; See also, *e.g.,* 18 U.S.C. 286, Conspiracy to Defraud the United States with Respect to Claims.

74) Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78m(b) (2)-(3), 78d-1, 78dd-2, 78ff.

75) 31 U.S.C. § 5313.

76) Racketeer Influenced Corrupt Organizational Act, 18 U.S.C. § 1961 *et seq.* This statute provides for both criminal and civil liability, including forfeiture of assets, for any person who uses a pattern of racketeering activity or utilizes any income derived from that activity, or uses such a pattern to conduct or acquire an interest in an "enterprise." Its broad reach has provoked much controversy. This topic is treated exhaustively in the literature and cases and will not be discussed here.

77) The Credit Card Fraud Act of 1984 (18 U.S.C. § 1029) expands 15 U.S.C. § 1644 (fraudulent use of credit cards) and 15 U.S.C. § 1693(n) (fraudulent use of debt instruments).

78) The addition of Section 1030 to Title 18 makes it an offense to (1) knowingly access a computer, without authorization, in order to obtain (a) certain classified information or (b) certain information on a consumer contained in financial records of a financial institution or consumer reporting agency and (2) use, modify, destroy or disclose information so accessed from a federal government computer. Conspiracies or attempts to commit these offenses are also punishable.

79) 18 U.S. C. § 666: theft or bribery involving local governments or private organizations that receive $10,000 or more annually.

80) A new general bank fraud statute, 18 U.S.C. 1344 supplements the existing and somewhat archaic criminal provisions relating to fraud against federally insured financial institutions, *e.g.,* 18 U.S.C. §§ 656, 657, 1005, 1006 and 1014. The new bank bribery statute, 18 U.S.C. § 215, generally broadens the kinds of acts punishable.

81) See Mail Order Consumer Protection Amendments of 1983, Pub. L. 98-186, which strengthens Postal Service authority under 39 U.S.C. § 3005.

82) Under 18 U.S.C 3623 the maximum fine for an individual defendant may not be more than the *greatest* of the following amounts:

- -The amount specified in the law setting forth the offense;
- -Twice the gross pecuniary gain the defendant derived from the offense or twice the gross pecuniary loss the offense causes another;
- -$250,000 in the case of a felony or of a misdemeanor resulting in death; or
- -$100,000 for a misdemeanor punishable by imprisonment for more than 6 months.

For a nonindividual defendant, the maximum fine levels are the same as above except that the maximum fine for a felony or for a misdemeanor resulting in death is $500,000 instead of $250,000.

Except as otherwise expressly provided, the aggregate of fines that may be imposed simultaneously for different offenses arising from a common scheme or plan, and causing no separable or distinguishable harm, is twice the amount permissible for the most serious offense.

83) *Capone* v. *United States,* 51 F. 2d 609 (7th Cir. 1931).

84) Indirect methods of proof such as bank deposits or net worth frequently rely upon documentary evidence of the defendant's use of bank accounts or of his expenditures and purchases.

85) American Bar Assn. Code of Professional Responsibility, D.R. 7-103(A) "A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause."

86) Nagel, *supra* n. 3 at 1441.

87) In the recent *General Dynamics* case, the government, suspended contract relationships and credited the liquidated monetary damages, *e.g.* improper cost overruns, against other existing liabilities owed by the United States toward the contractor. There is authority for such self-help remedies in the common law. *United States* v. *Munsey Trust Company,* 332 U.S. 234, 239-240 (1974); *Peterson* v. *Weinberger,* 508 F. 2d 45, 50 (5th Cir. 1975). See also, 31 U.S.C. Sections 951-953; 4 C.F.R. Section 102. Department of Justice, Bulletin on Economic Crime Enforcement, December, 1984 at page 9.

88) In *United States* v. *Rockwell International Corp.,* Civ. No. 82-6153 (C.D. California Nov 29, 1982), Rockwell was accused of falsifying labor charges on employee time cards by directing employees to charge their labor hours to cost-plus contracts when, in fact, labor was performed on fixed-price contracts. The false time cards were subsequently used to prepare false and fraudulent invoices submitted to the National Aeronautics and Space Administration (NASA) for payment on the cost-plus contracts.

Criminal prosecution was deferred in favor of civil action. Pursuant to the civil settlement, Rockwell agreed to refrain from making further false claims and to pay $500,00 in civil damages. The agreement also involved a number of administrative reforms to Rockwell's audit and timekeeping practices.

89) See *United States* v. *Litton Systems, Inc.,* 573 F. 2d 195 (4th Cir. 1978) cert. denied 439 U.S. 828 (1978). Care must be taken to protect Grand Jury secrecy and avoid the appearance that the government's prosecution power was used to extract a favorable civil settlement in return for criminal leniency or, conversely, that the defendant "bought" a better disposition by making a large civil settlement offer.

90) *United States* v. *Sells Engineering, Inc.,* 463 U.S. 418, 103 S. Ct. 3133 (1983).

91) Every white collar crime defendant with whom this writer has dealt has been a male.

92) Income tax evasion may be the only crime the commission of which may have crossed the mind of the average citizen. Not one in 10,000 has ever contemplated robbing a bank, selling narcotics or defrauding a neighbor. But at tax time there probably was a brief moment when he or she simply fantasized about altering an entry, thereby saving themselves a great deal of money. But, the moment passed and, like millions of others, they filled out their Form 1040 grudgingly, but accurately. Having done so, they expect others to do the same.

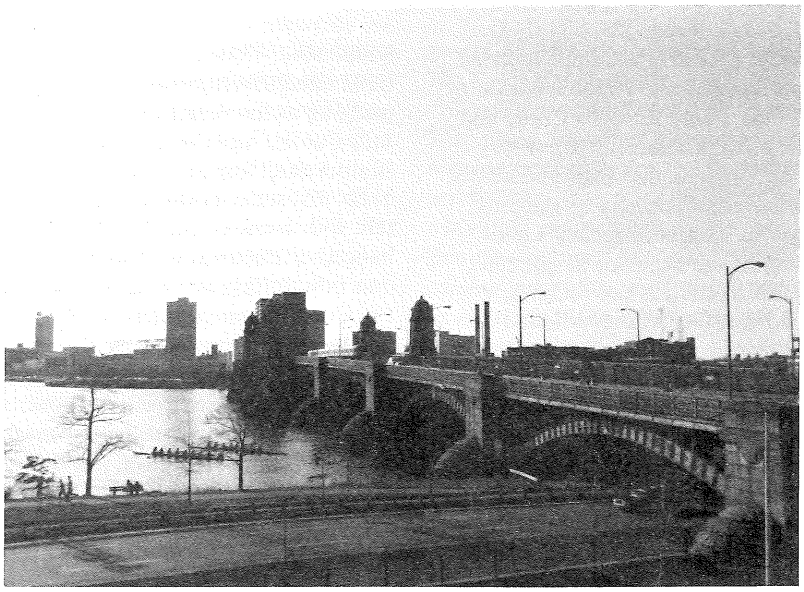
93) In the 1978 prosecution of Congressman Charles Diggs for mail fraud and false statements, the defense called as character witnesses Jesse Jackson, Coretta Scott King, Detroit Mayor Coleman Young and Walter Fauntroy. Diggs was, nevertheless, convicted and sentenced to two years in prison.

The effectiveness of character witnesses is probably overrated. They usually know nothing about the facts at issue, the defendant's business dealings or personal finances. One author argues that, as between the little old lady who suggests she was defrauded and the defendant's character witnesses, the character witnesses have the upper hand. In this writer's experience, the little old lady has the far greater impact upon the jury because she imparts substantial, almost tangible evidence.

94) Braithwaite, *supra* n. 24 at 489.

95) Cullen, *supra* n. 2 at 486.

96) Sentencing is primarily the function and responsibility of the trial court and any remarks that follow are not intended to infringe upon that prerogative.



97) Nagel, *supra* n. 3 at 1428; See also *Williams* v. *New York,* 337 U.S 241, 248-249 n. 13 (1949) "The court may consider four factors: protection of society against wrongdoers, punishment of the wrongdoer, reform and rehabilitation of the defendant and deterrence of others." While the Model Penal Code states that incarceration should only be imposed for the "protection of the public." This term is broadly defined to include deterrence, rehabilitation and retribution. Model Penal Code § 701 (1) (Proposed Official Draft, 1962).

98) Nagel, *supra* n. 3 at 1436; See also *United States* v. *Braun,* 382 F. Supp. 214, (S.D. N.Y. 1974) "The defendant

before us...is a man of 35. He has no prior criminal record. He is talented, gainfully employed, earnest in the discharge of family obligations, and entitled to hope for a bright, if unsung, future. He needs no 'rehabilitation' our prisons can offer. The likelihood that he will transgress again is as close to nil as we are ever able to predict." Judge Frankel agreed to suspend a jail sentence when he had originally imposed in light of President Ford's pardon of former President Nixon.

99) Coffee, *supra* n. 38 at 146.

100) Nagel, *supra* n. 3 at 1432, *Braun, supra* n. 98 "Vengeance, the greatest texts tell us, is not for mortal judges..."

101) Dan K. Webb, Scott F. Turow, The Prosecutor's Function in Sentencing, 13 Loyola University of Chicago Law Review 641, 652 (1982).

102) *Id.* at 653. See also *United States* v. *Gold,* 538 F. Supp. 523, 524 (N.D. Ohio 1982); President's Commission on Law Enforcement and Administration of Justice, Task Force Report - Crime and its Impact: An Assessment 105 (1967). The report suggests that prison terms for white collar criminals may be the only real way "to symbolize society's condemnation of the behavior in question, particularly where it is not on its face brutal or repulsive." Louis Michael Seidman, Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problems of Crime Control, 94 Yale Law Journal, 315, 333, (1984). When the threat of punishment no longer constitutes the equivalent of moral disapproval, people will be far more willing to engage in crime, *e.g.,* prohibition.

103) Sheldon Ekland-Olsen, Louis Lieb, Louis Zurcher, The Paradoxical Impact of Criminal Sanctions: Some Micro-Structural Findings, 18 Law and Society Review 159 (1984).

104) Webb, *supra* n. 101 at 649.

105) Braithwaite, *supra* n. 24 at 760.

106) *Pell* v. *Procunier,* 417 U.S. 817 (1974); *United States* v. *Foss,* 501 F. 2d 522 (1st Cir. 1974); *United States* v. *Good,* 538 F. Supp. 523, 524 (N.D. Ohio 1982) "If anything is to be done to reduce the incidence of 'white collar' crime, it must be clear that those offenders who are caught will certainly suffer some meaningful punishment. Imprisonment is the only such punishment."

107) See 18 U.S.C. Section 3577. "No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."; See also *United States* v. *Grayson,* 438 U.S. 45 (1978). Interviews with judges indicate that they tend to follow traditional variables: number of prior convictions, maximum penalty possible, number of charges of which the defendant was convicted, ethnicity, race, age and employment status. See also Nagel, *supra* n. 3 at 1449.

108) Nagel, *supra* n. 3 at 1432.

109) Braithwaite, *supra* n. 24 at 750 quoting A. Von Hirsch, Doing Justice: The Choice of Punishment at 66 (1979); See also Wheeler, *supra* n. 53 at 1421; See *Browder* v. *United States,* 398 F. Supp. 1042, 1046-47 (D. Ore. 1975) (upholding 25-year prison sentence for pledging stolen securities).

110) Cullen, *supra* n. 2 at 481, 483, 487; Braithwaite, *supra* n. 24 at 733, 739.

111) "If I were having a philosophical talk with a man I was going to have hanged or electrocuted I should say, I don't doubt that your act was inevitable for you, but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises." Oliver Wendell Holmes, 1 Holmes-Laski Letters 806 (M. Howe ed. 1953).

112) Nagel, *supra* n. 3 at 1431 n. 16, 1432.

113) *United States* v. *Alton Boxboard Company* [1977] Trade Cas. (CCH) para. 61, 336 at 71, 166.

114) Nagel, *supra* n. 3 at 1432; In *United States* v. *Bergman,* 416 F. Supp 496, 502-03 (S.D. N.Y. 1976). Judge Frankel imposed a prison term upon an elderly rabbi convicted of fraud. The court discounted the defendant's plea for leniency which was, in part, based on his public humiliation:

> Defendant's notoriety should not in the last analysis serve to lighten, any more than it may be permitted to aggravate, his sentence. The fact that he has been pilloried by journalists is essentially a consequence of the prestige he enjoyed before he was exposed as a wrongdoer. The long fall from grace was possible only because of the height he had reached. The suffering from loss of public esteem reflects a body of opinion that the esteem had been, in at least some measure, wrongly bestowed and enjoyed. It is not possible to justify the notion that this model of nonjudicial punishment should be an occasion for leniency not given to a defendant who never basked in such an admiring light at all. The quest for both the appearance and the substance of equal justice prompts the court to discount the thought that the public humiliation serves the function of imprisonment.

See also *United States* v. *Browder,* 398 F. Supp. 1042, 1046 (D. Ore. 1975), aff'd., 544 F. 2d 525 (9th Cir. 1976) "I cannot reconcile a policy of sending poorly educated burglars from the ghetto to jail when men in the highest positions of public trust and authority received judicial coddling when they are caught fleecing their constituencies."

115) Braithwaite, *supra* n. 24 at 740 n. 94.

116) This is not to say that punishment of two defendents for the same crime must be exactly the same, since even identical sentences, when imposed upon two individuals, will result in different punishment. Punishment is subjective and will impact upon certain persons in different ways. Nagel, *supra* n. 3 at 1435.

117) Nagel, *supra* n. 3 at 1436, quoting a report by the Committee on Economic Crime of the ABA Section on Criminal Justice. "The most effective punishment for the economic offender is incarceration." See also "Manhatten, Inc." *supra* n. 11 at 96. United States Attorney Giuliani suggests that for "planned and deliberate" white collar crimes like insider trading, deterrence through fines is ineffective and that for such crimes, "I think the general rule has to become prison".

118) Ekland-Olsen, *supra* n. 103 at 160, 176.

119) Coffee, *supra* n. 38 at 421.

120) *Id* at 424.

121) Corporations pose a special problem. A convicted corporate defendant may have little incentive to internally sanction the individuals responsible for its troubles. Coffee, *supra* n. 38 at 444, 445, 458, 499. Until recently it was not illegal for corporations to pay the fines

of the convicted corporate employees. The ABA-ALI Model Bus. Corp Act § 5(a) (1974) permits indemnification of fines if the employee or agent of the corporation "acted in good faith and in a manner he reasonably believed to be in the best interests of the corporation, and, with respect to any criminal action or proceeding, had no reasonable cause to believe his conduct was unlawful. This is now prohibited by federal law unless otherwise expressly allowed by state law. 18 U.S.C. Section 3565(f). Passing on fines to the public through price increases is also made more difficult by requiring that fines be paid from the assets of the organization. *Id.*

Certain innovative sanctions have been suggested, including the imposition of preventive restraints and a period of judicial oversight of the recidivist corporation, (ABA Standards Relating to the Administration of Criminal Justice, Sentences, Alternatives and Procedures (2nd Ed. 1979) at Standards 18-2.8) use of an equity fine whereby the corporation issues new equity securities equalling the value of the fine, (Braithwaite, *supra* n. 24 at 1466) and federal chartering of organizations. Vaughn, *supra* n. 49 at 1396.

122) *Id.* at 433.
123) See n. 82, *supra.*
124) Coffee, *supra* n. 38 at 433, 440.
125) *Id.* at 433, 434.
126) *Id.* at 425.
127) *Id.*
128) *Id.*
129) Coffee, *supra* n. 38 at 449. Restitution has become an area of increased attention because of the growing sensitivity toward "victims' rights". Civil suits by victims are almost impossible to organize and usually are not brought until the criminal and governmental civil penalty cases are resolved, which has usually resulted in depleting all of the assets of any but the deepest pocket. Restitution can be made a part of federal sentencing under two statutes. Restitution can be made a part of federal sentencing under two statutes. The Restitution and Probation Act, 18 U.S.C. 3651 and the recently passed Victims and Witness Protection Act of 1982, 18 U.S.C. 3579 *et seq.* One difficulty with the earlier Act is that restitution payments must be limited to the amount specified in the counts under which the defendant was convicted, unless the defendant is involved in an ongoing scheme. This limitation may be overcome by a plea agreement which includes restitution. See *United States* v. *Orr,* 691 F. 2d 431, 433-34 (9th Cir. 1982); *United States* v. *Davies,* 683 F. 2d 1052 (7th Cir. 1982); *Phillips* v. *United States,* 679 F. 2d 192 (9th Cir. 1982). It is highly unlikely that in a major case each instance of fraud will either be alleged as a separate violation or that there will be some evidence on each transaction at the trial. Thus, outside of a comprehensive plea bargain, this statute is of little use in providing restitution for all of the victims. See generally the *United States* v. *Johnson,* 700 F. 2d 699 (11th Cir. 1983).

The Victim and Witness Protection Act, *supra,* broadens the opportunity to provide restitution for the victims by permitting a sentencing judge to impose restitution independent of the specific charges contained in the indictment; *i.e.,* compensation for *all* of the victims may be ordered. If the Court does not order full restitution, the reason must be set out on the record. The amount of restitution is determined by the Court and the defendant is estopped from contesting that finding in any later proceedings. Under this new law, the Criminal Division's Public Integrity Section (See n. 59 *supra.*) collected in 1983 more than $4 million in restitution for the government and some $300,000 in restitution for victims. (It is interesting to note that this Section's entire 1983 budget was just over $2 million, making its work significantly cost-effective.).

If the victims cannot readily be identified, there is some authority that courts may require payment of the fine or restitution to the community injured. See *United States* v. *William Anderson Company,* 698 F. 2d 911 (8th Cir. 1982); contra, *United States* v. *Prescom Corp.,* 695 F. 2d 1236 (10th Cir. 1982).

130) See generally, Comprehensive Crime Control Act of 1984, Pub. Law 98-473 (1984).
131) See n. 111 *supra.*

POLITICAL BRIBERY AND THE RESTITUTIONAL SANCTION

by Ellen M. Gillis

Ellen M. Gillis, a graduate of Suffolk University Law School (J.D. 1985), wrote this paper for her Restitution Seminar taught by Professor Catherine Judge.

I. Introduction

When most public officials are elected or appointed to office they state that they will serve the public and will honor their trust in the administration of their duties. There seems to be an increasing number of political corruption cases brought to trial which belie these intentions. There is considerable controversy surrounding these prosecutions and the need for a truly effective punishment. "Although no official who accepts a bribe expects to be caught, fewer officials might risk getting caught if they knew they would be forced to return the bribe and be subjected to criminal sanctions."[1] This paper is focused on the civil theories and forms of restitution available against bribed officials, who have breached the public trust and their fiduciary duty to the public, and examines a proposal to stage a restitution hearing after the criminal trial of a convicted bribe taker.

An examination into the legal framework which gives rise to the use of restitution as a sanction against political bribery is necessary. Section 240.1 of the Model Penal Code (1962) states in pertinent part: "A person is guilty of bribery... if he offers, confers or agrees to confer upon another, or solicits, accepts or agrees to accept from another any benefit as consideration for a violation of a known legal duty as a public servant..." The crux of this definition is that any use of public office, whether it be in the holder's administrative functions or by the mere virtue of his office, to gain a benefit in any form is reprehensible conduct. The reasoning behind this theory is that "the revelation that public officials are pursuing their own gain rather than fulfilling their public trust can be profoundly harmful to a democratic-capitalist society...bribetakers teach society that those in power revere the pursuit of private wealth over the ideal of altruistic restraint. They generate cynicism about the entire process of democratic lawmaking..."[2] Restitution therefore is the most perfect remedy to disgorge the offender of his unjust enrichment to reinforce society's faith in the democratic process.

II. Theories of Recovery Against Public Officials.

A. Public Trust

It is well settled that a public office is a public trust and that officers are fiduciaries for the people they serve.[3] "As fiduciaries and trustees of the public welfare they are under an inescapable obligation to serve the public with the highest fidelity... They must be impervious to corrupting influences and they must transact their business frankly and openly in the light of the public scrutiny so that the public may know and be able to judge their work and them fairly."[4] "These are obligations imposed by the common law on public officers and are assumed by them as a matter of law upon their entering public office."[5]

Two famous Massachusetts cases discuss the theory of public trust. In the first, *City of Boston v. Santosuosso,*[6] Mayor Curley was charged with others for using their influence to have a certain claim against the City of Boston settled under an agreement where they would share the excess. The court stated:

> "The right of the city of Boston as a cestui que trust is preeminently an equitable right, and it arose as soon as the agreement was made and the fund was received by its mayor. When the fund was received under the agreement by the mayor the defendants held the legal title in trust to pay it over to the city of Boston."[6a]

In the second case, *City of Boston v. Dolan,*[7] the city of Boston brought a suit in equity to recover an amount of illegal gains realized by Dolan, as treasurer, through investment of certain city trust funds in bonds purchased at excessive prices from the treasurer's privately owned brokerage business. The court stated, "But as city treasurer the defendant was a fiduciary. As such he could be compelled to account in equity like a trustee, regardless of a possible remedy at law, and could not be permitted to retain a secret profit made in transactions conducted for the city. The saying, 'Public office is a public trust,' is more than mere rhetoric."[8]

A public office holder accepts serious obligations to the public whether he is elected, appointed, or simply hired to that position.

> "A public office is a public trust and the holder thereof cannot use it directly or indirectly for a personal profit; and officers are not permitted to place themselves in a position in which personal interest may come into conflict with the duty which they owe to the public."[9]

The public official acts in his official capacity as a fiduciary to the individual citizen. "The American courts which have decided the issue have uniformly found public officeholders to be fiduciaries to the public."[10]

The American Law Institute Restatement of Restitution, §197, provides that, "Where a fiduciary in violation of his

duty to the beneficiary receives or retains a bonus or commission or other profit, he holds what he receives upon a constructive trust for the beneficiary." This section of the Restatement emphasizes that no fiduciary is allowed to profit from his special position of trustee to the public, and that any bonus, commission or bribe will be held for the benefit of the cestui que. The public official is therefore no different from any other trustee and will be held to the highest degree of conduct to act only for the benefit of the beneficiary and to receive no other benefit from his position than his legal compensation.

B. Agency

The relationship between the government and the public official has been held to be that of a principle and agent relation.[11] "Neither an officer nor an agent can gain personal profits by neglect of duty or by an abuse of his discretion. If an agent breaches his fiduciary duty by using his position to gain a secret profit, he is liable to the principle for the income and gain on property acquired as a consequence of the breach."[12]

The landmark Supreme Court case *United States v. Carter*[13] held that an army officer could not retain secret profits gained on an engineering project which he was supervising. The opinion of the Court stated;

> "The larger interests of public justice will not tolerate, under any circumstances, that a public official shall retain any profit or advantage which he may realize through an acquirement of an interest in conflict with his fidelity as an agent...and he must account to his principle for all he has received."[14]

The court is seeking to compensate the government not only for lost monies from the treasury, but for the loss of the impartiality of a public official when exercising his authority to enter contracts on the government's behalf. The public officer's duty is to give to the public service the full benefit of a disinterested judgment and the utmost fidelity.[15]

It is not important whether the money was actually taken from the principal or whether the government is able to show actual harm; all that is necessary is proof that the public officer was able to obtain a personal benefit from his employment by the government.[16] The case of *Jersey City v. Hague*[17] discusses a very famous English case heard in the House of Lords, *Reading v. Attorney General.*[18] Reading was an English sergeant who was stationed in Egypt. He had agreed with a group of smugglers to ride on the backs of trucks which were filled with stolen goods. Reading was to receive an amount of money in exchange for wearing his uniform so that the trucks would not be searched. The smuggling operation was discovered and the English government seized the money which Reading received. Reading brought this action to recover the money.[19] Lord Porter presiding stated:

> "In my opinion any official position, whether marked by a uniform or not, which enables the holder to earn money by its use gives his master a right to receive the money so earned even though it was earned by a criminal act ... The fact that the Crown in this case, or that any master, has lost no profits or suffered no damage is, of course, immaterial, and the principle is so well known that it is unnecessary to cite the cases illustrating and supporting it. It is the receipt and possession of the money that matters, not the loss or prejudice to the master...[20]

The principle-agent relationship is a fiduciary relationship. Therefore the principles of fiduciary duty apply as they do to a trustee-beneficiary relationship. Lord Porter also stated in *Reading,* "... the words 'fiduciary relationship' in this setting are used in a wide and loose sense and include, inter alios, a case where the servant gains from his employment a position of authority which enables him to obtain the sum which he receives."[21] Therefore, as the Restatement dictates: "where a person in a fiduciary relation to another acquires property, and the retention of the property is a violation of his duty as a fiduciary, he holds it upon a constructive trust for another.[22]

C. Statutory Prohibitions

The crime of bribery has been a focus of political thought from the formation of our government.[23] Article II, section 4 of the United States Constitution lists bribery as grounds for impeachment and removal from office of the President, Vice President, and all civil officers. Both the federal and state legislative bodies have enacted legislation aimed at proscribing the offense of bribery and its criminal penalities.[24] In New York and California it is a felony for an executive officer or legislator to receive a bribe upon the understanding that his official actions shall be influenced.[25] In California, the convicted public officer may be punishable by imprisonment for a minimum of two years and a maximum of four years, forfeiture of office, and permanent disqualification from holding any office of public trust.[26] The punishment in New York is similar except that imprisonment may reach a maximum of seven years.[27]

In comparison, the federal bribery statute allows the official to be punishable up to fifteen years, and in addition, the official may be disqualified permanently from holding any federal office.[28] It is important for these statutes to be effectively enforced so as to punish swiftly the wrongdoer and to set an example for the temptable public officer considering such wrongdoing. In tandem with these statutes, a provision for the disgorgement of the profit and restitution to the public is necessary to complete the process of totally discouraging the breach of duty in public office.[29]

III. Restitution As A Remedy

Although there are many criminal statutory schemes for the punishment of soliciting and accepting political bribes, the established thought among legal scholars is that along with the criminal penalties for bribery, a civil action for restitution will lie against the public official.[30] Another legal scholar has proposed that "Every bribery conviction or accepted nolo plea would give rise, in addition to the sentencing hearing, to a mandatory restitution hearing... The court would issue a judgment stating the amount of restitution, the court's basis for arriving at that figure, and the jurisdiction to which the money is owed.[31]

A court may punish a bribed official with both civil and criminal sanctions without fear that it may be subjecting the defendant to double jeopardy. The double jeopardy clause of the fifth amendment to the Constitution does not allow two criminal punishments for the same criminal offense.[32] An examination of how the courts have utilized the

equitable remedies of the constructive trust and the equitable bill of accounting will provide a framework in which to view the possibilities of implementing the proposed restitution hearing in criminal prosecutions.

A. The Constructive Trust

A constructive trust is a trust by operation of law which is imposed against one who has obtained the legal right to property which he has no equitable right to enjoy.[33] The use of the doctrine of constructive trust has been prevalent in cases deciding the issue of a bribed public official.[34] "When a court imposes a constructive trust upon a bribed public official, the official is forced to act as trustee for all benefits received and the monies are placed in the public treasury.[35]

In the Supreme Court case *United States v. Carter*[36] the court traced the profits Carter had made and subsequently transferred to his father-in-law, R.F. Wescott, who was not a purchaser in good faith, and subjected the money to a constructive trust. The court stated:

> "The conclusion we must reach is, that Robert F. Wescott was but the agent and representative of Oberlin M. Carter in the receipt of a share of profit...For whatever gains, profits or gratuities he is shown to have received he must account. The contention that any recovery must be limited to property or securities into which such illicit gains have been traced is not sound."[37]

The Supreme Court of New Jersey noted the value of restitution when it imposed a constructive trust upon the Mayor for extorting a percentage of each city employee's salary as a guarantee that they could keep their jobs in the case *Jersey City v. Hague.*[38] The court in *Jersey City* stated:

> "As the decisions and the *Restatement* show, the development of the principle of restitution, both at law and in equity, as a remedy for breach by a public official of his fiduciary obligations has obviously been salutary. Restitution, by virtue of its adaptability to individual cases on equitable principles may, as we have seen, reach situations beyond the grasp of other civil or criminal remedies and do justice on equitable principles."[39]

Thus, "the constructive trust is not an action for compensation, but rather is a strict equitable doctrine which is applied to cure a fiduciary's breach of his duty by eliminating the source of his conflict of interest, and transferring it to his innocent beneficiary."[40] As previously noted, the courts are not interested in a fiduciary's motive for accepting a bribe, but in the effect of the bribe, as they are also not interested in a showing of actual harm.[41]

The Restatement of Restitution §190 states: "Where a person in a fiduciary relation to another acquires property, and the acquisition of retention of the property is in violation of his duty as a fiduciary, he holds it upon a constructive trust for the other."[41a] The Restatement of Restitution and the cases emphasize that the focus is upon the violation of the public trust and not upon the criminal aspects of the act of accepting a bribe. The need is to vindicate the administration of government and return trust to the public, rather than to serve a retributive function and vindicate the criminal justice system.[42]

The belief of the courts that the beneficiary of a trust relationship should be protected is so prevalent that the courts deciding the issue have held that a third party who colludes with a fiduciary in breach of his duty, and obtains a benefit, is also under a duty of restitution to the beneficiary.[42] The Supreme Court of Illinois in the case of *Chicago Park District v. Kenroy Inc.,*[43] noting the above principle stated: "Recognition of this salutary principle has resulted in the imposition of constructive trusts on benefits obtained by third persons through their knowledge of or involvement in a public official's breach of fiduciary duty."[44]

However, the courts have refused in some instances to reach the property of bribed officials. In *Bonelli v. State,*[45] a state official, who had been a member of a legislator's retirement plan, was indicted for bribery in office and fled to Mexico and remained until his death. His wife brought this action to recover the proceeds of his pension as the named beneficiary, since the state treasurer had placed the proceeds in trust to be used as a set off against the bribery monies which the treasurer felt belonged to the state.[46] The court held that a specific exemption statute protecting retirement benefits from invasion by legal process controlled over a more general set off statute, and that the money always was and had been the couple's property held in trust by the state and could not be set off against money allegedly owed to the state.[47]

B. The Equitable Bill of Accounting

The Equitable Bill of Accounting is an equitable remedy which is commonly sought in conjunction with the constructive trust. "A court of equity has jurisdiction to compel an accounting in those cases which there exists a need for discovery, a fiduciary relation, mutual or complicated accounts, or some other ground of equitable jurisdiction such as a fraud for which there is no other adequate remedy at law."[48] An accounting would be proper in a political bribery scenario where there exists a breach of the public trust and the method and amount of profits cannot be readily ascertained.

> "The courts will zealously scrutinize the transactions of parties to a fiduciary relationship where it appears that the one in whom the trust is reposed has profited or secured any advantage or expense of the subservient party. If the defendant fails to sustain his burden of proving, by clear and convincing evidence through the accounting, that he has acted in good faith and has not betrayed his confidence vested in him, all transactions occurring during the fiduciary relationship are presumptively fraudulant and equity imposes a constructive trust on the profits accruing from the fiduciary's breach."[49]

The ownership of the funds which are appropriated and the harm done to the beneficiary are not the important factors in determining whether an accounting for profits should be had. The focus is upon whether there exists a conflict of interest between the beneficiary's interests and the personal or business interests of the fiduciary.

In *United States v. Drumm,*[50] the court reversed a directed verdict and ordered an accounting of a poultry inspector's salary. The accounting covered a five year period during which time he was paid, as a consultant, by the poultry companies which he was to have been inspecting. The court held that a jury could conclude that there was such a

conflict of interest as would compromise the position of an impartial inspector.[51] The fact that there was no evidence that Drumm had passed bad poultry had no bearing on whether or not the accounting for the profits he made as a consultant was ordered.[52]

The Supreme Court in *United States v. Carter*[53] likewise ordered Carter to account for profits which he had been able to make through the use of his wide discretion in choosing the contractors for an Army engineering project. The fact that the project was completed ahead of schedule and for a reasonable amount of money was no defense to his breach of fiduciary duty to be impartial when entering contracts on behalf of the government.[54] The court said:

> "It would be a dangerous precedent to lay down as law that unless some affirmative fraud or loss can be shown, the agent may hold on to any secret benefit he may be able to make out of his agency."[55]

The equitable bill of accounting is an effective method of disgorging the profits from a bribed official because the plaintiff in the action may have no way of ascertaining whether there has been a misappropriation of funds.

In the *Drumm* case, the money was not taken from public funds. Rather it was earned through a position which conflicted with the inspector's official duties.[56] Similarly, *Carter* demonstrates that even if the public officer is able to carry out his administrative duties to perfection, this is no defense to the fact that he gained personally from his position as a government representative.[57] The knowledge of how and when the public officer gained a benefit from his position as either a trustee or an agent may be peculiar only to themselves. The equitable bill of accounting places the burden upon the party who is in the best position to know and explain the period in question; the defendant. The public official who is guilty of no wrongdoing will be vindicated by an accounting of his personal and business assets.[58] But, the public official who fails to explain benefits or profits received during a period he was acting in a fiduciary capacity will expect a constructive trust to be placed on these monies for the public good.[59]

C. Restitution Within the Framework of Criminal Bribery Prosecutions

The present state of the law in regard to obtaining restitution from a bribed public official is for either a citizen or the attorney general of the state to seek an equitable bill of accounting and to request that a constructive trust be placed on any profits which a public official may have gained through his position in the government.[60a] The theories of recovery upon which these actions are based is that the public official holds a position of trust to the public and is therefore a trustee for its welfare or that the public official is an agent for the government and is liable for any profits to his principle which accumulates through his position.

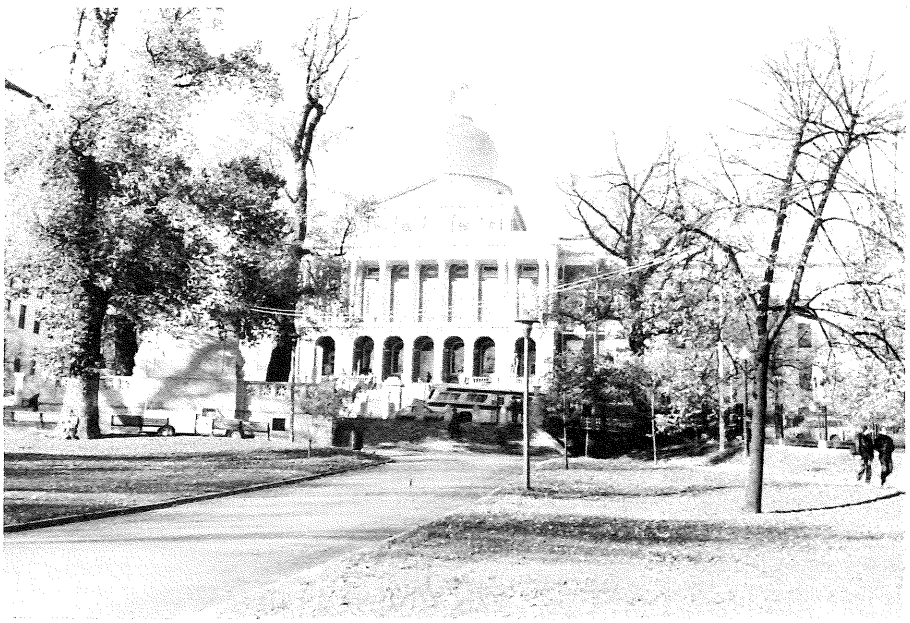
As noted earlier in this paper, there is one legal author who disagrees with the effectiveness of civil suits for the disgorgement of bribery monies from a public official.[60a] The author states in the comment, *Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery:*

> "Civil suits to recover the proceeds of bribery, brought either by private citizens or an attorney general, are penalogically ineffective and economically inefficient. Such suits inevitably delay and thereby attenuate the denunciatory, retributive, and deterrent effects of restitution. In addition, such suits fail to protect the interests of both the official and the society in distributive retributivism."[61]

The author supports the above proposition with the following arguments on the merits of the citizen suit and the civil suit brought by the attorney general. The citizen suit was deemed inadequate because of the lapse of time from detection to trial to disposition.[62] The author states, "Citizen suits, which typically conclude years after the criminal trial, substitute a fragmented and dispersed message for the required outburst of disapproval."[63] The author also states that the citizen suit is redundant in that it litigates the same issues which are covered in the parallel criminal trial.[64] The dangers of the civil suit are also pointed out by the author:

> "Yet civil process is poorly suited to the important task of screening out nonmeritorious or malicious cases...the civil suit permits determination of the critical factual issue — whether the official committed the crime of bribery — by preponderance of the evidence rather than beyond a reasonable doubt."[65]

The author also finds the suit by the attorney general to be unnecessarily repetitious, expensive and a delay of punishment.[66] It is also pointed out in this article that in those states where the attorney general has the sole authority to bring a suit against a corrupt official, he may choose not to do so for political reasons and leave the public without recourse.[67] The author proposes, as an



alternative to the civil suit seeking restitution from the bribed public official, that: "Restitution is most effectively and equitably effected by appending a mandatory hearing to the sentencing phase of the criminal process."[67a]

The author states that the advantages of the proposal would include the following: "...that a magistrate or grand jury would screen charges of bribery and that a jury would decide them beyond a reasonable doubt,"[68] and that "...the trial judge, having heard the case and the additional evidence, would be in an ideal position to determine the amount of restitution,"[69] and that "the issue of restitution arises only for those offenders who are convicted, and would be mandatory for every convicted offender."[70]

Implicit in those proposals is the recognition that political corruption cases are increasing, i.e. Watergate and ABSCAM, and that there is a need for an efficient and economical sanction to address the wrong to the public trust. The proposal has examined the traditional methods of achieving restitution from the corrupt official and found them lacking in punitive value and retribution. The flaw in the argument may be, however, that the author has underestimated the courts zealous protection of the beneficiary of a fiduciary relationship.

The equitable bill of accounting is a suit which is brought when there is a need for discovery and the accounts are jointly held or difficult to discern.[71] The essential facts as to where the money has come from and where it is at the time of trial may not be easily uncovered at a hearing. The proposal also does not detail whether the rules of evidence and procedure are the same as in a trial or are more informal. The judge who sits on the "appended hearing" may not have the proper powers in equity which would allow him to reach beyond the complex situation and grasp the monies in their present form.

Conclusion

Restitution has played an important and necessary function in rectifying the wrong perpetrated upon our democratic-capitalist society by a public official on-the-take.[72] Restitution takes back the gain a public officer acquires when he uses his position in the government, either passively or actively, for the benefit of himself or a third party.[73]

The law is clear that a public official occupies a position of fiduciary duty to the public which he serves.[74] The courts have jealously protected the public trust and by a resounding call have held that no fiduciary will be able to retain a bonus or commission in violation of his fiduciary duty, whether based on a theory of principle-agent or trustee beneficiary.[75]

The courts have successfully protected the public from its wayward officials through the equitable bill of accounting and the constructive trust.[76] The most successful approach has been to require the official to account for all profits realized by the official during the fiduciary relationship. When, and if, the official is unable, a constructive trust will be placed on all proceeds unaccounted for.[77] The use of the courts' equity powers to invoke restitution has been especially successful in situations where the proceeds have been transformed into other forms.[78] Equity is needed to grasp beyond these barriers to return the benefit to the public-beneficiary.[79]

The Legislature has attempted to discourage political bribery by increasing punishments and denying further careers in public service.[80] What is needed is a provision for restitution of the bribery proceeds. As noted, one author has suggested that a restitution hearing be appended onto the criminal conviction sentencing hearing.[81] However, the limitations on this proposal stem from the lack of equity jurisdiction in the informal hearing to reach the difficult situations of transformed proceeds. The complex accounting cases where discovery of the illegal benefit may be uniquely within the defendant's knowledge, would also be a problem in an informal hearing.

An alternative proposal would be for the legislative authorities of each state and the federal government to require the attorney general to bring a civil suit seeking restitution of bribery proceeds and gains from officials who breach their fiduciary duty to the public trust. The initiation of the civil suit would be mandatory, thereby eliminating the possibility that for political reasons an attorney general could choose not to bring suit. If the attorney general refused to bring suit, a writ of mandamus could be brought against them.

It is important that the citizen still have the option to bring a citizen's suit against the wayward public official. The public needs to be able to feel it has the power to reprimand its government officers as any beneficiary of a fiduciary relationship would be able to institute proceedings against a trustee in breach.[82]

The mandatory suit by the attorney general would insure, where there was a lack of citizen initiative, that restitution would be made of the bribery proceeds to the deserving public.

Footnotes

1) Comment, *Defending the Public Interest: Citizen Suits For Restitution Against Bribed Officials,* 48 Tenn. L. Rev. 347 (1981).
2) Garnishing Graft: *A Strategy For Recovering the Proceeds of Bribery,* 92 Yale L. J. 128 (1982).
3) *See generally Id.* at 136.
4) *Jersey City v. Hague,* 18 N.J. 584, 115 A.2d 8 (1955) quoting *Driscoll v. Burlington-Bristol Bridge Co.,* 8 N.J. 433, at page 474 et seq., 86 A.2d 201, at page 221 (1952).
5) *Id.* at 585, 115 A.2d at 12.
6) *City of Boston v. Santosuosso,* 298 Mass. 175, 10 N.E.2d 271 (1937).
6a) *Id.* at 179, 10 N.E.2d at 274.
7) *City of Boston v. Dolan,* 298 Mass. 346, 10 N.E.2d 275 (1937).
8) *Id.* at 348, 10 N.E.2d at 277.
9) *Fuchs v. Bidwell,* 31 Ill. App. 3d 567, 566, 334 N.E. 2d 117, 119 (1975), rev'd on other grounds, 65 Ill.2d 503, 359 N.E.2d 158 (1976).
10) Flaum and Carr, *The Equitable Bill of Accounting - A Viable Remedy of Combatting Official Misconduct,* 62 Ill. B.J. 622, 624 (1974).
11) 31 Ill. App.3d 567.
12) Comment, *supra* note 1, at 350.
13) *United States v. Carter,* 217 U.S. 286 (1910).
14) *Id.* at 306.
15) *City of Findlay v. Pertz,* 66 F. 427 (6 Cir. 1895).
16) *See,* 18 N.J. at 590, 115 A.2d 14.
17) 18 N.J. 584, 115 A.2d 8 (1955).
18) *Reading v. Attorney General,* (1951) A.C. 507; 1 All. E.R. 612.
19) *Id.*
20) *Id.*, 1 All. E.R. at 619.
21) *Id.*, 1 All. E.R. at 620.
22) Restatement of Restitution §197 (1937).
23) Comment, *supra* note 2, at 130.
24) *Id.*

25) Cal. Penal Code §§68, 86 (West Supp. 1984); N.Y. Penal Law §200.10 (McKinney 1975) (same).
26) Cal. Penal Code §§68, 86 (West Supp. 1984).
27) N.Y. Penal Law §70 (McKinney 1975) (same).
28) 18 U.S.C. §201(e) (1976).
29) Comment, *supra* note 2, at 131.
30) Comment, *supra* note 1, at 347.
31) Comment, *supra* note 2, at 141.
32) *United States, ex rel. Marcus v. Hess,* 317 U.S. 537, 548-49 (1943).
33) 54 Am. Jur. Trusts §218 (1936) update.
34) 217 U.S. 286; 18 N.J. 584, 115 A.2d 8; 298 Mass. 346, 10 N.E.2d 275; 298 Mass. 175, 10 N.E.2d 271.
35) *See McCarty v. City of Saint Paul,* 279 Minn. 62, 155 N.W.2d 459 (1967).
36) 217 U.S. 268 (1909).
37) *Id.* at 317.
38) 18 N.J. 584, 115 A.2d 8 (1955).
39) *Id.* at 589 115 A.2d at 15.
40) *County of Cook v. Barrett,* 36 Ill. App. 3rd 623, 631-632, 344 N.E.2d 540, 548 (1975).
41) *Supra,* note 16.
42) Ashbell, *The Third Party Trusteeship - An Equitable Remedy Against Bribers and Corrupters of Public Officials,* 67 Ill. B.J. 160 (1978).
43) *Chicago Park District v. Kenroy, Inc.,* 78 Ill.2d 555, 402 N.E.2d 181 (1980).
44) *Id.* at 559, 402 N.E.2d at 186.
45) *Bonelli v. State,* 71 Cal. App.3d 459, 139 Cal. Rptr. 486 (1977).
46) *Id.* at 460, 139 Cal. Rptr. at 487.
47) *Id.* at 466, 139 Cal. Rptr. at 493.
48) Flaum and Carr, *supra* note 10 at 624.
49) *Id.* at 625.
50) *United States v. Drumm,* 329 F.2d 109 (1st Cir. 1964).
51) *Id.*
52) *Id.*
53) 217 U.S. 268 (1909).
54) *Id.* at 305
55) *Id.* at 306.
56) 329 F.2d 109.
57) 217 U.S. at 306.
58) Flaum and Carr, *supra* note 10, at 626.
59) *Id.*
60) Comment, *supra* note 1 at 357-358.
61) *Id.* at 136.
62) *Id.* at 138.
63) *Id.*
64) *Id.*
65) *Id. at* 138-139.
66) *Id.* at 140.
67) *Id.*
67a) *Id.* at 141.
68) *Id.* at 142.
69) *Id.*
70) *Id.*
71) Flaum and Carr, *supra* note 10 at 624.
72) Comment, *supra* note 1.
73) *See,* 217 U.S. 286.
74) 298 Mass. at 185 , 10 N.E.2d at 281.
75) Restatement of Restitution §197 (1937).
76) Flaum and Carr, *supra* note 10.
77) *Id.*
78) 18 N.J. at 590, 115 A.2d at 15.
79) *Id.*
80) *See, supra* notes 24-29.
81) Comment, *supra* note 2 at 141.
82) Comment, *supra* note 1 at 368.

BIBLIOGRAPHY

Comment, *Defending the Public Interest: Citizen Suits for Restitution Against Bribed Officials,* 48 Tenn. L. Rev. 347 (1981).

Garnishing Graft: A Strategy for Recovering the Proceeds of Bribery, 92 Yale L.J. 128 (1982).

Ashbell, *The Third Party Trusteeship - An Equitable Remedy Against Bribers and Corrupters of Public Officials,* 67 Ill. B.J. 160 (1978).

Flaum and Carr, *The Equitable Bill of Accounting - A Viable Remedy for Combatting Official Misconduct,* 62 Ill. B.J. 622 (1974).

Restatement for Restitution §190, §197 (1937).

NOTES

ALUMNI NEWS:

Patricia Arons has a law practice located at the Commons, 225 Millburn Ave., Millburn, New Jersey.

Mark Canter is Assistant Vice President and Tax Counsel for the Phoenix Mutual Life Insurance Company in Hartford, CT.

John Hughes is with the law firm of Hutchins and Wheeler, 1 Boston Place, in Boston.

Joan Igoe has formed a law partnership under the firm name of Kosty and Igoe Consultants. The firm, which deals primarily in tax and financial planning, is located at 88 Broad Street in Boston.

Robert Karns has three law offices located in New Bedford, Fall River and Taunton under the name of Robert T. Karns, Inc.

Thomas Kiley has an office on 133 Federal Street in Boston.

James Samels is General Counsel for the Board of Regents of Higher Education in Massachusetts. He was recently named National Co-Chairman of the Membership Committee of the National Association of College and University Attorneys (NACUA). Attorney Samels is currently enrolled in doctoral program at the University of Massachusetts, Amherst.

Edward J. Smith is now the General Counsel to the Massachusetts Bar Association.

Ralph E. Stone is the co-author of an article, "The Federal Trade Commission and Pyramid Sales Schemes", published in 15 Pacific Law Journal 879 (1984).

John Tardif is practicing law in Winthrop at the Tardif Law Center.

MOOT COURT NEWS

Moot Court teams from Suffolk University captured the National Championships in 1985. First, the Anti-Trust Moot Court team consisting of Mark Fitzgerald and Edward McVinney, won the New York County Lawyers Association Anti-Trust Moot Court Competition, defeating Fordham Law School in the final round. The team advisor is Professor Russell Murphy. They were also selected for best brief.

Next, the Constitutional Law Moot Court team won the 1985 J. Braxton Craven Memorial Moot Court Competition, defeating Buffalo Law in the final round. That team consisted of James Healy, Hal Leibowitz and Sharon Offenberg. Ms. Offenberg was also named "outstanding advocate" of the competition and James Healy was named second best in that category. The Constitutional Law Team, advised by Professor Thomas Finn, won out over 32 law school teams.

Other teams, and team members, also fared well. The Tax team, made up of Paula Campbell, Dave Jaffe, Neil Daily and Colleen O'Connell competed in the Mugel Moot Court Tax Competition sponsored by Buffalo Law School. Paula Campbell was named the Outstanding Oral Advocate of the Nation.

The International Team, advised by Professor Steven Hicks and consisting of Chuck Cavas, Joe Donahue, Bill Sinnott, and Phil Posner, competed in the Jessup International Moot Court Competition. Their brief won Best Brief in the Regional Competition.

The Securities Team, advised by Professor Richard Vacco, competed in the Kaufman Securities Moot Court Competition sponsored by Fordham Law School. Team members Ed Gainor, Greg Howard and Larry McCarthy, competing among 36 teams, reached the quarter finals.

The Patent team won the Regional Competition. That team was advised by Professors Tom McMahon and Jason Mihabito. Team members were Barbara Clarke and Jason Hosenman.

The National Team was narrowly defeated by Boston College in the finals of the Regional Competition. The team advisor was Professor Marc Greenbaum and team members included Karen Bonn, Tom Daily and Jack O'Brien.

RECENT FACULTY PUBLICATIONS

The following each wrote a chapter in "Recent Developments in the Law" (December 1983) C.L.E. program: **Professors Lambert, O'Donovan, Elias, Vacco, Sandoe, Maleson, McEttrick, Bander.** "Massachusetts Family Law Actions, by **Professor Charles Kindregan** (1985).

Professors **Barry Brown** and **Bernard Keenan** are co-authors of a volume entitled "Massachusetts Condominium Law," published by Butterworth Legal Publishers.

GRANTS

Suffolk University Law School has been awarded a $10,500 grant from the US Department of Education for a law school clinical program to serve Chelsea's low-income Hispanic community. The grant, to be matched by the university, will be used to support the Suffolk University Legal Assistance Bureau's opening of a Spanish-speaking clinic in Chelsea in which 12 supervised Suffolk Law students will represent Spanish-speaking clients.

C.L.E.

The Law School's Center for Continuing Professional Development recently joined with the American Bar Association in co-sponsoring a seminar on the new federal child support legislation. The new law takes effect between 1985 and 1987. Faculty for the program included Professor Charles Kindregan, Attorney Robert Howowitz of Washington D.C., Professor Stephan Callahan, Attorney Elin Graydon of Boston, Judge Albert Pettoruto of Essex Co. Probate and Family Court, and attorneys Monroe Inker and David Wright of Boston.

OBITUARIES

Nancy Ann Bielski (J.D. 1985) passed away. She had suffered cancer since 1983, and graduated Magna Cum Laude from Suffolk Law School in June after years of study while undergoing chemotherapy at Dana-Farber Cancer Institute. Her former employer, Brian O'Neill, who heads the Ashburton Place Law firm where Miss Bielski worked first as a law clerk and researcher, then as a bankruptcy and tax lawyer, said that she would have "made one of the great female lawyers in the city of Boston".

Margaret Blizard (J.D. 1963) passed away in May of 1985. She was a leader in Massachusetts and National Democratic politics, state public and mental health and in women's professional activities. At the time of her death, she was a member of the governing council of the American Public Health Association, which in 1984, had honored her for her leadership and 40 years of public service. She was the administrator and legal assistant to the Commissioner of public health from 1965-1983.

John Doherty (J.D. 1930) passed away in May of 1985. He was 83 years old. He was a partner in the Lynn law firm of Donahue, Doherty, and Dolan from 1970 until his retirement in 1973. He was formerly President of the Suffolk Law School Alumni Association.

Clarence Elam (J.D. 1967) passed away in April of 1985 at the age of sixty-one. He was a former chairman of the Boston Licensing Board and one-time secretary to the late governor Christian A. Herter and the Governor's Council. In 1955, he was elected one of Greater Boston's 10 outstanding young men. At his death, he was operating a private law practice at Center Plaza and had been on the staff as a teacher and ombudsman at Roxbury Community College.

Ray McKenzie (J.D. 1945) passed away in June of 1985 after a long illness. He was 67 years old. He was an attorney for Crum and Forster Insurance, Co. of Boston until his retirement in 1979. He was a member of the Constellation Masonic Lodge of Dedham, and was an army veteran of World War II. He also was past commodore of the Lewis Bay Yacht Club and a member of the Hyannis Yacht Club.

Harold Stone, longtime undergraduate professor of accounting, passed away in July of 1985. He was 68.

Sidney Von Loesecke passed away this year at the age of 93. He graduated from Suffolk University Law School and practiced law for 39 years with the Automotive Legal Association in Boston. He was also in partnership with the late Joseph Shea, Sr. in Holliston. He was an army veteran of World War I. He was also active in Newton civic organizations and founded the Trinity Episcopal Church Memorial Fund.

ALUMNI NOTES INFORMATION

Please submit alumni notes to: Executive Editor
The ADVOCATE - The Suffolk University Law School Journal
Donahue Building, Room 207
41 Temple Street
Boston, MA 02114

NAME: _____ YEAR OF GRADUATION: _____

ADDRESS: _____ CURRENT EMPLOYMENT: _____

MARITAL STATUS: _____ ADDRESS: _____

NOTE: _____

_____

_____

_____

_____

SUFFOLK UNIVERSITY LAW SCHOOL

CENTER FOR CONTINUING PROFESSIONAL DEVELOPMENT

Continuing Legal Education Programs For Practicing Lawyers

Spring 1986

March 1, 1986	Proving Damages In Tort Cases
April 5, 1986	Civil Rights & Damage Claims for Public Employee Torts
May 3, 1986	Prenuptial Agreements

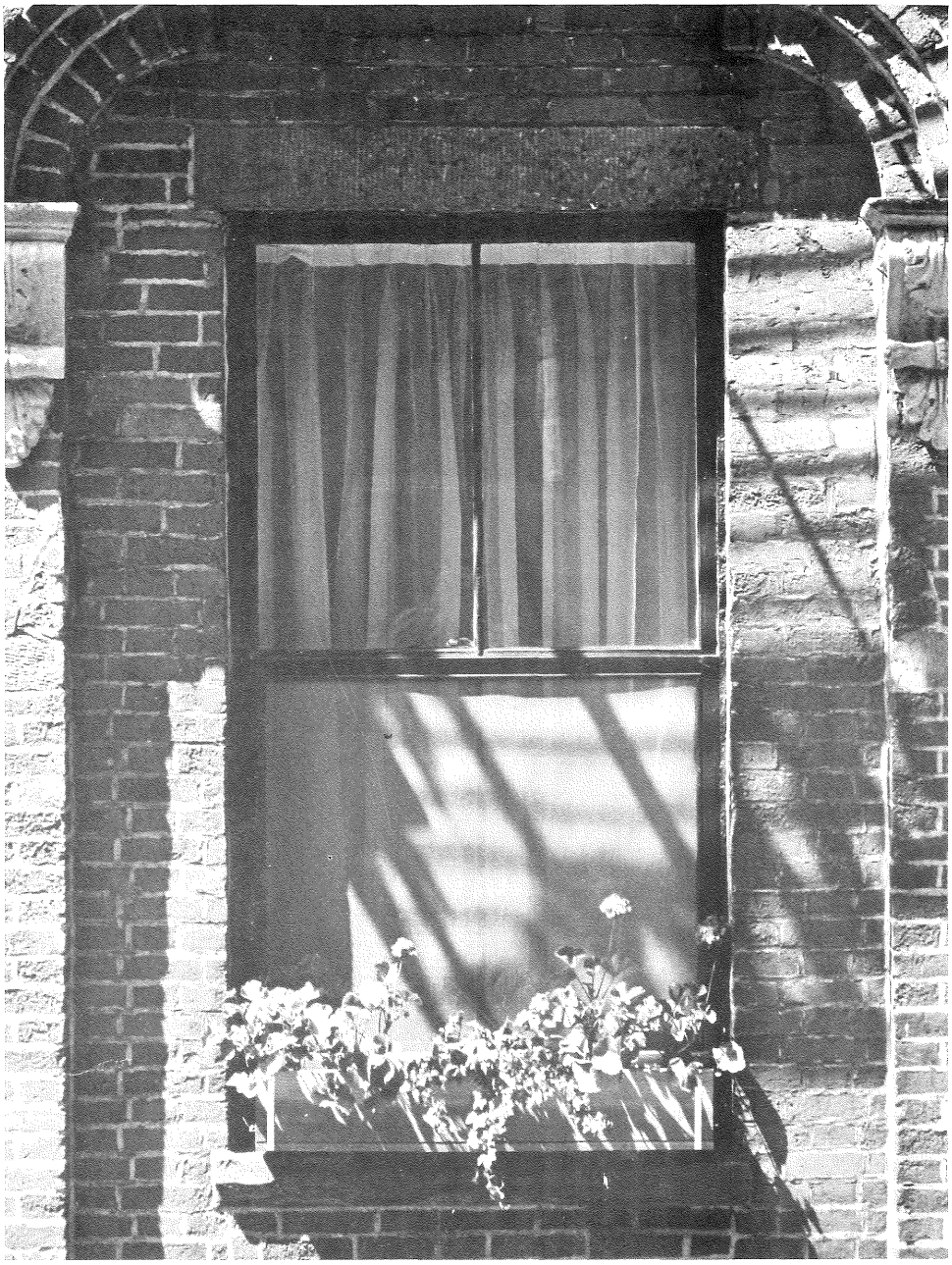
TUITION Full payment of $75 must accompany your registration. Make check payable to **SUFFOLK UNIVERSITY.** The registration fee includes course materials, luncheon, instruction costs and coffee.

For more information contact Carol Dunn, Coordinator, (617) 723-4700 Ext. 627

CENTER FOR CONTINUING PROFESSIONAL DEVELOPMENT
Suffolk University Law School
41 Temple Street
Boston, Massachusetts 02114

Judge Lawrence L. Cameron, a Suffolk graduate, was one of the several judges, professors and lawyers who recently participated in a training program for attorneys on civil practice in the district courts. The program was sponsored by the Center for Continuing Professional Development at Suffolk University Law School.

Faculty participants in recent continuing legal education program on *Care and Protection of Neglected Children* held at Suffolk University Law School on March 30, 1985. Faculty: (from left to right) Front. Robert O'Malley, Probation Officer; Dr. Nancy Coleman, Esq.; Judge Paul A. Chernoff. Rear. Professor Charles P. Kindregan, Director; Attorney Adrienne Markham; Professor Thomas Finn; Reverend Douglas Sears; Judge James J. Nixon.



Suffolk University Law School
41 Temple Street
Boston, Massachusetts 02114

Non-Profit Organization
U.S. Postage
PAID
Permit No. 56861
Boston, MA