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theAdvocate



Robert S. Stephen interviews Hon. Martin F. Loughlin.

theAdvocate

Volume 22, No. 1
Fall 1991

The Suffolk University Law School Journal

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Note From the Advocate

THE ADVOCATE WELCOMES COMPLETED MANUSCRIPTS AND IDEAS FOR ARTICLES THAT WOULD BE OF INTEREST TO OUR READERSHIP. PLEASE CONTACT PROFESSOR JOSEPH D. CRONIN, SUFFOLK UNIVERSITY LAW SCHOOL, BEACON HILL, BOSTON, MA 02114. TEL.: 617-573-8547.

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Dean Paul R. Sugarman

PROF. CLARK INTERVIEWING PROF. ROUNDS

September 18, 1991

AN IOLTA EYE OPENER



Professor Gerard J. Clark

Clark: Charles, I have here your article recently published in the Loyola University of Chicago Law Journal [22 Loy. U. Chi. L. J. 163 (1990); printed with permission in 5 Conn. Probate Law Journal 25 (1989)] about social investing and IOLTA. It has generated a good deal of comment. I know IOLTA is an acronym for Interest on Lawyers Trust Accounts but

what is it exactly? How does it work?

Rounds: IOLTA, besides being an acronym, is also a misnomer. It should be IOCTA, Interest on *Clients* Trust Accounts. Be that as it may, in states such as Massachusetts where it operates by judicial fiat, IOLTA is an elaborate scheme which enables the judiciary to control the disposition of enormous sums of money. Under the Massachusetts IOLTA scheme, a lawyer is compelled under threat of license suspension to pool certain clients funds – specifically nominal or short-term funds which the attorney does not make productive. The stream of income from the pool is then funneled through three conduits to a vast network of interest groups and causes many of which are charitable only in name, in IRS designation and in the eyes of their adherents. The Board of Bar Overseers serves as the SJC'S IOLTA enforcement agent. The IOLTA Committee serves as the SJC's IOLTA administrative agent. And the Massachusetts Legal Assistance Corporation, the Boston Bar Foundation, and the Massachusetts Bar Foundation are the three conduits. Essentially they act as the SJC's income disbursement agents. Both foundations, as creatures of their respective bar associations, serve other functions as well.

Clark: Are the property interests of clients involved here?

Rounds: Yes, in my view the right to determine how value is used is an incident of ownership and the court through the IOLTA scheme usurps that right. Obviously the court would not agree with me on this, although as to IOLTA matters the court and its agents are hardly disinterested.

Clark: But the IOLTA proponents point out that IOLTA income is not taxable to the client.

Rounds: The taxability of pool income has nothing to do with whether the client has a right to dictate how his or her property – nominal or otherwise – is used. Say your house is vacant and produces no income. That doesn't mean that the Salvation Army may garrison its troops in it without your permission.

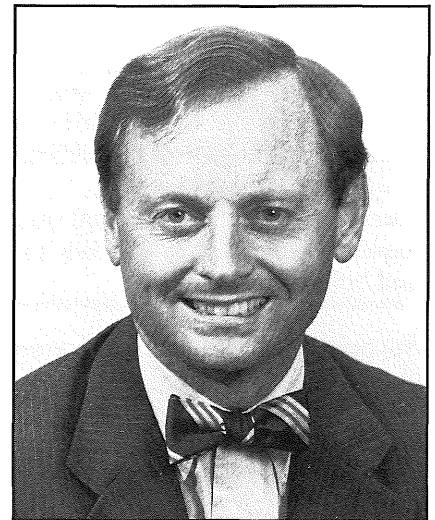
Clark: How do the disbursement agents operationally get possession of the income thrown off by all those commingled accounts?

Rounds: The attorney is required to open, and utilize as appropriate, a pooled IOLTA bank account. He or she must designate one of the three disbursement agents as the recipient of the income generated by the trust account. The bank then remits the income, usually on a monthly basis, directly to the agent designated. The disbursement agent in turn allocates the income among certain so-called charitable organizations of the agent's choosing.

Clark: Under traditional trust law principles, the trustee is accountable to the beneficiary as to matters within the scope of the trust. Does IOLTA require the client as beneficiary to be notified that his money is being placed in an IOLTA?

Rounds: According to the IOLTA Committee – and presumably the SJC agrees with the pronouncements of its agent – the attorney has no duty to inform his client of the existence of the IOLTA program or of the ultimate recipients of the IOLTA income. This flies squarely in the face of long-standing universally-accepted principles of trust law relating to the administration of revocable inter vivos trusts, specifically the duties of loyalty and of disclosure and the duty to account.

Clark: Who created the IOLTA Committee and who appoints its members?



Professor Charles E. Rounds, Jr.

Rounds: The SJC.

Clark: Does the IOLTA Committee audit the conduit entities or the ultimate recipients of the IOLTA income?

Rounds: Audit? The Committee itself is a participant in the shell game. It receives funding from the conduits. In any case, since IOLTA operates out of the judicial branch, it is unclear under our system of government how there ever can be credible independent accountability – at the state level at least. It would be interesting to know whether even a freedom of information act request could pierce the judicial veil protecting the shell game.

Clark: What are the typical situations in which the rules require the practicing attorney to segregate client monies and hold them in trust?

Rounds: A client's insurance settlement should be held in trust.

Clark: So personal injury practices have lots of clients' accounts. What about other specialties?

Rounds: Most everyone at one time or another will have occasion to hold client funds. In divorce matters, for example, funds are often turned over to the attorney for temporary safekeeping. It should be noted that IOLTA applies only to sums held for a short period of time or to nominal sums, whatever that means. There is anecdotal evidence, however, that all kinds of other funds are being put into IOLTA accounts.

Clark: Such as ?

Rounds: Well the other day I had occasion to speak to an outraged businessman. Apparently one of the large Boston firms had parked a large amount of his money for an extended period of time into an IOLTA account. I know of an attorney who was paid a consulting fee by a sole practitioner where the check was cut from an IOLTA account. It is my sense that IOLTA is being used as a convenient way of parking all kinds of money under color of judicial sanction in order to avoid the inconvenience of sub-accounting the income generated by client funds. I have no empirical evidence that this abuse is wide-spread. But none that it is limited. All we have is the propaganda of the IOLTA advocates. What is sorely needed is an impartial, independent non-partisan national audit of the hundreds of millions of dollars that have passed and are passing yearly through the national IOLTA system.

Clark: Hasn't it always been true that people in fiduciary capacities need not make productive small amounts or sums held short term?

Rounds: In the past it was not considered cost-effective and therefore reasonable to account to trust beneficiaries

for small sums of money or for sums held for a short period of time. So yes, in the past the practice was to put the money in non-interest bearing accounts with any economic benefit accruing to the banking industry. With the advent of computerized sweep accounts, however, the income on even small sums now can be cost-effectively sub-accounted, with income credited on a daily basis. In fact this was noted in a recent IOLTA case out of Indiana. [*In re Ind. State Bar Ass'n Petition to Authorize a Program Governing Interest on Lawyer's Trust Accounts*, 550 N.E. 2d 311 (Ind. 1990)]. There the court suggested that the operational problems that had provided the utilitarian justification for IOLTA have been largely eliminated by technological advances in trust accounting.

Clark: And the advance in technology has in your view somewhat impacted the former rule that allowed fiduciaries not to invest small amounts.

The stream of income from the pool is then funneled through three conduits to a vast network of interest groups and causes many of which are charitable only in name, in IRS designation and in the eyes of their adherents.

Rounds: Yes. Let's, however, assume that there has not been such a technological advancement. It is often said that there is nothing wrong with IOLTA because otherwise the economic benefit would accrue to the banking industry. My response is that that is the decision for the client to make, not the bench or the bar leadership. Clients should decide whether the economic benefit of their beneficial or equitable interests should accrue to the banking industry, to a charitable or political cause of the SJC's selection, or to whomever. It seems to me that whether or not the banking industry receives any economic benefit from client funds held in trust is a red herring.

Clark: How did IOLTA come about?

Rounds: The idea originated with a Florida judge who brought the concept from Canada in the late 1970's. His strategy at the time was to press hard for a rapid adoption of IOLTA across the country so that if its constitutionality should ever come before the U.S. Supreme Court the scheme would have a "patina" of authority. His word. After the ABA took up the cause IOLTA spread rapidly. In twenty jurisdictions IOLTA is compulsory. Voluntary in fifteen. Fifteen jurisdictions have what they call opt-out schemes. That brings us to fifty jurisdictions including D.C., Massachusetts, of course, being one of them. Indiana, however, has steadfastly refused to participate in the IOLTA program.

Clark: Does it matter in your view whether the state's plan is mandatory such as we have here in Massachusetts or voluntary along the lines of the New Hampshire plan?

Rounds: If by voluntary you mean voluntary on the part of the lawyer, then I see no distinction. If one assumes that the beneficial or equitable interest in entrusted client funds is the property of the client, then whether the attorney takes it voluntarily with the state's permission or is compelled to take it by the state is irrelevant. It belongs to the client and it is up to the clients to determine whether their property should be income producing or non-income producing. . . . and if income producing where that income should go.

Clark: IOLTA began in Massachusetts as a program which was voluntary on the part of the attorney. In 1990 it was made compulsory. What has been the reaction of the bar to that change?

Rounds: A good question. I don't know. Privately one hears many expressions of anger and outrage. Fear and apathy probably account more than anything for the public silence. Let me explain. Back when IOLTA was voluntary on the part of the lawyer there was a torrent of propaganda from the bar leadership, Governor Dukakis, and others, exhorting attorneys to participate in IOLTA and praising those who did. Then I could not understand why the participating attorney was deserving of praise when it was not the attorney's money that was being put at the disposal of the bench and bar leadership for their pet charitable and political projects. When not enough attorneys responded to these exhortations, when apparently not enough money was being shaken from the client money tree, there was a movement to make IOLTA compulsory. Now that IOLTA is compulsory, – or "comprehensive" to use the ridiculous, ultra-disingenuous IOLTA euphemism – the communications from the IOLTA Committee, the SJC's administrative agent, have become somewhat threatening. For example a recent communication from the Chair of the IOLTA Committee contains the following cryptic two-sentence totalitarian-flavored paragraph: "Any attorney who fails to fill out the enclosed IOLTA Compliance statement is subject to suspension. Instructions are on the back of this letter." Thus since IOLTA has become compulsory the program has become less, shall we say, friendly.

Clark: You said IOLTA has spread rapidly. Do you have any knowledge of numbers? How much money did IOLTA generate nationwide or in Massachusetts?

Rounds: Yes I do. The ABA IOLTA Clearing House reports that as of the end of 1990 the total income generated nationwide by IOLTA since its inception in the late 1970's was closing on a half a billion dollars. Because of the rapid proliferation of compulsory programs the aggregate number should be about one billion in two to three years.

Clark: What about Massachusetts? What are the numbers?

Rounds: I understand that the number for 1991 is likely to be in the range of 11 million. When IOLTA became compulsory there was almost a 10-fold increase in the IOLTA income available for disposition by the judicial branch and its agents.

What is sorely needed is an impartial, independent non-partisan national audit of the hundreds of millions of dollars that have passed and are passing yearly through the national IOLTA system.

Clark: A suit was recently filed in the United States District Court (Mass.) entitled *Washington Legal Foundation, et al. v. Massachusetts Bar Foundation, et al* [Civil Action No. 91-11135-T] challenging IOLTA. Who are the plaintiffs?

Rounds: The plaintiffs in this suit are two practicing attorneys, several non-lawyers, and the Washington Legal Foundation which characterizes itself as a public interest advocacy group based in Washington.

Clark: I assume they receive no IOLTA funds.

Rounds: Correct. Although if the Massachusetts Lawyers Committee for Civil Rights, the Massachusetts Civil Liberties Union Foundation, and the Connecticut Civil Liberties Union may receive IOLTA funds – and they all have or do –, so also should the Washington Legal Foundation be eligible. It's all politics, and nothing is more politically correct than IOLTA. Incidentally, some of the Washington Legal Foundation's own funds were deposited by its local counsel into an IOLTA account. Perhaps some of the income generated by those funds will be used directly or indirectly to subsidize pro-IOLTA amicus briefs? We will probably never know.

Clark: And who are the defendants?

Rounds: The defendants are the Justices of the SJC in their official capacities and their agents: The Board of Bar Overseers, the IOLTA Committee, and the three conduits.

Clark: And what is the legal basis of the plaintiffs' claim?

Rounds: The legal basis of the civil rights suit is that Massachusetts IOLTA violates the first, fifth, and fourteenth amendment rights of clients and attorneys.

Clark: Just work that out for me. How is the First Amendment implicated?

Rounds: Well, all parties would probably agree that the First Amendment argument is dependent to some extent on the finding of a Fifth Amendment violation. The plaintiffs assert that IOLTA involves a taking by the state of a client's beneficial or equitable interest in the client's property without just compensation – a taking of the use of the trust principal. The U.S. Supreme Court has twice declined to hear constitutional challenges to IOLTA. In neither case, however, was the taking of a client's beneficial or equitable interest in the trust principal litigated. If the Court accepts the assertion that such beneficial or equitable interests are property interests subject to Fifth Amendment protection, we come then to the First Amendment issue of whether the state through the judicial branch can expropriate these beneficial or equitable interests and then exploit them for its own political purposes. The plaintiffs assert that at issue here are the speech and associational rights of clients and attorneys.

It seems to me that whether or not the banking industry receives any economic benefits from client funds held in trust is a red herring.

Clark: As I recall in *Keller v. State Bar of California* [110 S. Ct. 2228 (1990)] the Court drew a distinction between charitable and political expenditures; what's the meaning of that?

Rounds: In California attorneys – as a condition of bar membership – must belong to the state's bar association. In that case the plaintiffs claimed that some portion of the association's compulsory dues were being exploited for political purposes.

Clark: Such as what?

Rounds: Such as the adoption of gun control resolutions, opposing victims' rights legislation, endorsing nuclear weapons freeze initiatives, opposing federal legislation limiting the jurisdiction of federal courts over abortion, and so forth.

Clark: And did the Court declare that if those allegations were proved those expenditures would violate the First Amendment rights of lawyers?

Rounds: Yes. A portion of the dues allocable to the political activities must then be returned to the objecting attorney. If attorneys may not be compelled by the state to commit the use of their own property to political purposes, all the more should they not be compelled to commit the use of their clients' property to such purposes.

Clark: Well what are the allegations of the Massachusetts case? My understanding is that most of the IOLTA monies fund legal services for the poor.

Rounds: The allegations made in the complaint are that even if that were true, IOLTA should be voluntary on the part of the client after full and fair disclosure. Be that as it may, the allegations are that the three conduits are disbursing IOLTA monies to groups and causes which are charitable only in name.

Clark: The allegation is that some of the ultimate recipients here in Massachusetts fall on the political side of the charitable-political distinction.

Rounds: That is correct.

Clark: Can you think of any examples where the plaintiffs might be able to prove that?

Rounds: In a recent edition of the *Massachusetts Lawyers Weekly*, the head of the Massachusetts Legal Assistance Corporation, one of the court's disbursement agents, admitted that IOLTA funds were used for "legislative advocacy." The reports of the Lawyers Committee for Civil Rights – which has received through the conduits IOLTA monies for its "general support" – describe in great detail a number of legislative and class action initiatives in which it participates. It seems, for example, to have a particular fondness for getting involved in legislative redistricting issues. The Massachusetts Advocacy Center, a recipient of monies from the Massachusetts Legal Assistance Corporation – and by the way from the United Way of Massachusetts as well – has produced a study calling for the abolition of Boston Latin School's merit-based admissions criteria and the elimination of "basic" level courses generally.

Clark: Do you perceive a separation of powers problem as well with IOLTA under the Massachusetts constitution.

Rounds: Yes, I do. I discussed this matter with Professor Cella the other day. He speculated that there is an issue whether the income generated by the Commonwealth's IOLTA pool is "public" money or "private" money. He did not see how it could be both, or neither. If public, then these funds belong in the Commonwealth's treasury where it must be subject to appropriation by the legislative branch. If private, then we have a fifth and fourteenth amendment problem. In either case we very likely have a separation of powers problem because it's hard to come up with a theory whereby the judiciary can expropriate and appropriate the beneficial or equitable interests of citizens in this manner. It arguably could if this were the property of the attorney and it was somehow related to its regulation of the practice of law. But these entrusted funds are not the attorney's funds – they are the client's – so I am hard pressed to see how IOLTA fits into our tri-partite system of government. With the anomaly come a number of accountability and freedom of information issues. The plaintiffs, however, have not raised the separation of powers issue in their complaint.

Clark: I get the impression, that your notions of the traditional obligations of a fiduciary are inconsistent with IOLTA as well.

Rounds: Yes, and this is probably how I came to take an interest in IOLTA in the first place. I am first and foremost a trust lawyer. Back in the late 70's and early 80's as the program was developing nationally I began to study the IOLTA propaganda seriously. It seemed clear to me that principles of trust law were applicable. A client trust account was not a bailment nor was the client a creditor of the attorney. The attorney as a trustee has always been held to the highest standard of care in the administration of the client's property. Until IOLTA arrived on the scene, the attorney had always had a duty to act solely in the interest of the client-beneficiary. I found it difficult, therefore, to understand how the bar leadership and the bench could justify compelling an attorney to divert the beneficial or equitable interests of client-beneficiaries without their prior knowledge or informed consent. Apparently the legal establishment was not going to let fiduciary obligations applicable to the rank and file stand in the way of its tapping all that float and the power and patronage that goes with it.

Clark: Based on what you say, I take it that a client's property can literally be used against him?

Rounds: In theory yes. Let's say a landlord-client places monies with his lawyer. The lawyer places some of it in an IOLTA account. The income then finds its way into the coffers of a tenants advocacy group which files a class action suit against the landlord-client. Not too farfetched. It has probably happened already. If constitutional rights are involved, it is irrelevant whether the amounts on deposit are nominal. That seems to be one of the messages of *Keller*.

Clark: How is the public reacting to the filing of this suit?

Rounds: There has been little public response by the rank and file of the bar who oppose the politics of IOLTA, largely out of fear. Privately the plaintiffs are enjoying wide-spread support due more I suspect to the imperious and condescending behavior of the IOLTA Committee than to concern for fiduciary principles. There has been no formal public response by the bar leadership. It continues to pump out its pro-IOLTA propaganda without any reference to the suit, following almost to the letter the script laid out by the IOLTA judge who brought the concept from Canada. The script essentially says that the legality of IOLTA is a settled matter and only the crackpots are raising objections. The Massachusetts Lawyers Weekly, however, has given the suit thorough, consistent, fair, and balanced coverage. Warren Brookes in a column nationally syndicated in about 70 newspapers mentioned the matter of IOLTA and cited my article. His article more than anything else has stimulated public interest. It is he who has

taken the issue outside the legal fraternity to the public at large. Here in Massachusetts as expected both sides have reacted politically. The Boston Sunday Globe, for example, ran a piece in its financial section – not its editorial page – referring to the Washington Legal Foundation as “a noisy collection of lawyers”; whereas in the South Boston Tribune Councillor Kelly in one of his columns described the Foundation as “prestigious.” I think the juxtaposition of responses says it all. By the way I once suggested to someone in the Massachusetts bar leadership that my article – then in draft form – might be published in one of the bar journals; he responded by suggesting that he would do everything he could to prevent its publication, or at least delay its publication until the rulings of the SJC making IOLTA compulsory were final. He suggested that IOLTA was too important – that was his word – for the issues raised in my article to stir up the bar's rank and file. I turned to an ABA publication only to be told that it would not see the light of day in that publication unless all references to IOLTA were stripped from it. Eventually seven academic publications took an interest in it and it was actually published in two of them.

It's all politics, and nothing is more politically correct than IOLTA.

Clark: Well, every state supreme court has declared IOLTA constitutional. Isn't that pretty good evidence that this Washington Legal Foundation case is not worth too much?

Rounds: To the contrary. Often it is the very entity that creates the IOLTA program that then rules on its constitutionality. So its hard to see how there has been an independent, impartial airing of the issues. In any case the taking of the equitable or beneficial interests of clients has not been litigated nor have the First Amendment political speech and association issues.

Clark: Well, the plaintiffs have really taken on some institutions here, the highest court in the state and the two most prestigious bar associations in the state.

Rounds: To be sure. The lawyer plaintiffs deserve our admiration regardless of whether or not we agree with what they are doing. These two men have much to lose by taking on the folks who license them; but they have already gained the respect of many of their peers for doing this, for demonstrating the courage of their conviction that the client comes first. The judicial branch and the bar leadership stand to lose the power and patronage that accrues to those who have power of disposition over enormous sums of money. You can be sure they will not take this lying down. My brother-in-law, a Manhattan lawyer, claims he can already hear the distant squeals of oxen being gored.

Clark: But the response of the defendants is that IOLTA does a lot of good, especially for the poor. So what's the big complaint?

Rounds: Let me respond with an excerpt from Sir Walter Scott's 1828 biography of Napoleon, which I just happen to have here under my arm. Alluding to the behavior of the Emperor Joseph II before the French Revolution, he wrote:

The suppression of the religious orders, and the appropriation of their revenues to the general purposes of government, had in it something to flatter the feelings of those of the reformed religion; but, in a moral point of view, the seizing upon the property of any private individual, or public body, is an invasion of the most sacred principles of public justice, and such spoliation cannot be vindicated by urgent circumstances of state necessity, or any plausible pretext of state advantage whatsoever, since no necessity can vindicate what is in itself unjust, and no public advantage can compensate a breach of public faith.

I think the message here is that no matter how laudable the goals, the ends do not justify the means. If the goals of IOLTA are worthy then it is to the taxpayer that the SJC should turn. It should not resort to holding hostage the license to practice law. Scott's eloquent words may be con-

trasted with those of a recent president of the Boston Bar Association:

To be sure some will complain that the mandatory nature of the new IOLTA program is intrusive and that it involves some administrative inconvenience in setting up the new account. However when the massive unmet legal needs of the poor are weighed against the small intrusion and small inconvenience, it seems clear the scales tip in favor of those in need.

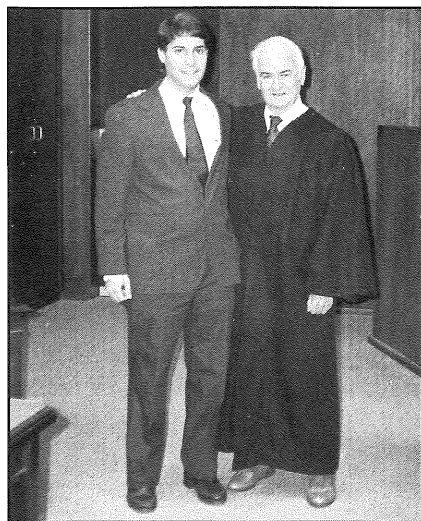
I would suggest to you that when it comes to the violation of First Amendment rights of speech and association even nominal violations are impermissible. There are no balancing tests. Again that is one of the lessons of *Keller*.

Clark: What has been the reaction of the bar leadership to the suit?

Rounds: I will tell you one thing, Gerry, there has been precious little said on behalf of the client. In my view, any doubt whatsoever as to the legality or propriety of IOLTA should be resolved in favor of the client. This has not happened. Instead the defendants are standing firm . . . making preparations to defend what they perceive as their prerogatives, namely the right to exploit the beneficial or equitable interests of others. Unfortunately those others happen to be our clients.

AN INTERVIEW WITH HON. MARTIN F. LOUGHLIN, DISTRICT JUDGE, UNITED STATES DISTRICT COURT, DISTRICT OF NEW HAMPSHIRE

Interview conducted by Robert S. Stephen



Judge Martin F. Loughlin graduated from Suffolk University Law School in 1951. Thereafter, he briefly served as an attorney in the Army during the Korean war, before going into private practice from 1953 until 1963. In 1963, he was appointed to the New Hampshire Superior Court bench and eventually obtained the position of Chief

Justice of the Superior Court. In 1979, Judge Loughlin was appointed by President Jimmy Carter to the Federal District Court of New Hampshire, and consequently became the first Suffolk alumnus to be appointed to the federal bench. He has previously taught trial advocacy at Franklin Pierce Law Center in Concord, New Hampshire.

Judge Loughlin is an avid book reader and tennis player. He and his wife, Margaret, live in Manchester, N.H., where they have raised seven children.

Representing *The Advocate* in the interview was Robert S. Stephen, a third year evening student at Suffolk, where he is a staff member of the Suffolk University Law Review. Rob lives in Manchester, N.H., where he is presently employed in the Hillsborough County Attorney's Office.*

Advocate: On behalf of *The Advocate*, I want to thank you, Judge Loughlin, for agreeing to be interviewed. I would like to begin by asking you about your experience in the Army in your early adulthood. At what point in your life did you join the Army and what effect did your experience have on your future?

Loughlin: I went into the Army when I was nineteen. I joined the 10th Mountain Division and was with them for nine months. I was then transferred to the 80th Infantry, which later became part of the 3rd Army. I was in World War II for approximately three years, nine months of which was active combat. In response to your question

regarding the effect my experience in the Army had on my future, I don't mean to wave the flag, but I think the effect was an appreciation of the United States, especially after seeing the situation in other countries. I think the most searing experience I ever had in the Army was when we liberated Buchenwald in April of 1945. It was a very horrible experience to see what anti-semitism can do.

Advocate: Thereafter, you went on to attend college. I am curious what compelled you to attend college at a time when that was more the exception than the rule.

Loughlin: I was originally interested in pre-med and thus enrolled at St. Anselm College in Goffstown, N.H. with a pre-med major. In my last year, I changed to pre-law because I would have been a poor doctor.

Advocate: Then you attended Suffolk Law School in the late 1940s and early 1950s. Would you comment on the difference between law school then and law school today?

Loughlin: I did do some teaching at Franklin Pierce Law Center so I do have some idea. I think law school today offers more practical courses such as trial advocacy, for example. Although the job market was tough at the time I graduated, today there are many more lawyers per capita. Also, back in the late 1940s and early 1950s a lot of veterans entered law school and, of course, most of their education was paid for under the G.I. bill.

Advocate: Did you enjoy teaching?

Loughlin: Yes. Very much.

Advocate: Do you foresee yourself teaching again at some point in the future?

Loughlin: Yes. That is a possibility.

Advocate: In 1906, Gleason L. Archer, after graduating from Boston University School of Law, founded Archer's Evening Law School. The school was originally designed for the evening law student of modest resources who was compelled to work during the day to meet his educational expenses. Were you a day or evening student and did you work while you went to school?

*Special thanks are extended to Professor Joseph D. Cronin for his assistance in preparation of this interview for publication and to Martin T. Cavanaugh for his assistance during the interview.

Loughlin: I was a day student, but in my last year because of a schedule foul up, I had to go two nights a week to take Evidence. I could appreciate the day students and the night students. I think the night students must overcome great difficulty with working and attending school for four years. I lived in Boston my first two years. Then the last year, I commuted. We still had trains in New Hampshire. I would catch the train right out of Manchester at 6:30 in the morning. Two nights a week, I wouldn't get home until 11:00 at night. With regard to work, I did work summers. At that time, however, they did not have the legal internships that they have today. I think that is a great improvement.

Advocate: What was it like attending school in the city of Boston in the early 1950s?

Loughlin: It was very pleasant. I don't think that there was any problem with crime or drugs. I lived on Pinckney Street which is close to Suffolk. I walked to school. I enjoyed Boston.

Advocate: In 1951, the tuition for a full time day student was \$300.00 a year. Was it difficult in that day to come up with such an amount, which according to today's standards seems so affordable?

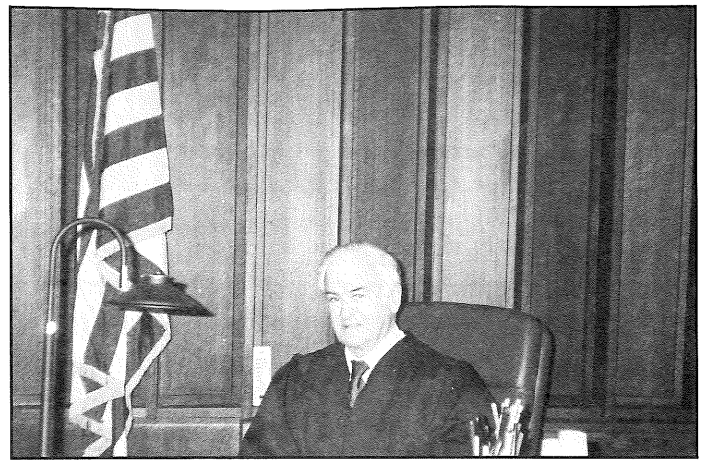
Loughlin: Well, to give you some idea, when I first started practicing in 1953, I got \$50 a week. I can still remember I paid no income tax but I paid 90¢ social security and I brought home \$49.10. I had two children at the time but to get back to your question, the G.I. bill paid all of my remaining St. Anselm tuition and all but my last semester at Suffolk.

Advocate: So the G.I. bill provided the opportunity for many people to go on to school, whether it was college or law school?

Loughlin: I think that it was the greatest thing. Many people are not aware of this but the father of Chief Judge Shane Devine [of the Federal District Court of New Hampshire] was a World War I veteran and was instrumental in getting the G.I. bill for World War II veterans. He was also one of the original founders of Devine, Millimet, & Branch law firm.

Advocate: By the time you enrolled at Suffolk, Frank Simpson had replaced Gleason Archer as dean. What memories do you have of Dean Simpson?

Loughlin: I have very fond memories of Frank Simpson. He was a fine gentleman and he would talk to the students. You could walk right into his office and talk to him. He was always accessible. He was very kind to me. Frank Simpson wrote a book on Massachusetts law which is a masterpiece. I also have fond memories of his son, Donald. Donald taught at Franklin Pierce when I was there, after he retired as dean of Suffolk Law School.



Advocate: Dean Gleason Archer felt that the Socratic method of teaching law was not appropriate at Suffolk Law School as it did not blend well with the constraints the early students had with day time jobs. Rather, he supported the black letter approach, based on lectures reducing law to simple rules and elements. What was the teaching approach when you attended Suffolk?

Loughlin: Predominately lecture. There were a few Socratic classes but the approach was mainly lecture. Many other law schools such as Boston College and Harvard used the Socratic method but Suffolk was different.

Advocate: As a graduate of Suffolk, are you satisfied with the relationship the school maintains with its alumni?

Loughlin: Very much. There is a very close affinity between the school and alumni. I enjoy the annual alumni dinner in December. I am very satisfied with the relationship. In fact, we have a local chapter of Suffolk alumni in New Hampshire. Dean Donahue and Dean Sargent have attended. It is a very strong organization. I was president for one year and one of my law clerks, Margaret Ann Moran, was two years ago.

Advocate: Upon graduation from Suffolk, was it a goal of yours to become a judge?

Loughlin: No, it was not a goal. In fact, when I was first offered a judgeship I refused because of the financial situation. I believe a superior court judge in New Hampshire at the time in 1963 was paid \$16,000. I was making substantially more than that in private practice. At the time, I had four children.

Advocate: What did you do for work directly after graduating?

Loughlin: I graduated in 1951 and took the bar exam on the 27th, 28th and 29th of June. On June 30th, I was on a morning report at Fort Benning, Georgia. I was recalled for the Korean war.

Advocate: That is quite different from most law graduates who often go into private practice upon passing the bar exam.

Loughlin: In a way, it was a mixed blessing. I didn't realize this at the time I got to Fort Benning, but was later apprised of the fact that I had passed the N.H. bar. When they learned that, they transferred me to the legal section of the combat training command at Fort Benning. I was not a member of JAG [Judge Advocate General] but was assigned to do defense work, which I did for eighteen months. Not the office practice but actual trial experience which is dramatically different.

Advocate: Did you find it helpful to get courtroom experience right out of law school?

I have to be candid. There were only two ways of becoming a judge and that was to know a governor or senator and I knew Governor John King and I knew Senator John Durkin.

Loughlin: Yes, but my clients may have suffered at the beginning.

Advocate: Did you have many interesting cases when you were in the Army?

Loughlin: Very Many. I had rape cases, attempted murder, desertion, the entire gamut. All I did was defense work. The head of the JAG would not allow any of his JAG counsel to act as defense counsel, only as prosecutors.

Advocate: Did you ever work as a prosecutor?

Loughlin: Never. When I was at Fort Benning, I would have liked to try one or two, but the policy was that only JAG would prosecute. The head of the JAG was an old infantry officer who went to law school after World War I, so he was quite a disciplinarian.

Advocate: At some point after law school, you went into private practice. Did you enjoy that point in your career?

Loughlin: I was in private practice from April 1st of 1953 until September 9th of 1963. I was an associate with Conrad Danais and then I was a partner with Jim Broderick. I enjoyed that part of my career. Approximately 50% was trial work and 50% was general practice. At that time, we didn't specialize. We took anything as we didn't know any better. Today, there is a problem regarding malpractice. Malpractice was unheard of then. We mainly represented plaintiffs in negligence cases, as well as defendants in criminal cases. This is, of course, prior to *Gideon v. Wainwright*, and thus assigned counsel wasn't paid very much.

Advocate: Having been a judge now for approximately 30 years, do you miss private practice?

Loughlin: I used to, but in the last ten years or so, no. I am getting too old to go back into private practice. I could go back perhaps as "of counsel."

Advocate: Thereafter, I believe you were appointed to the superior court in New Hampshire and ultimately appointed Chief Justice. Would you comment on that part of your career?

Loughlin: I became a judge on September 9, 1963. I enjoyed private practice and was a little bit reluctant to leave it but once I had been on the bench for two or three years, I felt I should stay. It was a difficult decision as it was a financial sacrifice at the time. I remember that my wife wasn't too keen about my going on the bench, although she has supported me 100 percent. After practicing law, I thought I would like to be a judge. I think that most lawyers do. I thought that, perhaps, I would do something that could help people. I was Chief Justice for a short period of time before I was appointed to the federal bench.

Advocate: What were the obligations of the Chief Justice as compared to the other judges on the superior court?

Loughlin: The Chief Justice mainly did the administrative work. If there was an illness of a judge, the Chief Justice would assign someone to cover. If a judge was overloaded with work, the Chief Justice would remove that judge from an active circuit. At that time, we circuited the whole state. When I went on in 1963, there were seven judges. Now there are twenty five. We covered all ten counties. The longest trip was to Berlin, 135 miles each way. The Chief Justice had a myriad of duties. When I was Chief Justice, I still carried about a 70% case load and 30% administrative. Now it has gotten so big that the Chief Justice couldn't do that. I believe that the present Chief Justice, Richard Dunfee, does only administrative work.

Advocate: What are some of the differences you have experienced between being a state judge and a federal judge?

Loughlin: Generally speaking, I believe the state court is tougher. That court deals with more difficult criminal cases. I think the most difficult cases, however, that I have ever handled were domestics, which is something I don't have anymore. Whether it is federal or state court, sentencing in criminal cases is very difficult. On the federal side you do get difficult cases in the criminal field but you don't get murder cases. I believe that civil cases in the federal courts are much more difficult, generally speaking. The reason is that Congress has passed so many complicated laws regarding civil rights legislation. I think that is one of the problems that we are experiencing with the increase in litigation of the federal courts. Congress passes a law and says, here you are, one thousand judges take care of

it, without giving us any idea of what they are dumping on us.

Advocate: You said that the most difficult cases that you have handled were the domestic cases in state court. Was that due to the emotions involved?

Loughlin: Emotions and the difficult decisions such as whether a husband or wife or both should have custody. You make decisions regarding their life long work, whether or not they should retain certain property and how the property is going to be divided. You hope that they come out to a stipulation so you don't have to get into it. I also find that they are more volatile. Sitting in Exeter on one occasion, when I had been a judge for about three months, a husband shot his wife right outside of the courtroom. In another incident, I was sitting over in Newport in Sullivan County waiting for the litigants to come in on a domestic case. However, the husband intercepted the wife coming from Claremont and killed her and then killed himself. That could have happened in the courtroom. Those are the dangerous cases.

Advocate: We were talking before about some threats lodged against various federal district court judges and the danger they are put in. It must be difficult when you become a judge because you want to help people and as a result of the emotions involved, your life is sometimes put in danger.

Loughlin: To give you a bit of historical background, in 1979, Judge Wood from Texas was murdered. Since then, two more federal judges have been murdered. Judge Vance was killed by a package bomb in Alabama and a federal judge from New York was killed, while he was mowing his lawn, by a disgruntled ex-police officer who thought that his daughter should have gotten a verdict in a civil rights action. For a hundred years before that, there was never a federal judge killed. In the last twelve years we have had three, plus a number of threats, such as the recent threats against Judge Kelly from Kansas.

Advocate: Do threats and the possibility of resulting danger concern you?

Loughlin: Not really. What really bothers me is any risk regarding my family. If they are going to get you, they are going to get you.

Advocate: You were appointed to the Federal District Court of N.H. in 1979 by President Carter, thus becoming the first Suffolk alumnus to be appointed to the federal bench. Would you discuss the continuously increasing reputation of Suffolk in the legal community, as evidenced by your own appointment?

Loughlin: I guess I may be prejudiced to some degree, but I must be candid. Suffolk has a tremendous reputation

in New Hampshire and all over, but I know more about New Hampshire. I take pride in Suffolk and I am happy to see somebody from Suffolk doing well. I have had quite a few law clerks from Suffolk as well as other law schools. I can compare Suffolk to any other law school. I could give you a litany of judges who have graduated from Suffolk. Off hand, I can think of Judge Dalianis, Judge McHugh, Judge Barry, and Judge Champagne from Manchester District Court. There are probably as many as seven or eight on the superior court. Suffolk has an excellent reputation in New Hampshire. I know from talking with judges in the First Circuit without soliciting their thoughts that they are very impressed with Suffolk. In fact, I believe Judge McNaught from Massachusetts, who just retired from the Federal District Court, is teaching at Suffolk.

I can unequivocally say that I would still be trying criminal cases, which are very interesting and easier, if it were not for the sentencing guidelines that went into effect on November 1, 1987.

Advocate: What did it mean to you to be appointed to such a highly respected position as a federal court judge?

Loughlin: Well, it might sound weird to you but I deliberated about taking it because I liked the superior court so much. It was with some reservation that I did take it. I am not sorry that I made the move but I have a great respect and fondness for the superior court.

Advocate: What ultimately compelled you to decide to become a federal judge?

Loughlin: I don't want to sound mercenary, but I guess I will. It was the substantial increase in salary and the challenge. Federal law is a lot different. I have to be candid. There were only two ways of becoming a judge and that was to know a governor or senator and I knew Governor John King and I knew Senator John Durkin. There may be a few exceptions to that but generally speaking that is true.

Advocate: After being a judge for so long, do you still learn something new every day?

Loughlin: Sure. Human nature, the law, dealing with people, and cases, new angles on cases which you think are routine. It is always something different.

Advocate: Were you ever involved in politics?

Loughlin: Yes, that is probably why Gov. King appointed me. When Gov. King ran for office, I was the city

co-chairman of the Democratic Party. After being on the superior and federal court bench, I found out it made no difference what party affiliation you had. You call them as you see them.

Advocate: Having a large family with seven children, did you find it difficult to raise your family while concentrating on your legal career?

Loughlin: Well, it was difficult. I did a lot of traveling once I became a judge and the financing was difficult. When I started out, it was pretty hard to get a job. When I first took the bar, there were forty-nine others also taking it and at that point that was the largest number of bar applicants. Fifty percent passed. There was one available job that I knew of in the state. There may have been others but that was the only one I was aware of. There are more jobs now but proportionately more lawyers, so it is still difficult.

Advocate: Do you find many Suffolk alumni in your courtroom?

Loughlin: I do. In fact, I believe proportionately that there are more Suffolk graduates practicing in this state than any other non-domestic law school.

Advocate: During your eleven years of sitting on the federal bench, what decision or decisions are most memorable to you?

Recently we had a case. . . . We were told it was destroying government property in a federal park. We found out that a woman had broken a branch to toast marshmallows for her kids. That case was quickly thrown out by the magistrate.

Loughlin: The most arduous case I ever had was an environmental case out of Kingston which involved and still involves 32 million dollars. It started on May 15, 1980. It has been up to the First Circuit. It is the longest environmental case ever tried, 185 trial days. I still have the case as I am monitoring the settlement and there is still some litigation between the two litigants. They figure the premises in this particular case will not be cleaned up until the year 2042.

Advocate: I believe, as a senior judge on the federal bench, you have the opportunity to choose the type of case you wish to hear. Which type do you prefer and why?

Loughlin: As a senior judge, I am taking everything but criminal cases. I have cut back on my case load. I do perhaps 75% to 80% of what I did as a non-senior judge. The reason why I have stopped taking criminal cases is because

of my strong feelings about the sentencing guidelines. I can unequivocally say that I would still be trying criminal cases, which are very interesting and easier, if it were not for the sentencing guidelines that went into effect on November 1, 1987.

Advocate: Regarding the sentencing guidelines, the argument against them is that they take away much of the discretion a judge would otherwise have. It must be difficult for you when you are powerless to consider any of the extenuating circumstances in a case.

Loughlin: It not only takes away much of the discretion, it takes away practically all your discretion. It takes away any compassion. It takes away any ability to deal with unusual cases which call for either an upward or downward adjustment. They pay lip service and say you can go upward or downward in some cases but if you look at federal guideline cases, especially from the First Circuit, very few downward departures have been sustained. Under the old rule 35 [Federal Rules of Criminal Procedure], the only one who can really proffer a reduction in sentence is the United States Attorney, if he gets substantial cooperation from the defendant. If the defendant decides to inform on someone else, then only the U.S. Attorney can bring an appropriate motion and the judge will sit there and say "yes" or "no" to it, but the court cannot initiate the process. That has many untoward effects. I had a situation where a defendant cooperated 100% but he had nothing to offer so his sentence stayed as is. I could give a multitude of examples why I disagree with the guidelines. They have created their own frankenstein. Under the sentencing guidelines, everybody goes to jail. Our prisons are already overcrowded. I think that the shock incarceration programs you now see are a very subtle way of saying, hey, we have too many people in prison and we want to get them out. The guidelines, however, are inconsistent with this approach.

Advocate: Do you think the sentencing guidelines will be repealed?

Loughlin: I doubt that they will ever be repealed. Modified possibly, but not repealed.

Advocate: The demeanor in the courtroom is often serious. Could you comment on the lighter side of your courtroom experiences?

Loughlin: There were many humorous experiences. Perhaps this story is not considered humorous but there was a trial up in Coos County where two defendants had been accused of breaking and entering and stealing twenty bottles of liquor from the legion post. The liquor was introduced into evidence and after the judge charged the jury, the jury went out to deliberate. Within two or three hours, they seemed to be a very jovial bunch. We later found out that they had been imbibing from the evidence. A mistrial resulted. In another case, a domestic relations case, an at-

torney objected to a question. The judge asked what the basis was for the objection. The attorney couldn't think of anything so he said: "I object to his tone of voice." The other attorney was pretty sharp and said: "can we strike the tone and let the question stand?" I remember a case over in Exeter, another domestic case, where one counsel was cross-examining the husband. Just as this attorney pointed his finger at the husband, the other attorney got up to get some papers and passed the cross-examining attorney's line of vision when the cross-examining attorney said: "you beat your wife." The other attorney took umbrage at that and starting chasing him around the courtroom. I was trying hard not to laugh. I had a criminal case where a juror fell asleep. I noticed it and my law clerk noticed it so I called the juror in. He said he had a rough night as he had done a lot of celebrating. I excused him. One of the jurors later said to me: "I didn't mind him sleeping but he snored and it kept me awake."

Advocate: Speaking of juries, do you deal directly and closely with your juries?

Loughlin: Yes. I have always had a close relationship with the juries. The jury system is wonderful. After the case is over, I usually go in and talk with them and when the term is ended, I thank them. I don't discuss their decision but if they have any questions about the case, I will discuss that with them. One thing I have learned is that you can't read juries. If you could you would be a millionaire. I had a very serious personal injury case where the parties settled on the last day of a fourteen day trial. One of the attorneys said to me: "I settled because I was afraid of the number four juror; I could tell just by looking at her that we didn't have a case as far as she was concerned." It was really ironic because that juror later said to the plaintiff's counsel: "There is not enough money in the world to compensate your client."

Advocate: From your perspective as a judge, what tips do you have to offer to trial attorneys?

Loughlin: I think trial attorneys really have to know the rules of evidence well and trust the judge. If you have a case and you know that there is going to be a question on an exception to the hearsay rule, for example, and you have briefed that issue, you can say to the judge: "Judge, under 803(18), learned treatises, it shouldn't go into evidence." That is very impressive. The other thing is that you just have to go into the courtroom and take your knocks. I don't recommend taking a million dollar case as your first case but you do have to go in and get your knocks. It is similar to a boxer who spars but never fights a fight. The only way to learn is to go in there and fight.

Advocate: What considerations are important to you in hiring your law clerks?

Loughlin: Their ability to write. I try to get some idea of their background. Are they hard workers? You can often

establish that by looking at what they have done for work in the past. Also their ability to get along with other people is important. High marks are not a criterion as far as I am concerned. I have had quite a few Suffolk students work as law clerks. I would say that I have had as many as ten. I think it is tremendous experience.

Advocate: Many of the federal courts are in crisis across the country due to case overload. What effect has this had on the federal district court in which you sit and what do you foresee for the future?

One of the most rewarding things to me is the fact that I have had four cases go to the Supreme Court of the United States from the First Circuit Court of Appeals and the Supreme Court agreed with my decision three out of four times.

Loughlin: We are inundated with criminal cases. In the last four or five months, Judge Devine and Judge Stahl have tried nothing but criminal cases. I have taken up some of the slack on the civil cases. As a result of the large number of criminal cases we are seeing a backlog of civil cases because they can't get at them. It is a problem now and it is going to get worse.

Advocate: Is the solution to the problem simply the appointment of more judges or will something more have to be done such as limiting federal court jurisdiction?

Loughlin: More judges would help on criminal cases as well as a more common sense approach by the U.S. Attorney in what cases to prosecute. You wonder about some of them being prosecuted. This is ridiculous but recently we had a case and we asked what the case was about. We were told it was destroying government property in a federal park. We found out that a woman had broken a branch to toast marshmallows for her kids. That case was quickly thrown out by the magistrate. That is kind of silly but that is part of the problem.

Advocate: Does it bother you when you decide a case only to be reversed by the First Circuit?

Loughlin: No judge likes to be reversed. There are some cases where even after you are reversed you still think you were right and they were wrong. I think I may have a little bit higher of a reversal rate than most judges. One of the most rewarding things to me is the fact that I have had four cases go to the Supreme Court of the United States from the First Circuit Court of Appeals and The Supreme Court agreed with my decision three out of four times. In *Piper v. State of New Hampshire*, Piper was a resident of Vermont and under the old N.H. rule, if you were going to prac-

tice and take the bar in N.H. you had to represent that you were going to reside here. I held that the rule was unconstitutional and in effect I reversed the N.H. Supreme Court. Eventually, the U.S. Supreme Court agreed with me. There are some cases where I have been reversed and have looked at it after and have asked why did I do such a stupid thing. It used to bother me, but it doesn't anymore.

Advocate: In the near future, after vacancies of federal judgeships are filled by President Bush, Reagan and Bush judges will account for nearly 70% of the federal judiciary. As a Carter appointee, what effect do you feel this conservative trend will have on the law enunciated from these courts?

I have quite a bit of experience with Justice Souter. . . . He is a real student of the law. That is one of the great appointments which have been made by President Bush.

Loughlin: Already has. I went on the superior court bench before *Miranda* and it was a conservative Court then. I saw the pendulum swing after *Miranda* more towards a liberal ideology and it is very evident today that the Court has become ultra conservative. *Arizona v. Fulminante* is hard to swallow. That is the case where the death penalty was received by the defendant and in a 5-4 decision, the Supreme Court said that the confession of a defendant may be harmless error. It is just common sense from a juror's point of view to believe a defendant must have committed the murder if he confesses. What stronger evidence can you get. To say that it is harmless error is really stretching it.

Advocate: What was your reaction when you learned that a former New Hampshire Supreme Court Justice and First Circuit Judge, David Souter, was nominated to the United States Supreme Court?

Loughlin: Ecstatic. I think it was a great appointment. I don't agree with him in a lot of his opinions but that doesn't mean he is wrong and I am right. I have quite a bit of experience with Justice Souter. When he was with the Attorney

General's office, I was on the superior court and then he came onto the superior court and I was an associate judge with him and then I became Chief Judge. He is a real student of the law. His writings are excellent. We all should be proud of him. That is one of the great appointments which have been made by President Bush.

Advocate: Originalists believe that the words of the Constitution carry the meaning that was originally understood by those who ratified it. Do you agree with this strict construction approach to interpreting the Constitution?

Loughlin: I agree with a common sense approach. Not too liberal nor too conservative. Just common sense.

Advocate: Is it true that you are an avid book reader?

Loughlin: Yes. I like to read, especially history. I probably read 50 to 70 books a year. I am a World War II buff. I have probably 800 books on World War II.

Advocate: Do you have a favorite author and/or book?

Loughlin: A.J. Cronin. *The Keys to the Kingdom*. I have always liked him.

Advocate: Is it true that you are a former golden glove boxer?

Loughlin: Yes, but I couldn't break an egg! 1947 was the last year I fought.

Advocate: Today, you have settled for a less brutal sport, tennis.

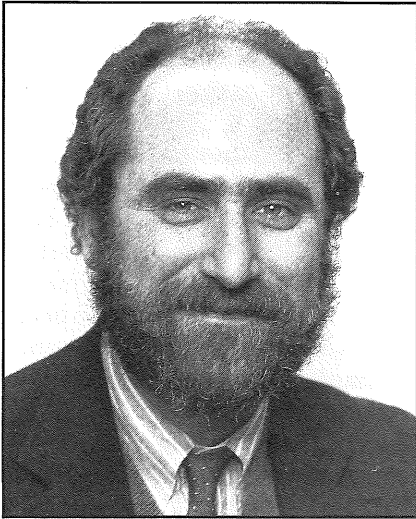
Loughlin: Yes. I have been playing tennis since 1953. It is not, however, always less brutal.

Advocate: Thank you for taking time out of your busy schedule for this interview. I am confident that I speak on behalf of the entire Suffolk Law School community when I say that we are proud of you and we wish you and your family the best of luck in the future.

Loughlin: Thank you. I enjoyed this interview.

THE HIV INFECTED HEALTH CARE WORKER: THE NEW AIDS SCAPEGOAT

by Steven Eisenstat*



I. Introduction

Over the past eight years since the Human Immunodeficiency Virus ("HIV") was first identified as the cause of Acquired Immune Deficiency Syndrome, ("AIDS") there have been repeated demands that measures be implemented to curtail the spread of the infection. Often these measures, while ostensibly

proposed to safeguard the public health, did not offer any real protection to the public. For example, there have been demands to tattoo and quarantine those infected with the virus, to prohibit HIV positive food handlers and teachers from continuing in their profession, and to prohibit students from attending classes. All of these measures have been ultimately rejected, since, given the mode of transmission of HIV (through either blood to blood or sexual contact), such measures were determined to be unnecessary, and in fact, ineffective in halting the spread of the virus. However, the widespread support for many of these measures, despite the ineffectiveness of the proposals to truly halt the virus's spread, has been indicative of the anger, frustration, and fear which many have felt towards the disease and those infected with it. Homosexual males and intravenous drug users, the two groups most prone to contracting the disease, have been singled out and scapegoated as the cause of the epidemic. "They" were the reason for the disease, and if only "they" could be isolated, "we" would all be safe.

Over the past few months, a new scapegoat has appeared on the AIDS landscape. Joining the ranks of gays and intravenous drug users as those who are somehow responsible for the AIDS epidemic are doctors, dentists, and other health care workers ("HCWs") who, despite knowing of their HIV infection, have continued their medical practice. These professionals have now come under attack as a public health menace due to the tragic case of Kimberly Ber-

galis, a twenty-three year old Florida woman who is dying from AIDS.

It is believed Ms. Bergalis contracted the disease during surgery to extract two maxillary third molars. Unbeknownst to her, her dentist, Dr. David Acer was infected with the virus. The doctor was aware that he was HIV positive, but nonetheless continued his practice. It is unclear how Ms. Bergalis became infected: that is, whether Acer was conforming with the Centers for Disease Control ("CDC") recommended protective measures of properly disinfecting his equipment and not reusing certain equipment such as surgical gloves. Such procedures are designed to safeguard against transmission of the virus during surgery. It is also unclear whether the infection was even transmitted from Dr. Acer, or whether Ms. Bergalis contracted the virus from another one of Dr. Acer's patients via poorly sterilized dental equipment. Subsequent investigations by the CDC indicate that four other patients of Dr. Acer were also infected as a result of being treated by the dentist.

Ms. Bergalis's story has captured the attention of the nation for it justifies many people's worst fears; that an individual can be monogamous, heterosexual, and not use intravenous drugs, and still get AIDS. Indeed an individual can be infected as a result of being treated by the very doctor from whom she seeks medical care. As such, the story has received extensive media coverage. Largely as a result of the Bergalis tragedy, and the discovery of other HCWs who have continued their medical or dental practice despite knowing of their own infection, attention has been focused on a number of measures designed to protect patients from being infected by their HCWs. A number of jurisdictions have already enacted such legislation, and more are considering proposed bills. For example, in July 1991 the United States Senate passed two bills which would mandate the HIV antibody testing of all HCWs who perform exposure-prone invasive procedures, and imprison all infected HCWs who fail to inform their patients of their infection. Moreover, the CDC, the American Medical Association ("AMA") and the American Dental Association ("ADA") have formulated their own guidelines concerning this issue.

This essay will attempt to address what I believe are the two underlying questions which must be resolved before any limitation on HIV infected HCWs should be adopted.

First I will examine the actual risk of infection imposed by infected HCWs to their patients. Second, I will examine one proposal which has been advanced for protecting patients from possible infection by their HCWs: that of requiring that all HIV positive HCWs reveal their status to their patients and/or licensing authorities, and then subsequently be restricted from performing certain invasive procedures.¹ My conclusion is that based upon the current data, the risk of transmission of the virus from HCW to patient is exceedingly slight. I also suggest that there are significant drawbacks with the proposal to require that infected HCWs reveal their infection to their patients. Thus, I conclude that given the extremely slight risk of transmission, and in light of the proposal's serious flaws, that mandatory HCW disclosure does not represent sound public health policy.

Given, however, the overwhelming public support for some limitations, and the need to encourage public confidence in our public health officials and the manner in which they are dealing with the AIDS epidemic, I believe political reasons, rather than public health concerns, will dictate that some form of disclosure restrictions be implemented.

II. While HCW to Patient HIV Transmission is a Viable Means of HIV Infection, the Extent of the Risk of Transmission is Extremely Low.

Since 1985, the CDC has recognized the risk presented by infected HCWs transmitting the virus to their patients. Given that one of the possible routes of transmission is through blood to blood contact, HCWs, when performing certain invasive procedures, can transmit the virus by cutting themselves and thereby having their infected blood mingle with the blood of their patients. In fact, this is one of the ways in which Ms. Bergalis may have been infected by her dentist.

However, the risk of an infected HCW transmitting the virus to one of her patients is exceedingly slight. The CDC estimates that there are more than 6,400 HIV infected HCWs (although only 40 have been infected as a result of occupationally related exposures), including 703 non-surgeon physicians, 47 surgeons, 171 dental workers and 1,358 nurses. Over the past decade, there are only five known cases of possible HCW to patient transmission, and all five were Dr. Acer's patients. Given the number of infected HCWs, and that they have probably performed hundreds of thousands of medical procedures which are capable of transmitting the virus, the low transmission rate of HIV by this means is readily apparent.

There have been various estimates concerning the actual risk imposed by infected HCWs performing invasive procedures. The CDC estimates that between 12 to 122 patients may have died as a result of HIV infection transmission through surgery over the past ten years. The CDC places

the risk of the virus being transmitted from an infected dentist to a patient from between 1 in 263,000 to 1 in 2.6 million; and the risk of transmission from an infected surgeon from between 1 in 42,000 to 1 in 417,000. Other medical sources question the accuracy of the CDC estimates, and place the risk of infection through surgery from between 1 in 100,000 to 1 in one million operations. Dr. C. Everett Koop, the former United States Surgeon General has characterized the risk to be "so remote that it may never be measured."

Further evidence of the extremely low risk of infection posed by infected HCWs has been documented by examining the patients of four other HCWs who were found to have performed invasive procedures for years after becoming infected. In one case, a Nashville surgeon performed 2,160 operations after learning of his infection. Of the 616 patients who agreed to be tested, only one tested positive, and he was an intravenous drug user who was likely infected prior to his surgery. In two other studies, 137 patients of two surgeons who were infected with HIV were tested. All 137 tested negative for HIV infection. And in a fourth study, 143 former patients of an infected dental student subsequently tested negative as well. Admittedly, these studies are not conclusive. For example, not all of the infected HCWs' former patients agreed to be tested, thus raising the possibility at least that those patients who were infected, fearing the loss of their confidentiality, refused to be tested or otherwise reveal their HIV status. Based on the available data, however, Dr. Acer's five patients are the only patients thus far who have been identified as possibly being infected by their HCW.

As alluded to earlier, the fact that all the known suspected cases have been Dr. Acer's patients, raises the question of why only his patients became infected. While investigations have concluded that his patients contracted the disease through their contact with him, it is probable that Dr. Acer failed to comply with the infection control procedures designed to prevent transmission of the virus through surgery. For example, there are some indications that the dentist failed to disinfect his operating instruments properly, and that he may have reused certain disposable items such as his latex operating gloves. There are several significant implications if the cause of Dr. Acer's patients' infection was his own failure to adhere to infection control procedures. First, it would help explain why all the known suspected cases of HCW to patient infection have been among only one HCW. One would ordinarily expect a random occurrence of such infection among a number of different HCWs' patients. Second, finding all the cases clustered with one HCW could provide powerful evidence of both the professional skills of the overwhelming majority of HCWs, and the effectiveness of infection control procedures to protect both patients and HCWs from infection.

Thus, if the cause of the transmission was due to Dr. Acer's failure to adhere to infection control procedures, then it is that failure, and not the inherent risk involved

in having HIV infected HCWs performing surgery on patients which should be addressed. Consequently a more appropriate focus for public health concerns as a result of the Kimberly Bergalis tragedy would be to ensure that infection control procedures are scrupulously followed, rather than upon prohibiting HIV positive HCWs from conducting invasive procedures.

III. Since the Extent of the Risk of HCW to Patient Transmission is Exceedingly Low, Should Infected HCWs be Prohibited from Treating Patients?

As noted earlier, there is a clear legislative trend towards placing some restrictions upon HIV infected HCWs. In light of the July 1991 CDC Guidelines, which recommend disclosure and practice restrictions, that trend is likely to accelerate. As with previous proposals, the public health is being cited as the motivating factor for these restraints. However, due to the extremely low risk of HIV transmission from HCW to patient, one must at least question if such legislation is necessary to safeguard the public's health.

A. Reasons for Requiring Patient Disclosure and Restricting the Practice of Infected HCWs.

One measure advocated to reduce the risk of HCW transmission is to require that infected HCWs disclose their infection to their patients and/or prohibit them from continuing to perform invasive procedures. The CDC Guidelines incorporate both these measures. The Guidelines suggest that all infected HCWs who perform "exposure-prone" procedures should refrain from conducting those procedures unless they inform their patients of their infection, and receive permission to conduct the procedures from an "expert review panel." This review panel would consist of the HCW's personal physician, an infectious disease expert, a medical professional with expertise in the procedures performed by the infected HCW, and a public health official.

Certainly, many of the reasons in favor of mandating patient disclosure and imposing practice restrictions are compelling. One cannot help but be moved by Ms. Bergalis's tragic experience, and thus be drawn to conclude that some HCW restrictions may be necessary. Had her dentist been required to warn her of his infection, or had he been prohibited from performing oral surgery, she would probably not now be dying of AIDS. Implicit in the demand for disclosure requirements, is the belief that patients have a right to be informed of their HCW's infection, and the risks attendant thereto, prior to their agreeing to be treated by the HCW. It has been suggested that this right is founded upon the doctrine of informed consent. Informed consent, which is premised upon the belief that individuals have the right to bodily autonomy, guarantees each patient the right to know of all material risks associated with a medical

procedure prior to the patient's agreeing to undergo the procedure. It is thus argued that the risk that an infected HCW may transmit the virus while performing a medical procedure on a patient is a material risk, and therefore one which the patient has the right to be informed of prior to consenting to be treated by the infected HCW.

There is, however, some question as to whether the doctrine of informed consent is even applicable to a patient's right to be informed of her HCW's infectious status. A number of commentators have argued that the doctrine was developed so that patients could render informed decisions concerning the risks and benefits associated with a particular procedure, and not as a means to protect them against dangerous or incompetent physicians. Rather, it is suggested that professional and licensing authorities have the responsibility to protect patients against incompetent or dangerous HCWs.

There is merit to this position. The doctrine of informed consent does not compel HCWs to inform their patients of other personal conditions which would expose their patients to increased risks. For example, cardiac surgeons are not required to inform their patients of successful malpractice suits filed against them. Nor are they required to inform their patients that they are alcoholics or substance abusers. And yet, such information may certainly be relevant to an increased risk of serious harm, or even death, which the patients of such HCWs would face. Since the doctrine does not require that negligent or alcoholic surgeons reveal their status as such, why then should it mandate that HCWs reveal their HIV status?

Another reason advanced for requiring physicians and other HCWs to disclose their infectious status is based on the need for governmental, public health and medical officials to maintain public confidence. To date, the credibility of these officials has remained fairly intact, due in large part to the fact that they have been right when offering assurances that there is no need to worry about contagion through casual contact such as in the work place or in school. However, the CDC cannot offer the same assurances that there is nothing to fear from an infected HCW who performs invasive procedures. The risk is slim; extremely slim, but it does exist. Thus, if restrictions are not placed upon infected HCWs, and more cases of HCWs infecting their patients occur, the risk that the public will lose its confidence and trust in public health officials is real. Such a loss of faith could lead to the enactment of even greater restrictions upon all HIV infected individuals, even when there is no risk of transmission, since those voices that have traditionally been successful in preventing the enactment of unnecessary measures would have lost their credibility.

Failure to place restrictions upon infected HCWs could also cause the public to forego its trust in their health care providers as well. Doctors are expected to make their patients healthy, not to give them a deadly disease. How then

can HCWs justify exposing their patients to AIDS, merely so they can continue to practice their profession? This concern over the medical profession's image is shared by the medical profession itself. The AMA has adopted an ethical position that states: "A physician who knows he or she is seropositive should not engage in any activity that creates a risk of transmission of the disease to others." The ADA has adopted a similar position for its members. A 1991 survey of 300 dentists, conducted by the Journal of American Medical Practice, indicated that while most of the responding 168 dentists believed that the risk of transmission through oral surgery to be either slim or nonexistent, a majority of the respondents nonetheless believed that HIV infected dentists should refrain from performing clinical work. This apparent inconsistency in reactions was explained by the study's authors as representing the "dentists' self-interest in safeguarding the public's image of dentistry."

Over the past few months, a new scapegoat has appeared on the AIDS landscape.

Lastly, while the extent of the risk of transmission is extremely low, it is, at this point, purely conjectural. While there are only five suspected cases, it can be argued that the number of patients who have actually been infected by their HCWs is higher. The CDC has estimated that over the past decade anywhere between 13 and 128 patients have been infected in this manner. In addition, as the number of infected HCWs rise, so too will the possibility that more of their patients will be infected as well. Therefore, an argument can be made that the risk to patients is actually greater than the current numbers would indicate, and that accordingly, stringent restrictions are necessary to prevent further and more widespread infection.

B. Reasons Against Requiring Disclosure and Restricting the Practice of HIV-Infected HCWs.

The above stated considerations forcefully argue in favor of requiring some form of disclosure and invasive procedure restrictions upon infected HCWs. The imposition of these restrictions, however, could also have significant and profound implications upon the delivery of health services to those with AIDS, and those most at risk of contracting the virus. As such, the cost of setting the restrictions could interfere with the attainment of crucial public health goals and thus may outweigh the limited benefit gained through their implementation.

Physicians and other health care providers are increasingly wary of treating HIV infected individuals and those who are perceived to be at risk of being infected. For example, in a recent study reported in *Newsweek* magazine, two-thirds of the medical residents polled stated that they did not intend to treat people with AIDS. Another survey, con-

ducted in 1989 and reported in the *New York Times*, indicated that only 31% of 5800 dentists polled were willing to treat AIDS patients. These surveys seem to present an accurate picture of the hesitancy of HCWs to treat and care for AIDS patients. For example, in New York City, with over 25,000 physicians, the Gay Men's Health Crisis, the largest volunteer AIDS agency in the city, had, in 1990, a referral list of fewer than 60 physicians willing to treat the city's over 200,000 patients with HIV infection.

Obviously, the primary reason for HCWs' reluctance to treat AIDS patients is the fear of transmission from patient to HCW. Once again, while such transmission is rare, it has occurred. There are currently forty confirmed cases of HCWs becoming infected through occupational exposure. If HCWs are told that in addition to facing possible infection from treating AIDS patients, they would also forfeit their practice should they become infected, one would certainly expect the number of HCWs who are currently willing to treat HIV-infected patients to diminish even further.

Attendant to the HCWs' fear of losing their livelihood should they become infected, they would also face the significant stigma that attaches to individuals with AIDS, particularly when such information is disseminated to others besides the patient and her physician. Despite assurances of confidentiality, the infected HCWs' patients, colleagues and licensing authorities would likely be informed of the HCWs' infection. As a result, HCWs would lose more than their livelihood. Rather, they would be exposed to the same forms of public and professional ostracism that other people with AIDS have been forced to endure. HCWs would also face the possible loss of employment and insurance coverage as a result of their disease. These losses, and more, would be the "reward" society would pay to the HCW who willingly risked getting AIDS from treating HIV infected patients. Who could blame any HCW, who, when faced with these costs, chose not to treat HIV infected patients? Therefore, the setting of practice restrictions would likely cause many more HCWs to reconsider the wisdom of continuing to treat patients who are HIV infected. In light of the dramatic anticipated increase in the number of AIDS patients requiring medical attention over the next ten years, a public health policy that reduces the number of HCWs willing to treat these patients certainly needs to be questioned seriously.

Such restrictions would not only diminish the number of HCWs willing to treat HIV infected patients, but they would likely also limit the type of care that many HCWs still willing to treat such patients would be willing to perform. For example, while HCWs might still examine and perform non-invasive procedures, they would be reluctant to perform invasive procedures on their patients. Thus, patients requiring surgery, particularly if the surgery could be characterized as "elective" in nature, would find it increasingly more difficult to find HCWs willing to perform such procedures.

The imposition of disclosure and practice restriction regulations also raise the issue of how those restrictions would be enforced. For example, if a surgeon discovers she is HIV infected, how will anybody learn of her seropositivity unless she herself reports it to her employer or licensing authority? There are currently anonymous test sites where persons can receive the results of their HIV tests without giving their names. Thus, a HCW could continue to practice for years (until her symptoms were noticeable), before she would be identified as being HIV infected, and therefore could continually expose her patients to risk of infections. Further, practice restrictions could cause infected HCWs to refrain from employing additional infection control measures, such as double gloving during surgery, for fear that such measures would identify them as HIV positive. Thus, their patients would be at an increased risk of transmission.

Lastly, these restrictions, even if rigorously enforced, would not entirely eliminate the risk of HCW to patient transmission. In many cases, HCWs may be infected but remain unaware of their own infection, since symptoms of HIV infection may not appear for many years after exposure. Thus the infected HCW would not seek HIV testing until she suspected her own infection. She would, however, still be infectious and thus capable of transmitting the infection. Therefore, unless HCWs are required to be tested on a periodic basis, mandating patient disclosure and invasive procedure restrictions will not totally eliminate the risk of HCW to patient transmission.

IV. Does the Setting of Disclosure and Procedure Restrictions Represent Sound Public Health Policy?

A. Implementing Disclosure Requirements and Practice Restrictions Represents a Political, Rather than a Public Health Necessity.

The setting of disclosure and invasive procedure restrictions is not likely to reduce significantly the number of newly infected AIDS patients. There are only five suspected cases of HCW to patient transmission, and even those patients may not have been infected by their dentist's virus. The CDC's predictions estimate that perhaps as many as 128, and as few as 13 patients have been infected by their HCWs over the past ten years. Since the CDC estimates that there are currently between 800,000-1.5 million Americans infected with HIV, the percentage of patients infected by their HCW is between .00086% and .016% of the total number of infected persons. Moreover, it is questionable whether such restrictions are necessary at all, since it is entirely possible that all of the known transmission cases could have been prevented if Dr. Acer had only complied with proper infection control procedures. In light of these considerations, does it represent sound public health policy for disclosure and practice restrictions to be imposed when their effectiveness to pro-

tect patients from infection is questionable, and their effect upon the medical community's ability to treat and care for those already infected with HIV is likely to be so substantial?

Failure to place restrictions upon infected HCWs could also cause the public to forego its trust in their health care providers as well.

I suggest that the question of whether to set these restrictions is really not a public health question at all. Rather, the issue is more accurately framed as a political one. According to a 1991 Gallup poll conducted for *Newsweek* magazine, 90% of those surveyed believed that all HCWs should be required to reveal their infectious status to their patients. The fact that there have been only five suspected cases over the past ten years, that even these few infections were likely avoidable, and that such restrictions would probably seriously diminish the capability of medical and health care institutions to provide care to AIDS patients, are simply irrelevant to an overwhelming majority of Americans. Rather, it appears that most people are unwilling to accept even one case of this form of transmission, because any one receiving medical care can be the next case. It is acceptable when public health officials offer assurances that attending school with HIV infected persons poses no threat of contagion. One hundred percent assurances are acceptable; however, a 99.99% guarantee is simply not enough. Since it cannot be said that infected HCWs who conduct invasive procedures pose no threat at all to their patients, most individuals are unwilling to accept the possibility of their becoming the next Kimberly Bergalis.

Given the extremely strong public demand for some form of restrictions, public health and governmental agencies have two options. First, they can forcefully attempt to explain the actual public health risks of HCW to patient transmission, and the attendant public health concerns that would accompany the setting of such restrictions. In effect, public health officials could argue that the greater good, that is, the *public's* health, would be ill-served by requiring patient notification and prohibiting infected HCWs from performing invasive procedures, and that while an extremely few individuals might contract AIDS from their HCWs, the "good of the many" would need to take precedence over the "good of the few."

Public health laws have historically been upheld on these very same grounds. Compulsory inoculations and even quarantines have been upheld on the basis that the greater good of safeguarding the public's health warranted the significant intrusion which such measures placed upon individual rights. Moreover, inoculations against polio, pertussis (whooping cough) and other diseases, continue to be re-

quired despite the knowledge that more than 50 infants in the United States every year suffer serious neurological disorders and paralysis as a result of these compulsory inoculations. And yet these tragic cases are deemed to be warranted so that the health of a greater number of individuals can be protected against the spread of such diseases.

The proposed disclosure and invasive procedure restrictions could be opposed by using the same rationale. Given the greater good of ensuring and encouraging HCWs to continue to treat HIV infected patients, the fact that extremely few patients *may* become infected through their HCW, could become a price that more, if not a majority of the American public would be willing to pay. This argument, when buttressed with the inherent limitations of disclosure and procedure restrictions (i.e. the problems of ensuring that HCWs would report their infection, and that HCWs who are unaware of their infection would still pose a risk of transmission) could therefore effectively counter public demands for the imposing of these measures.

However, in light of the overwhelming public support for requiring HCWs to disclose their infection to their patients, such arguments would probably not be able to sway public sentiment away from demanding some form of restrictions. Given this reality, public health and medical officials probably need to support some form of restrictions, for if they do not, it is likely that far more restrictive and potentially damaging measures, such as those passed by the United States Senate, which require HCW screening and the imposing of criminal sanctions on HCWs who do not disclose their HIV status, will be mandated by others.

B. The Efficacy of the 1991 CDC Guidelines as a Model For Disclosure and Practice Restriction Legislation.

The 1991 CDC Guidelines appear to offer a framework upon which to formulate a rational public health policy for dealing with HCW to patient transmission of HIV. At the outset, they state that HCWs who adhere to universal precautions and who do not perform invasive procedures do not pose a threat of HIV transmission to their patients, thus appropriately limiting any restrictions to only those infected HCWs who perform certain invasive procedures. The Guidelines next define those invasive procedures, which they refer to as "exposure-prone procedures," to include those procedures where there is simultaneous presence within a body cavity of a HCW's fingers and a needle or other sharp instrument, and where there is an increased risk of the HCW cutting herself due to poor visualization or a highly confined anatomic site. Those procedures that are actually exposure prone would be determined by professional medical, surgical, and dental organizations, and by those medical institutions where the procedures are performed.

The Guidelines also set out those circumstances under which infected HCWs may perform exposure prone procedures. The HCW must first seek the counsel of a medical

review panel, which consists of the HCW's physician and medical and public health officials, who would advise the HCW if, and under what circumstances, she may perform the procedure. The Guidelines state that such circumstances include notifying prospective patients of their HCW's infection before the patients undergo exposure-prone invasive procedures.

The Guidelines, by their definition of exposure prone procedures, would appear to prevent HCWs from performing only those invasive procedures that, due to their complexity and degree of invasiveness, have an increased possibility of transmission. They would not appear to include other more common and less invasive procedures, such as the drawing of blood and suturing. However, by leaving it to individual health institutions to determine which procedures constitute "exposure prone" procedures, the Guidelines afford such institutions great, and perhaps, undue flexibility to make such determinations. For example, a hospital in New York State recently forced an HIV infected doctor to resign, based on the hospital's determination that putting in stitches was an exposure prone procedure.

I suggest that the question of whether to set these restrictions is really not a public health question at all. Rather the issue is more accurately framed as a political one.

Similarly, the Guidelines would also appear to deal rationally with the issue of practice prohibitions, as they do not contain an explicit ban against infected HCWs performing invasive procedures. By permitting the HCW to seek approval from the review committee, the Guidelines purportedly offer her the possibility that she will be able to continue to perform such procedures. This possibility is more illusory than real, however, since she is required to disclose her infection not only to the review panel, but to her patients as well. While the Guidelines caution that the review panel should be sensitive to the HCW's confidentiality and privacy rights, compelling disclosure to patients as well seriously reduces the chances that the disclosures will remain confidential. It is unrealistic to expect that once a HCW reveals her infectious status to one of her patients, that word of her infection will not spread among her other patients. Thus, the HCW's privacy rights are seriously undermined by the patient notification requirement.

Moreover, not only does requiring patient disclosure result in probable breaches of the HCW's confidentiality, it also constitutes a *de facto* prohibition on the HCW performing both invasive *and* non-invasive procedures. According to the Gallup/Newsweek poll cited previously, 65% of those surveyed would not seek *any* form of treatment from an infected HCW. Therefore, once a HCW's infectious status became known among her patients, she would lose

her ability to perform both invasive and non-invasive procedures. Consequently, if an infected HCW wishes to continue performing non-invasive procedures, she will have to decide, as a practical matter, to forego performing invasive procedures, and thus avoid the patient disclosure requirement.

As a practical matter, the Guidelines therefore do not offer infected HCWs the option of continuing to perform invasive procedures, since by compelling HCWs to disclose their status to their patients, the Guidelines, in effect, terminate HCWs' ability to practice at all. As such, the Guidelines really offer infected HCWs who wish to continue performing invasive procedures only one option; that is, not to reveal their status at all, and hope that they are not discovered. The Guidelines thus offer a disincentive for honest and complete HCW disclosure. Moreover, the Guidelines also provide a further disincentive for uninfected HCWs to treat infected patients, since should these HCWs become infected through occupational exposures, they too would be barred from continuing their practice.

These problems could be minimized if the Guidelines did not require patient disclosure. The Guidelines could continue to require that the HCW inform the review panel of her infection. The panel could require that the HCW undergo periodic monitoring and training in infection control procedures so as to ensure that she was performing the invasive procedures in strict conformity with infection control practices. Since the only known cases of HCW to patient transmission were likely caused by one dentist's lack of compliance with such infection control procedures, focusing on improving compliance with infection control, rather than upon barring perhaps thousands of HCWs from their practice, would appear to meet the rational concerns of HCW to patient transmission, in a less restrictive manner. Those infected HCWs who through monitoring were identified as failing to comply with infection control procedures could then be prohibited from performing further procedures.

Eliminating the patient disclosure requirement would also minimize the other problems inherent with the Guidelines. The Guidelines would still require physician disclosure to the review panel, and thus continue to safeguard patient safety. By eliminating the patient disclosure requirement, however, HCWs would be assured of having at least some of their patients remaining after being given review committee approval to perform invasive procedures. Thus the HCW's privacy and her ability to practice medicine would be protected, without jeopardizing her patients' health. In addition, eliminating the patient disclosure requirement would reduce the Guidelines' effect of diminishing the number of uninfected physicians who would still be willing to treat infected patients. Thus, the medical services of thousands of infected and uninfected HCWs would not be lost, and at the same time, the already minimal risk of patient infection would be further reduced.

V. Conclusion

While eliminating mandatory patient notification would solve many of the problems with the CDC Guidelines, it is extremely doubtful that any measure that does not require patient notification will receive public or legislative support. Given the overwhelming public support for disclosure and protective restrictions, the Guidelines, along with their patient notification requirement, probably will be enacted in many jurisdictions. Nevertheless, neither practice prohibitions nor disclosure requirements should be implemented under the guise that they are necessary to safeguard the public. Rather, their adoption should be accompanied by the acknowledgment that political realities, and not public health concerns, have mandated their implementation. If that distinction is not recognized, this false sense of a public health emergency will likely provide the rationale for instituting more restrictive and ill-advised measures against HCWs.

ENDNOTES

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1 Another proposal for preventing HCW to patient HIV transmission would require that all HCWs who perform invasive procedures be periodically tested for the HIV antibody, with those that test positive being prohibited from performing such procedures. The United States Senate, as well as a number of states have approved such measures. While a discussion of mandatory HIV antibody testing is outside the scope of this essay, the measure does implicate many of the same concerns raised by requiring HCWs to disclose their HIV status to patients. Mandatory testing raises other concerns as well. For example, due to the relatively low incidence of the disease among HCWs, it is likely that more HCWs would be falsely identified as being HIV positive, than would be identified correctly as being infected. See Eisenstat, *An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Governmental Public Health Interests with the Individual's Privacy Interest*, 52 U. Pitt. L. Rev. 327, 332 (1991). Further, many infected HCWs would test negative for the antibody, thus creating a false sense of security among HCWs and their patients that the HCWs are not infectious. The costs associated with implementing mandatory HCW testing, and with ensuring the confidentiality of the test results also argue against the adoption of this proposal. A more comprehensive discussion of this issue is contained in the forthcoming Article in Volume 44 Rutgers Law Review.

A SHORT HISTORY OF THE LOCAL HOUSING AUTHORITIES

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In November of 1989 an article entitled "The Shadow Government" appeared in *Boston Magazine*.¹ The article was the culmination of a research project that gathered information from approximately 42 state, regional and local public authorities in Massachusetts.² The 42 authorities targeted in the research were selected as representative samples illustrating the types of traditional governmental activities generally assumed by these entities, activities ranging from the provision of low income housing (Boston Housing Authority) and travel services (Massachusetts Port and Turnpike Authorities) to recreational activities (Woburn Golf and Ski Authority).³ The main thrust of the article was to contrast the highly public and critically essential functions performed by most public authorities with their relative anonymity and perceived lack of public accountability.⁴

While it is certainly possible to criticize some of the conclusions reached in the *Boston Magazine* article, nevertheless, one point is absolutely accurate; that the public authority has developed into one of the most significant instrumentalities in the administration of government on all levels from the federal to the state and municipal and yet the entity continues to be one of the least understood entities in use. The purpose of this article is to provide a short history of the authority as governmental entity with emphasis on its use in public housing and particularly its evolution as the vehicle for managing both federal and state low income family and elderly housing programs in Massachusetts.⁵

I. History of Public Authorities In General

Early in the nineteenth century the various states and many municipal governments were using their borrowing power to raise monies which they in turn would make available to private enterprise to encourage and finance construction of a spectrum of public works such as turnpikes, canals, and railroads.⁶ Initially there were few checks on this public fund raising and distribution activity since generally there were no limits placed either on the legislative power to establish financial obligations for the state or the amount of debt municipal governments could incur.⁷ Even in those cases where there were specific state constitutional or legislative enactments which limited governmental spending to "public purpose" programs,⁸ most courts were liberal in their willingness to find a public purpose whenever a governmental agency was in any way involved.

One of the major and most notorious beneficiaries of this governmental largesse was the railroad companies. State, and to a lesser extent, even municipal governments were vying to attract railroad expansion into their territory by offering massive grants of land, money and credit to these companies.⁹

Eventually the spendthrift attitude of the states caught up with them as toward the end of the nineteenth century the country experienced a general economic depression causing many states and municipalities to default on their debt obligations.¹⁰ Regardless of these financial difficulties many states and municipalities continued to overextend while revenues declined and fixed costs rose. Ultimately, this financial maladministration resulted in new constitutional and legislative enactments which were designed to place a cap on the amount of debt that a state or municipal government could incur at any given time.¹¹ Generally the restrictions were one of three types; either they limited the gross amounts that could be borrowed by a governmental entity; or placed a ceiling on the borrowing by relating it to assessed real property valuation; or simply limited borrowing to the total tax revenues received.¹² At roughly the same time as these spending restrictions were being enacted, the courts were becoming less willing to uphold legislative expenditures as within the scope of "public purpose" when those monies were utilized to aid private enterprise.¹³

During this period of public debt limitation measures, two events were occurring more or less simultaneously. First, revenue bond financing was becoming a popular mechanism for raising funds and the corporate business entity was rising in importance as an effective means of administering business ventures.¹⁴

Government continued to be interested in financing public improvements but was hampered by the constitutional and legislative debt limitations. Different methods for financing projects were explored. In 1921, New York combined the concept of revenue bond financing with the corporate entity and created the first authority in the United States, the Port of New York Authority.¹⁵ Although variations have developed over the years, the current form of the authority remains very similar to this prototype.¹⁶

The authority seemed to offer the vehicle that the states were seeking. It was designed to have a separate and dis-

tinct existence from the state and thus the debt limitations placed upon the state or municipal government did not apply to it. In addition, since it would be constituted specifically to accomplish a stated public purpose there would be no difficulty with its violating the judicially applied "public purpose" doctrine.

Regardless of its obvious advantages, however, the use of the authority concept progressed rather slowly for some time following its inception in New York in 1921. It was not until President Franklin D. Roosevelt created the Public Works Administration that the authority took on national significance as a device for financing and administering revenue producing improvements throughout the various states.¹⁷ In order to stimulate the states to take advantage of certain federal public works programs, President Roosevelt wrote to the Governors encouraging them to sponsor local legislation establishing "public corporations" with power to issue revenue bonds.¹⁸

It seems federal encouragement was sufficient to call the attention of the states to the authority as a vehicle for addressing many of the problems that they were experiencing on a local level. It was ideally suited to avoid the debt limitations while allowing substantial input into the management and administration of the projects developed. Further it could be established to generate operating funds from the earnings of its projects rather than relying on legislative largesse and yet be specifically tailored to administer any type of program desired and avoid layers of bureaucracy generally associated with typical governmental units burdened with diverse responsibilities.

The increased use of the public authority by the states in the area of low income housing can be traced to the Wagner-Steagall Act of 1937.¹⁹

II. History of Massachusetts Housing Authority

A. Housing Corporation

The Commonwealth of Massachusetts recognized a need to intervene in the area of housing as early as 1933 when it passed legislation establishing a State Board of Housing within the Department of Public Welfare.²⁰ The primary purpose of the Housing Board was to "... investigate defective housing, the evils resulting therefrom and the work being done in the commonwealth and elsewhere to remedy them . . ." ²¹ Among the powers delegated to the Housing Board was the power to take land by eminent domain for the purpose of "... relieving congestion of population and providing homesteads or small houses and plots of grounds for mechanics, laborers, wage earners of any kind, or others, citizens of the commonwealth . . ." ²²

As part of the legislation establishing the Housing Board, the legislature, utilizing existing business corporation laws, authorized three or more persons to associate

themselves as a limited dividend corporation, specifically for the purpose "... of carrying out one or more projects authorized and approved . . . by the housing board."²³ This entity was known as a "housing corporation" and was in actuality the precursor of today's housing authority in Massachusetts. The housing corporation was declared an "instrumentality of the commonwealth" and came within the direct control and supervision of the preexisting Housing Board.²⁴ The housing corporation was delegated all those powers that had previously been delegated to the Housing Board including the power of eminent domain, although the exercise of power did require authorization and approval of the Housing Board.

The housing corporation presented a mix of public and private attributes much like the current housing authority concept. It was bound by the rules and regulations of both the State Housing Board and those established for the regulation of private corporations by the Secretary of the Commonwealth.²⁵ Unlike a private corporation, the housing corporation was considered an instrumentality of the Commonwealth and it was deemed to be organized to serve a public purpose. All real estate acquired by the corporation was considered to be acquired for the purpose of promoting the public health, safety and welfare of the inhabitants of the Commonwealth. While the housing corporation had private stockholders as a business corporation would, nevertheless, these stockholders were restricted in the amount of return they could receive from their investments to the par value of their stock together with cumulative dividends at the rate of six percent per annum. At all times one director of the housing corporation had to be a person designated by the State Housing Board and that person did not have to be a shareholder. The housing corporation and its officers could sue and be sued in the same manner as a business corporation and the Commonwealth was not financially obligated or required to pledge its credit on behalf of the corporation. Finally, housing corporations were apparently financed through private investments in much the same way as any private corporation.

B. Massachusetts Housing Authority

The housing authority emerged as a distinct entity in Massachusetts in 1935.²⁶ It was in this year that the legislature recognized as a state policy that "unsanitary substandard housing conditions" existed within the Commonwealth and that there was not "an adequate supply of decent, safe and sanitary dwelling accommodations for persons of low income."²⁷ It can be safely assumed that at least one reason for the creation and utilization of the public authority to administer low income housing programs at this point in Massachusetts history was to take advantage of certain federal housing programs that had been established by President Roosevelt.²⁸

Unlike the precursor housing corporation, the housing authority did not have to rely upon private investment for

funding. The housing authority was empowered to issue revenue bonds for financing and such bonds were specifically not to be considered as bonds of the state for purposes of the states' debt limitation and thus adequate funding for housing programs was made available without the need of prior legislative approval.²⁹

The entity contemplated in the 1935 legislation was a "public body politic and corporate."³⁰ The legislation was of the enabling variety in that an authority was not called into existence until a city or town determined a need for such an entity and voted its creation within its geographical boundaries. Once established the housing authority came under the supervision and control of the State Housing Board located within the Department of Public Welfare.³¹ The housing authority was managed and controlled by a five member board, either appointed or elected depending upon the form of government in the municipality where it was located.³² Provision was made for the removal for cause of the board members and their appointees.³³ The authority was delegated many powers including, powers to sue and be sued; receive loans and grants from the federal government; determine what areas within its jurisdiction were unsanitary or substandard; purchase or in any other way acquire property in its own name with title remaining in the authority, not in the commonwealth; take property by eminent domain and issue revenue bonds.³⁴

In 1938, in order to take advantage of the United States Housing Act of 1937,³⁵ Massachusetts substantially modified the housing authority legislation of 1935.³⁶ The thrust of the 1938 legislation was to take advantage of federal housing programs that would both eliminate slums and provide low-rent housing.³⁷ Although most of the original features of the housing authority remained intact in the 1938 legislation, nevertheless, there were some additional provisions worthy of note. The 1938 legislation, for the first time, authorized cities and towns to raise and appropriate monies for housing authorities to defray the costs associated with the development, acquisition and operation of slum clearance and low-income housing projects.³⁸ In addition, the statute exempted housing authority property acquired or developed as part of a project under the Federal Housing Act of 1937, from both real and tangible personal property taxation.³⁹ While the power to issue revenue bonds remained intact, the clear intent of the 1938 legislation seemed to be to take advantage of governmental appropriations, federal, state and municipal, as a prime source of revenue for financing housing projects. Under the 1938 statute, the housing authority remained a separate body politic and corporate but took on more public than private attributes.

The constitutionality of the 1938 housing authority legislation was raised in *Allydon Realty Corporation v. Holyoke Housing Authority*.⁴⁰ In *Allydon*, the Supreme Judicial Court was called upon to determine whether the public purpose doctrine allowed this novel legislative at-

tempt to utilize governmental monies ostensibly for improvements or services affecting private individuals.⁴¹ The Court upheld the constitutionality of the statute while acknowledging that it would be much more difficult to find public purpose if "the sole object of the statute" was the "construction and maintenance of low-rent housing for families of low income."⁴² According to the Court, since "the real purpose of the statute [was]..the elimination of slums and unsafe and unsanitary dwelling, and the provision by public funds of low-rent housing is only a means by which the main object is to be accomplished . . . [t]he statute as a whole is designed to serve a public need, and the money expended [for both] . . . , is for a public use."⁴³ Thus, having survived the constitutional challenge, the housing authority became a viable quasi-governmental entity in Massachusetts allowing the commonwealth to collaborate with the federal government to resolve pressing housing issues of the 1930's.

The housing authority law remained unchanged until 1946, when it was again amended in order to comport with federal legislation.⁴⁴ The basic nucleus of the housing authority remained intact. For the first time, however, veterans and families of veterans were specifically identified and given housing preference above all others who qualified for public housing.⁴⁵ In addition, the 1946 amendment added a provision that established a separate subsistence program for low income farmers. This program authorized local housing authorities to enter leasehold arrangements with qualified farmers that tied the rental cost of the property directly to the earning capacity of the farm and also authorized the tenant farmer to purchase the dwelling in question with credit from previous rental payments.⁴⁶ A final significant inclusion within the housing authority legislation of 1946 was a provision authorizing local housing authorities to engage in land assembly and redevelopment.⁴⁷

The most recent and generally most complete revision of the housing authority law occurred in 1969.⁴⁸ The 1969 legislation sought to further both housing and urban renewal. It authorized cities and towns to establish redevelopment authorities along with housing authorities as they deemed necessary.⁴⁹ A particularly noteworthy feature of the 1969 legislation was that it both established a program of direct state annual financial assistance to authorities and made provisions for the Commonwealth to guarantee their notes and bonds.⁵⁰ In addition, the legislation established an elderly housing program with financial contributions from the state and a separate rental assistance program allowing tenants to find housing on the open market and receive a rental subsidy from the state through the local housing authority.⁵¹

While the framework of the housing authority has remained generally unchanged from the original legislation creating the entity, it has continued to take on more public than private attributes over the years. Indeed, as one re-

views the general structure of the modern housing authority, one would be hard pressed to identify any private characteristics. It is managed, governed and controlled by five members, four of whom are either appointed by the mayor (in a city) or elected (in a town).⁵² In each case the fifth member is appointed by the State Department of Community Affairs.⁵³ The authority elects a chairman and vice-chairman from among its own members and may employ legal counsel, an executive director, a treasurer and any other officers, agents, and employees as it deems necessary.⁵⁴ An authority is deemed to be a municipal agency for purposes of the state conflict of interest laws,⁵⁵ and each member of the authority and any person who performs professional services for the authority on a part-time, intermittent or consultant basis, is considered to be a special municipal employee for purposes of the conflict of interest law.⁵⁶ The real estate and tangible personal property of the authority is considered public property exempt from taxation.⁵⁷ Cities and towns are authorized to incur indebtedness, outside their statutory limits of indebtedness, in order to assist housing authorities in carrying out their objectives.⁵⁸ A local housing authority is required to submit an annual report of all its activities including its receipts and expenditures to the mayor of the city or the selectmen in the town where it is organized.⁵⁹ The state public employee labor law applies to housing authorities and, except for the executive director, the state civil service law applies to termination of all employees who have been employed by a local housing authority for a minimum of five years.⁶⁰

III. Summary

As one reviews the history of housing corporations and authorities in Massachusetts, certain generalizations become apparent as the entities have undergone transformation. Perhaps the most dramatic contrasts in the character of the entities have occurred in the areas of supervision/regulation, financial independence and political accountability.

The housing corporation established by legislative act in 1933 had mostly private sector attributes as it was organized under the business corporation laws of the state and except for one director of the corporation, who was to be designated by the State Board of Housing, all the directors were selected in the same manner as any private corporation. Stockholders held shares in this corporation and were entitled to receive a return on their investments. While projects undertaken by the housing corporation required prior approval from the State Housing Board, nevertheless, they were financed with private monies and the commonwealth's credit was not involved.

In contrast, the Massachusetts Executive Office of Communities and Development is directly responsible for the supervision and regulation of the housing authority. Funding and operating expenses of the entity come primarily from either federal or state sources.⁶¹ Clearly, the

modern housing authority is highly regulated and almost entirely dependent upon the federal and state governments for this capital outlay and operating budget funding. In addition, the housing authority's Board of Commissioners is politically accountable as they are either elected directly or appointed by other elected offices holders. Thus while some public authorities may operate outside the normal scope of control generally associated with governmental entities, nevertheless, all are politically accountable in one fashion or another and some, such as local housing authorities, are as accountable as any other governmental entity.

The local housing authority in Massachusetts is a democratically established and politically accountable entity that could hardly be considered to be a part of some "shadow government."

ENDNOTES

1 John Strahinich, "Inside The Invisible Government," *Boston Magazine*, November 1989, p. 128.

2 The article estimated that there were approximately 506 such authorities operating in the state at the time of the research. *Boston Magazine* at 131.

3 *Id.*

4 Using the 42 authorities as an indicator, the article surmised that authorities "employ more people, spend more money, and run up more debt than anybody ever thought. In fact, taken together, they rival the size of some state governments, including our own." *Boston Magazine*, at 132.

5 There are a number of excellent scholarly works that relate the history and development of the authority. Comment, *An Analysis of Authorities: Traditional and Multicounty*, 71 Mich. L. Rev. 1376 (1973); Tilden, *Forerunners of the Public Authority*, 7 Wm. & Mary L. Rev. 1 (1966); Note, *Constitutional Restrictions On The Use of Public Authorities In The New England States*, 43 B.U. L. Rev. 122 (1963); Gerwig, *Public Authorities In The United States*, 26 Law & Contemp. Probs. 591 (1961). (hereinafter "Gerwig").

6 Gerwig, *supra*, note 5 at 595.

7 Note, 43 B.U.L. Rev. 122, 123.

8 *Id.* The term "public purpose" as used herein is a shorthand expression for the so-called "public purpose doctrine." The doctrine derives generally from interpretation of the Fifth and Fourteenth Amendments to the U.S. Constitution and similar provisions in state constitutions. The doctrine essentially provides that public funds may not be expended by the government for private property unless the property is to have a public use. Whether or not funds are being expended for a public purpose is a matter of law for the court to decide. Obviously, what is considered a "public purpose" or "public use" can vary at any given time depending upon many factors, not the least of which is judicial attitude, Note, 43 B.U.L. Rev. at 125. For an excellent discussion of the "public purpose" doctrine in Massachusetts see Cella, *Administrative*

Law, 39 Mass. Practice Series, section 1143. It should be noted that the “public purpose” doctrine was applied to those situations involving the expenditure of state funds or the extension of state credit to benefit private individuals. It should be distinguished from those statutes and constitutional amendments which placed a limit on the *amount* of debt that a municipality or legislature could incur at any given time. Although, as will be mentioned later, a public authority initially did have to contend with the public purpose doctrine, nevertheless, there was less difficulty in this regard if the authority were constituted properly.

9 *Id.* As mentioned above, courts were reluctant to invoke constitutional doctrine to interfere in this area. As late as 1879 the Massachusetts Court held that the power to tax for the benefit of a private railroad corporation was a valid “public purpose.” *Troy & Greenfield Railroad v. Commonwealth*, 127 Mass. 43 (1879).

10 *Id.*

11 *Id.* Massachusetts enacted legislation of this type in 1875 placing a debt limitation upon municipalities which was related to their equalized evaluation. St. 1875, c.209, section 6; G.L. c.44, section 10. In 1918, as a result of the Constitutional Convention of 1917–18, Article 62 of the Amendments was added to the Massachusetts Constitution. It appears that one of the main purposes of this Amendment was to control legislative spending. “Article 62 . . . was aimed at borrowing by the commonwealth. A study of the proceedings of the convention, and a fair reading, as a whole, of the pertinent portions of the debates . . . show that the purpose was to put ‘fetters..on the legislature,” *Ayer v. Commissioner of Administration*, 340 Mass. 586, 591, 165 N.E. 2d 885, 888 (1960). *See also* Cella, *Administrative Law*, 39 Mass. Practice Series, section 1142.

12 Gerwig, *supra* note 5 at 596.

13 *Id.*

14 *Id.* Revenue bond financing simply stated is a concept whereby bonds are sold to raise revenues to finance public improvements. The bond indebtedness is ultimately satisfied from the revenues generated by the charges paid by those who utilize the improvement.

15 Goldstein, *An Authority in Action- An Account of the Port of New York and its Recent Activities*, 26 Law & Contemp. Probs. 715 (1961). The New York Port Authority is generally recognized as the first use of the authority concept in this country. It was created and designed primarily as a vehicle to supervise development of New York Harbor. Since part of the Harbor lies in New Jersey, the authority concept solved what had previously presented a heated jurisdictional dispute. The authority was modeled after the Port of London Authority which had been created twelve years earlier (1909) in London.

16 It should be noted that one of the more appealing attributes of the authority concept is the ability to tailor it to the specific purpose it is designed to address. Once created, the authority can either be self-starting or it can require some further action before becoming operative. An example of a self-starting authority in Massachusetts is the Turnpike Authority. G.L.c.81, App. §§ 1–1 et seq. The legislature creates the authority, establishes its powers, structure and financing mechanism and no other action is necessary. Alternatively, an example of an authority that is not

self-starting is the Local Housing Authority in Massachusetts. G.L.c.121B, §§ 1 et seq. In this case the legislature enacts a law that establishes the powers, duties and responsibilities of the entity but that requires a vote by the local municipality in order for the entity to become extant in that community.

17 Gerwig, *supra*, note 5 at 597. It appears the legal staff of the Public Works Administration devised enabling legislation for the creation of public authorities which was ultimately used as a model by the states.

18 *Id.*

19 U.S.Housing Act of 1937. 50 Stat. 888 (1937), as amended, 42 U.S.C.A. §§ 1401 et seq. (1964); *see also* Friedman, *Public Housing and the Poor: An Overview*, 54 Cal. L. Rev. 642 (1966).

20 St. 1933,c.364, § 108. It should be noted that the Massachusetts Legislature made an effort to involve the Commonwealth in housing as early as 1908. An amendment to the 1908 Banking Law was proposed which, if enacted, would have created a “homestead commission” with the power to “purchase land, and develop, build upon, rent, manage, sell and repurchase the same.” The purpose as expressed in the bill was to provide homes “for mechanics, laborers, or wage earners.” The finances to fund the homestead commission were to come from unclaimed monies that Massachusetts Savings Banks were required to turn over to the state treasury. St.1908,c.590, § 56. The proposed “homestead commission” legislation was never enacted. Fearing problems with the public purpose doctrine, the Massachusetts House of Representatives requested an Advisory Opinion from the Supreme Judicial Court on this issue while the legislation was under consideration. The Court rendered an adverse ruling. In its Opinion, the Court indicated that the proposed legislation did not serve a public purpose and thus was unconstitutional. According to the Court, the statute at issue did not provide for the elimination of unsafe and unsanitary dwellings but rather essentially authorized the Commonwealth “to go into the business of furnishing homes for people who have money enough to pay rent and ultimately to become purchasers.” *Opinion of the Justices*, 211 Mass. 624, 625, 98 N.E. 611 (1912).

Steadfast in its attempt to enter the housing arena, the legislature recreated the “homestead commission” in a modified form in 1911. St.1911,c.607. Although this legislation continued the purpose as originally proposed in 1908, nevertheless, as an apparent reaction to the Court’s dissatisfaction with the funding mechanism as contained in the 1908 proposal, this legislation did not depend upon any state funds for implementation. Unlike its 1908 predecessor, chapter 607 of the Acts of 1911 was enacted without prior judicial consideration via a request for an advisory opinion. This legislation created the “homestead commission” and acknowledged its purpose to assist so that “homesteads or small houses and plots of ground may be acquired by mechanics, factory employees, laborers and others in the suburbs of the cities and towns.” St.1911, c.607. In 1913, the membership of the 1911 homestead commission was enlarged by two. St.1913, c.595, § 1. In 1917, the commission was delegated the power to purchase land and funding was provided. It is unclear, however, whether the commission ever became operational and in 1919 it was abolished as a separate entity and its functions were included within the responsibilities of the Commission of the Department of Public Welfare. St.1919, c.350, §§ 87–90. Prior to creation of the state Board of Housing via chapter 364 of the Acts of 1933, the Com-

missioner of Public Welfare and the Advisory Board of the Department of Public Welfare were authorized to investigate housing problems in the Commonwealth. G.L. c.121, §§ 24–26 (Ter. Ed. 1932). Indeed, chapter 364 of the Acts of 1933 did little other than create a separate Housing Board and substitute it for the Commissioner as the appropriate governmental entity to investigate housing problems in the Commonwealth. The purposes and objectives of the program remained substantially unchanged from the original homestead commission legislation of 1908 and 1911, to provide “homesteads or small houses and plots of ground for mechanics, laborers, wage earners of any kind.” St.1933, c.364, §3.

21 St. 1933, c.364, § 2 (G.L. Ter. Ed. c.121, § 261 et seq.).

22 St. 1933, c.364, § 3. The Housing Board could exercise the eminent domain power only after obtaining consent from the Governor and Governor’s Council.

23 *Id.* § 6.

24 *Id.* §§ 6, 26E.

25 *Id.* The laws relative to private business corporations were applicable so long as they were not inconsistent with the provisions of the legislation creating the housing corporation.

26 St.1935, c.449, § 1 et seq. The housing corporation continued to exist as a separate entity until 1945. St.1945, c.654, §2.

27 St.1935, c.449, § 5. The legislature also acknowledged that the unsanitary conditions tended to cause “an increase and spread of disease and crime,” and constituted “a menace to the health, safety, morals and welfare and comfort of the inhabitants of the commonwealth.”

28 Another reason for the emergence of the housing authority in Massachusetts at this time could have been legislative reaction to the Supreme Judicial Court’s application of the “public purpose” doctrine. As mentioned previously, during the middle and late nineteenth century, courts generally seemed to be rather liberal in their application of the public purpose doctrine when the states were consistently borrowing money on their own credit to fund private improvement projects. However, the Massachusetts court was much more restrictive and narrow in its application of the doctrine, apparently reflecting a laissez-faire attitude among a majority of its members. Indeed, at least one commentator has referred to the Massachusetts Supreme Judicial Court as “the stronghold of narrow interpretation of the doctrine.” Note, *Constitutional Restrictions On The Use Of Public Authorities In The New England States*, 43 B.U.L. Rev. 122, 126 (1963). In many of its decisions during the late nineteenth and early twentieth centuries, the Supreme Judicial Court seemingly required that any private property acquired with state funds had to be used by the public as a whole in order to be constitutional. *Lowell v. Boston*, 111 Mass. 454 (1873). An example of the Massachusetts Court’s rather narrow application of the public purpose doctrine can be found in *Opinion of the Justices*, 211 Mass. 624, 98 N.E. 611 (1912). In the 1930’s the Supreme Judicial Court seemed to be relaxing in this regard. See, Note, *supra*, 43 B.U.L. Rev. 122; Cella, *Administrative Law*, 39 Mass. Practice Series, § 1143.

29 Specifically, Article 62 of the Amendments to the Massachusetts Constitution, provides that the Commonwealth can not borrow money except in certain enumerated circumstances and then only with a 2/3 legislative vote. Art.62, § 3.

30 This phrase has an interesting history in its own right. The Preamble to the Massachusetts Constitution contains a reference to “the body politic . . . formed by a voluntary association of individuals. . . .” In addition the legislature early in the Commonwealth’s history identified every town within the Commonwealth as constituting a “body corporate and politic.” St.1785, c.75, § 8. A review of the history of the phrase is contained in *Kargman v. Boston Water & Sewer Commission*, 18 Mass. App. Ct. 51, 54–55, 463 N.E.2d 350 (1984).

31 St.1935, c.449, § 5.

32 St. 1935, c.449, § 5. In a city, four of the members of the board were to be appointed by the mayor and the fifth was to be appointed by the state. In a town, four of the members were to be elected with the fifth also appointed by the state.

33 *Id.*

34 *Id.* § 26QQ.

35 50 Stat. 888 (1937), as amended, USC, § 1401 et. seq. Section 3 of the U.S. Housing Act of 1937 created a U.S. Housing Authority.

36 St. 1938, c. 484. M.G.L.A. c. 121, § 26I to 26II (Ter. Ed.).

37 *Id.*

38 *Id.* Indeed, the provision allowed a city or town to incur debt for this purpose, outside the limit of indebtedness imposed on municipalities in G.L., c. 44, § 10. Although this ability was not unlimited it represented a major departure from existing debt limitation policy. Alternatively, in lieu of providing monies to housing authorities, municipalities were authorized to render certain enumerated governmental services. G.L. c. 121, § 26X. Included among the services were: Sell, convey or lease any of its interests in any property. Cause parks, playgrounds or schools or other public improvements to be constructed or furnished adjacent to a housing project; lay out and construct, alter, relocate, change the grade of public ways adjacent to a housing project; cause public improvements to be made and services and facilities to be furnished for the benefit of a housing authority; purchase and hold any of the bonds or notes of a housing authority. *Id.* This again represented a major departure from preexisting policy and seemed to bring the public authority closer to the realm of a governmental unit.

39 G.L. c. 121, § 26W. The legislature declared this property to be public property used for essential public and governmental services. A payment in lieu of taxes was authorized. In addition, the legislature set forth specific guidelines as to the methods for selecting and setting rents for low-income tenants to be housed in the housing projects. *Id.* (26AA).

40 304 Mass. 288, 23 N.E.2d 665 (1939).

41 The court framed the issue as whether under the housing authority legislation, public monies and the power of taxation were to be utilized for purposes that are in their nature public, or for the private advantage of particular persons. *Id.* at 289.

42 304 Mass. 288, 295, 23 N.E.2d 665 (1939).

43 *Id.* It has been suggested that the *Allydon* decision repre-

sented a dramatic transformation in the Supreme Judicial Court's utilization of the public purpose doctrine. See generally, Cella, *Administrative Law*, 39 Massachusetts Practice Series, § 1143. Essentially the Court acknowledge that if the primary consequences, effects, and results of the legislation benefit the public, private individuals may benefit incidentally from its application without violating the public purpose doctrine.

44 St. 1946, c. 574. The 1938 legislation had been added to G.L. c. 121 (Ter.Ed.), § 26I to 26II. The 1946 legislation replaced c.121, § 26I to 26II with new § 26I to 26N.

45 St. 1946, c. 574, § 26FF (f): "[as] between applicants equally in need and eligible for occupancy of the dwelling and at the rent involved, preference shall be given to families of servicemen (including families of servicemen who died in service) and to families of veterans who have been discharged (other than dishonorable) from the armed forces of the United States four years prior to the date of applications for admission to such housing."

46 St. 1946, c. 574, § 26II.

47 *Id.* § 26JJ -26MM.

48 St. 1969, c. 751. G.L. c. 121, § 23-26 mmm was repealed and a new chapter 121B was added to the General Laws, G.L.c 121B, § 1 et. seq.

49 G.L. c. 121B, § 4. The form of the redevelopment authority is essentially the same as that of the housing authority with all the powers of the housing authority and whatever additional powers that might be necessary to fulfill their objective of engaging in urban renewal projects. Urban renewal projects are defined rather specifically in section 1 of c. 121B.

50 *Id.* § 34-37.

51 *Id.* § 38 and § 42. Implicit policy statements in these programs are that a need exists for providing housing for elderly people of low-income and to move away from the congregate state owned housing programs to more diverse housing within the community for those of low-income.

52 G.L. c. 121B, § 5. Membership positions on an authority are restricted to residents of the particular city or town where the entity is established and in a city, at least one member must be a representative of organized labor. Members of the authority can be removed from office after requisite due process in a city by the mayor with approval of the city council and in a town by the selectmen. *Id.* § 6.

53 *Id.* § 5. The Department of Community Affairs is a sub-agency within the State's Executive Office of Communities and Development. The Executive Office of Communities and Development was established in 1969 as a part of an overall reorganization of the Executive branch of Government. St. 1969, c. 704, § 3, approved August 14, 1969, and by § 60 made effective April 30, 1971. G.L. c. 6A, § 8, as amended by Acts of 1970, c. 862, § 3, and Acts of 1971, c.204.

54 G.L. c. 121B, § 7. The executive director sits as an *ex officio* secretary of the authority, and the treasurer may, but need not, be a member of the authority. Section 7 requires the authority to make use of the services of the agencies, officers and employees

of the city or town where it is situated, whenever possible. Moreover, the statute appears to require the city or town to make those services available when requested.

" . . . and such city or town shall, if requested, make available such services . . ."G.L.c. 121B, § 7.

55 G.L.c. 121B, § 7 provides: "[f]or purposes of chapter two hundred and sixty-eight A (268A), each housing . . . authority shall be considered a municipal agency . . ."

56 *Id.* Examples of part-time, intermittent or consultant services are: architectural, legal engineering, planning, construction, financial, real estate or transportation. The city or town can designate the housing authority employees as regular municipal employees if it so desires.

57 *Id.* § 16. There is provision for payment in lieu of taxes. In addition, the property and/or funds of the authority are not subject to attachment or to levy and sale on execution. *Id.* § 13. As with most public agencies, the appropriate procedure to force the authority to pay a legal judgment is a writ of mandamus directed to the treasurer of the authority. *Id.*

58 *Id.* § 19, 20, 21. In lieu of financial contributions to a housing authority, a city or town may utilize its municipal powers to provide governmental services to the authority. *Id.* § 23.

59 *Id.* § 29. Such reports are also required to be filed with the State Auditor, and the Executive Office of Communities and Development.

60 *Id.*

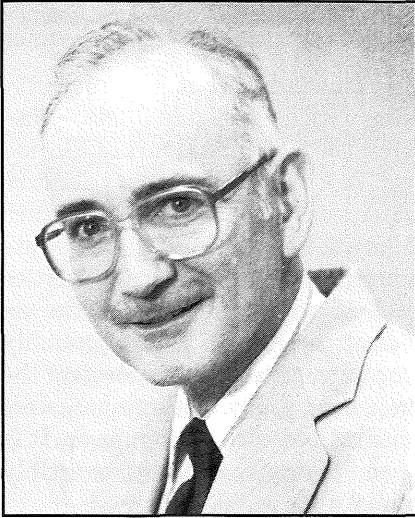
61 Historically, one of the most salient features of the public authority was its ability to issue bonds to raise revenues for its programs without implicating state debt limitations. The principal and interest payments on the bonds were to be paid from revenues generated by the rental of the authority's dwelling units. Each local housing authority had a certain amount of discretion in setting the amount of rent to be charged for its dwellings and could relate it directly to its debt service responsibilities. Prior to 1969, the legislative guidance relative to fixing rents was directly related to the operating costs of the authority and provided, in part, as follows: " . . . an authority shall fix the rentals for dwelling units in its projects at no higher rates than it shall find to be necessary in order to produce revenues which together with all other available monies, revenues, income and receipts to the authority, from whatever sources derived, will be sufficient: . . . (a) to pay, as the same become due, the principal and interest on the bonds of the authority; (b) to meet the cost of insurance and the payments in lieu of taxes provided by section sixteen and to provide for maintaining, operating and using the projects and the administrative expenses of the authority; (c) to create, during not less than the twelve years immediately succeeding its issuance of bonds and notes or other evidences of indebtedness, a reserve sufficient to meet the largest principal and interest payments which will be due on such bonds in any one year thereafter and to maintain such reserve; and (d) to provide, subject to the approval of the department, such recreational and community facilities in or near a housing project or projects as the authority may deem necessary for the health and welfare of the residents in the projects under its control, and such supervision and maintenance as may be

necessarily incidental thereto." St. 1969, c 751, § 32. The financial independence afforded the housing authority by this rent fixing flexibility was essentially eliminated by federal and state legislation between 1969 and 1971. In 1969, Congress enacted the so-called "Brooke Amendment", Pub. L. 91§152, Section 213 (a), 83 Stat. 389 (1969), and in 1971 the Massachusetts Legislature enacted the so-called "baby-Brooke Amendment," St. 1971, c 1114. The effect of these two statutes was to require housing authorities to fix rent for each tenant at a level not exceeding twenty-five (25%) percent of the tenant's income. 42 U.S.C. § 1437a; G.L. c. 121B, § 32. Thus, housing authorities were no longer capable of relating rental income to operating expenses. In order to compensate for the reduction of revenues implicit in the new rent fixing provision, the legislature committed the Commonwealth to

pay "[a]ny deficiency in the budget of a housing authority." Thus, housing authorities became totally dependent upon the federal and state governments for subsidies to allow them to operate. The federally-assisted housing programs are administered by the United States Department for Housing and Urban Development (HUD), and the state-assisted housing programs are administered by the Stated Executive Office of Communities and Development. These two agencies supervise, regulate and approve the operating budget of the local housing authority. Capital spending of local housing authorities is also entirely dependent upon monies raised by either the federal or state government. On a state level, funds for capital expenditures are raised by bonds issued directly by the Commonwealth. e.g. St. 1985, c. 748, §§ 2-5 and 8-11.

“Working the Buses”: Leave the Searching to Us

by Professor Joseph D. Cronin



At first I was tempted to say: “Help. I think I am in danger of becoming a liberal.” But the subject is too serious for that and it would be a mistake anyway to cartoon this into a liberal-conservative spat. “Are you in favor of crime, or what?”

Remember the good old days when buses just meant integrating the schools? Now there is something new. On June 20, 1991 in the waning days of its term, the United States Supreme Court upheld the police drug interdiction technique of boarding buses and, without suspicion of illegal activities, questioning passengers, asking for identification and requesting permission to search luggage. *Florida v. Bostick*.¹ By a vote of six to three, reversing the Supreme Court of Florida, which had divided four to three, the Court appears to have concluded that this does not violate the Fourth Amendment. Justice Marshall, who filed the dissenting opinion, has, of course, since left the Court.

A dissenting opinion in the intermediate court of appeals in Florida stated the facts in detail. The Supreme Court of Florida quoted that recitation and the Supreme Court of the United States quoted from that opinion in turn. This factual statement is as follows:

“Two officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol, boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. Eyeing the passengers, the officers admittedly without articulable suspicion, picked out the defendant passenger and asked to inspect his

ticket and identification. The ticket, from Miami to Atlanta, matched the defendant’s identification and both were immediately returned to him as unremarkable. However, the two police officers persisted and explained their presence as narcotics agents on the lookout for illegal drugs. In pursuit of that aim, they then requested the defendant’s consent to search his luggage. Needless to say, there is a conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent. However, any conflict must be resolved in favor of the state, it being a question of fact decided by the trial judge.”

This case raises fundamental questions about how our society is to function. Has the war on drugs, which we appear to be losing anyway,² driven us to the point that we must become accustomed to routine encounters of this sort with the police? One officer searched over 3,000 pieces of luggage in nine months.³ The theory is that these are consensual encounters and individuals need not cooperate. To what extent, however, will real world reasonable persons as opposed to hypothetical, legal-construct “reasonable persons” be likely to think that they have any choice? Also, programs such as these, as they become more routine and accepted would tend to move from one arena to another, stops on the street, for example. Moreover, while the present emphasis is on drug enforcement there is no reason in principle why the program would have to be limited to drug enforcement.

Perhaps the drug menace has reached such extraordinary proportions that objections such as these may appear naive and unworldly. Nevertheless, we are already making Fourth Amendment compromises with drug testing, anti-terrorist searches at airports, searches at courthouses and other public buildings, immigration related searches, etc. The impact of all of this is cumulative. The older cohort of the present generation of Americans at least views this more authoritarian structure that has emerged as an ab-

¹111 S. Ct. 2382 (1991).

²For an extended appraisal of the battle against drug use see Richter and Ostro, *Drug War Looks Like a Long One*, Los Angeles Times, August 5, 1991, at A1, 14-15. The article notes “Congress’ apparent determination to cut as much as \$600 million from Bush’s \$11.7-billion anti-drug plan for fiscal 1992.” Citing government studies the authors also conclude that while casual cocaine use is declining, “hard-core” use is increasing.

³*State v. Kerwick*, 512 So. 2d 347 (Fla. App. 4Dist. 1987).

normality, an aberrational departure from the “regular” American free lifestyle. Soon, however, a generation will come of age that has known nothing else. Practices that we previously would have associated with police states will have become the norm and will not easily be dislodged.

Some will say that it is better to have police free to work the buses than to have drug dealers free to work the streets. That may be. But we had better be sure that we understand the implications of what we are accepting and be sure that all the alternatives in fighting the war on drugs have been adequately explored. It is a commonplace that the real protection of the Bill of Rights, and the Constitution generally, is not in the words of the Constitution or even the enforcement powers of judges but in the belief, spirit and vigilance of the people. This may be a time for vigilance.

THE OPINIONS

First, let’s take a look at Justice O’Connor’s opinion of the Court in *Bostick* as well as Justice Marshall’s dissent. The opening paragraph of Justice O’Connor’s opinion reads in its totality as follows:

We have held that the Fourth Amendment permits police officers to approach individuals at random in airport lobbies and other public places to ask them questions and to request consent to search their luggage, so long as a reasonable person would understand that he or she could refuse to cooperate. This case requires us to determine whether the same rule applies to police encounters that take place on a bus.

This table-setting paragraph was well crafted from the standpoint of the majority. It implies that a police practice, unobjectionable in itself and already used in myriad places, has now been used on a bus. Unsurprisingly, the Court goes on to reject the idea that the rules should suddenly change just because the police go on a bus rather than some other means of public conveyance or some other public place. The real issue, however, is when encounters of this sort should be regarded as consensual, taking into account all the circumstances, including in this case the close confines of the bus. It is, therefore, not a question of whether there is a distinctive Fourth Amendment law of buses, although the special nature of the bus encounter would have to be thrown into the overall equation.

A crucial point about the Court’s analysis is that it repeated insistently that the Florida Supreme Court had adopted a *per se* rule about “working the buses” and strictly speaking it was only that *per se* rule that the Court addressed. In four different places in its comparatively brief opinion the Court referred to this asserted *per se* rule. “The Florida Supreme Court thus adopted a *per se* rule that the Broward County Sheriff’s practice of ‘working the buses’ is unconstitutional”; “We granted certiorari . . . to determine whether the Florida Supreme Court’s *per se* rule

is consistent with our Fourth Amendment jurisprudence”; “The Florida Supreme Court found this argument persuasive, so much so that it adopted a *per se* rule prohibiting the police from randomly boarding buses as a means of drug interdiction”; “The Florida Supreme Court erred in adopting a *per se* rule.”

This case raises fundamental questions about how our society is to function.

The perceptive reader concludes that the majority thought that it was dealing with a *per se* rule. Justice Marshall in dissent denied that the Supreme Court of Florida had done any such thing. In a rebuttal footnote, Justice O’Connor for the Court cited six subsequent cases in which the Supreme Court of Florida had assertedly treated its *Bostick* opinion as having created a *per se* rule. Justice Marshall did not respond. My own inspection of the six cases leads to the view that the Florida Court probably does regard its *Bostick* opinion as having disposed of the “working the buses” problem generally. The opinions were brief and cryptic, however, and resulted in remands. It is not clear that the point can be resolved incontrovertibly from the face of the opinions.

It is not really crucial whether the Florida Court intended a *per se* rule. What is crucial is that the Supreme Court thought it did and disposed of the case on that basis. It didn’t actually decide in this case that the defendant had not been “seized” and observed that “the facts of this case . . . leave some doubt whether a seizure occurred.” The Court remanded to the Florida courts for decision based on the totality of the circumstances rather than a *per se* rule for buses. Reading between the lines, however, it is clear that the message sent to lower courts by the majority opinion is that normally encounters of the sort in this case are consensual rather than constituting seizures in the Fourth Amendment sense. Just as the Florida Supreme Court was plainly sending a contrary message, even if it did not adopt a *per se* rule.

In a general way the Court and the dissenters agreed on the standard to be applied in this case. Police do not necessarily have to have probable cause or even articulable suspicion in order to ask questions of citizens. A passage from *Terry v. Ohio* is quoted routinely in cases of this sort. “Obviously, not all personal intercourse between policemen and citizens involves ‘seizures’ of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a ‘seizure’ has occurred.”

Since the state conceded that there was no articulable suspicion in this case the issue was whether the encounter was consensual. A “free to leave” standard is not helpful here because the passenger, at an intermediate stop, has

no desire to leave the bus even if legally free to do so. The question then is whether a reasonable person would regard himself as free to decline to cooperate with the police in all the circumstances, including the tight physical confines of the bus. The Court stressed that on the facts as found by the state court the defendant was informed that he did not have to consent to a search of his luggage. The dissent properly notes, however, that the truly relevant point is that he was not warned of his right to refuse to participate in the encounter with the police at all. If that encounter results in an illegal seizure then the consent search is tainted even if the consent is otherwise valid.

In *Bostick* the Court relied heavily on its opinion in *Immigration and Naturalization Service v. Delgado*.⁴ In *Delgado* INS agents conducted workforce “factory surveys” in order to apprehend illegal aliens.

At the beginning of the surveys several agents positioned themselves near the buildings’ exits while other agents dispersed throughout the factory to question most, but not all employees at their work stations. The agents displayed badges, carried walkie-talkies, and were armed, although at no point during any of the surveys was a weapon ever drawn. Moving systematically through the factory, the agents approached employees and after identifying themselves, asked them from one to three questions relating to their citizenship. If the employee gave a credible reply that he was a United States citizen, the questioning ended, and the agent moved on to another employee. If the employee gave an unsatisfactory response or admitted that he was an alien, the employee was asked to produce his immigration papers. During the survey, employees continued with their work and were free to walk around within the factory.

On these facts the Court concluded: “The factory surveys did not result in the seizure of the entire work forces, and the individual questioning of the respondent employees by INS agents concerning their citizenship did not amount to a detention or seizure under the Fourth Amendment.” (Syllabus)

The opinions in *Bostick* differ on how *Delgado* applies to the “working the buses” problem and the facts are sufficiently different that I suppose an argument can be made either way. Two points about *Delgado* should be noted, however. First, Justice Brennan, in his opinion dissenting in part in *Delgado* objected not so much to the dry logic of the Court’s opinion as “its studied air of unreality.” If that characterization was justified in *Delgado* it would be

perhaps equally so in *Bostick*. It is necessary in deciding whether a seizure has taken place on certain facts to take a step back after the legal parsing has taken place and consider whether real world people, even real world innocent people,⁵ would feel free not to cooperate with the police.

The second point about *Delgado* is that Supreme Court opinions do not simply sit in the law books and behave themselves. They tend to get up and walk around. Upon first reading *Delgado* one might be tempted to say, “well, there’s a lot of winking and nodding going on here but what are we going to do? There are millions of illegal aliens; something has to be done; we’re not about to install a mine field along the Mexican border so maybe we have to allow unusual latitude to the INS.” I do not pause to deal with this line of reasoning on its own terms. The point is that *Delgado* ends up not being simply a “factory survey” INS case. Inevitably it is applied by analogy elsewhere. Similarly, *Bostick* is not just a “working the buses” case or even just a drugs case. If cases such as *Delgado* and *Bostick* as well as the recent *California v. Hodari D*,⁶ set the standard for seizure under the Fourth Amendment, then that standard will be applied in other, perhaps unforeseeable, situations down the road.

One way in which the bus sweeps may be limited is by local law that is more restrictive than the Fourth Amendment, especially state constitutional law.

As noted, Justice Marshall in his dissent disagreed with the application of the Court’s standard rather than the standard itself. He observed that “undoubtedly, such a sweep holds up the progress of the bus,” although he seemed to be referring to bus sweeps in general, not necessarily *Bostick*. Also, he noted that although the police may not proffer an articulable suspicion, they may in fact have motivation for focusing on particular individuals. Such motives may be invidious, even racial.

The more general fear Justice Marshall raises in his dissent, reinforced by several lengthy quotes from lower court opinions, is the emergence of a police state, particularly since, ironically, some former authoritarian states are now in the process of liberalizing their systems. “The spectre of American citizens being asked by badge-wielding police, for identification, travel papers – in short a *raison d’être* – is foreign to any fair reading of the Constitution, and its guarantee of human liberties.” “. . . the police will be free

⁴466 U.S. 210 (1984).

⁵“We do reject, however, *Bostick*’s argument that he must have been seized because no reasonable person would freely consent to a search of luggage that he or she knows contains drugs. This argument cannot prevail because the ‘reasonable person’ test presupposes an *innocent* person.” 111 S. Ct. at 2388.

⁶111 S. Ct. 1547 (1991).

to accost people on our streets without any reason or cause. In this 'anything goes' war on drugs, random knocks on the doors of our citizens' homes seeking 'consent' to search for drugs cannot be far away. This is not America."

REFLECTIONS

1. One of the problems with *Bostick* is a conflict between logic and common sense. It is generally agreed that there is nothing wrong with a police officer's going up to a citizen and seeking cooperation on a law enforcement matter. In principle this is true whether it is an ad hoc one-on-one encounter or whether it is pursuant to a policy such as working the buses; whether it is on the street, in an airport lobby or on a bus. The question is whether it is a consensual encounter. If factory surveys are carried out as in *Delgado* "by surprise by relatively large numbers of agents, generally from 15 to 25, who moved systematically through the rows of workers," it is possible with a straight face to construct a logical argument that these encounters are consensual. But at some point common sense intrudes. The other day I read that solipsists often buy life insurance. The moral of the story, I suppose, is that it is possible to be persuaded intellectually by an argument that as a matter of common sense one refuses to take seriously. They are persuaded but they do not believe.

2. *Fact finding*. Even if there were a clear distinction in principle between consensual and coercive encounters, facts and even nuances as to facts, are obviously critical. The judge at the suppression hearing finds the facts and as long as the findings have support in the record these are the facts. Whether there is a seizure is a question of law but the judge's determination of the historical facts is largely unreviewable. Practically speaking this often means that the police version of what occurred becomes the facts.

Bostick illustrates the problem. As noted above, "there is a conflict in the evidence about whether the defendant consented to the search of the second bag in which the contraband was found and as to whether he was informed of his right to refuse consent." In this case, and generally, it is the government's version that prevails. Moreover, the Solicitor General's Amicus brief supporting the state of Florida discusses other factual subtleties. "The Florida Supreme Court stated that 'Officer Nutt stood in a position that partially blocked the only possible exit from the bus.' . . . That statement seems to acknowledge that respondent's path was not completely blocked, and the undisputed evidence at the suppression hearing was that the officer stood in a way that did not block respondent's path out of the bus." (Brief for the United States at 17n.7). "The Florida Supreme Court noted that respondent testified 'that Officer

Nutt had his hand in a black pouch that appeared to contain a gun'. . . Even if the court had credited respondent's testimony, that testimony reflects only that respondent suspected Officer Nutt was carrying a weapon . . . moreover, while Officer Nutt testified that it was possible that he had his hand in his bag, he also stated that his normal practice was to keep that bag zipped . . . Officer Rubino confirmed that he had never seen Officer Nutt unzip his pouch or put his hand in it while questioning a person on a bus." (Brief for the United States at 18n.8). In regard to defendant's testimony that he had been asleep, "Officer Nutt's recollection was that respondent was merely resting, not sleeping, and that he responded when the officer introduced himself. . . . Officer Rubino also recalled that respondent had been resting, not sleeping." (Brief for the United States at 18n.9). Concerning whether the defendant could have left the bus, "in a deposition given in connection with the suppression motion, the bus driver testified that he closed the door and left the bus after the officers arrived. The driver explained that he routinely shut the bus door whenever he left the bus during a station stop so that unauthorized persons could not board the bus without a ticket. . . . There was no suggestion in the record that a passenger who decided to leave could not simply reopen the door and walk off the bus." (Brief for the United States at 19n.10).

We always think of these things as happening to other people.

Of course, in general there is nothing novel about the idea that the application of a legal rule is going to depend on the facts and "the facts" may have to emerge from a welter of conflicting testimony and inferences. The question here, however, is one of peculiar subtlety. Would a reasonable person believe himself at liberty not to cooperate with the police? Unless we have a per se rule one way or another in regard to the bus sweeps the social ambience of the scene will have to be recreated. Not merely crude historical facts such as whether the officer took his gun out but more subtle points regarding voice tone and other aspects of police demeanor.⁷ Practically, much of this cannot be reconstructed. There may be a bus load of passengers but apart from the question of how much they saw and remember, are the passengers going to be around to testify at the suppression hearing?

3. *Constitutional requirements versus policy choices*. It is generally agreed that not every policy issue should masquerade as a constitutional dispute. That "working the buses" may comport with Fourth Amendment minima is

⁷Relevant factors include the time of day, the place, the officer's tone of voice, and whether the officer displayed a weapon or handcuffs, wore a uniform, touched the individual without permission, threatened or physically intimidated him, or retained his identification or travel ticket." *United States v. Lewis*, 921 F.2d 1294, 1297 (DC Cir. 1990).

not dispositive on the issue of whether it is sound policy. Even the Court in *Bostick* stated: “. . . this Court is not empowered to forbid law enforcement practices simply because it considers them distasteful. The Fourth Amendment proscribes unreasonable searches and seizures; it does not proscribe voluntary cooperation.”

4. *Local law, especially state constitutional law.* One way in which the bus sweeps may be limited is by local law that is more restrictive than the Fourth Amendment, especially state constitutional law. Obviously the Fourth Amendment does not require bus sweeps even if it permits them. It is well known that there has been a resurgence in state constitutional law in recent years. This has been especially true in the search and seizure area because many state courts are more inclined to rule favorably from the standpoint of criminal defendants on search and seizure issues than is the Supreme Court of the United States. The state courts in effect circumvent Supreme Court interpretations of the Fourth Amendment by using local law, usually state constitutional law. In *Bostick* the Supreme Court of Florida made several references to the state Constitution but its analysis pertained only to the federal Constitution. That is no doubt because an amendment to the Florida Constitution makes it impossible for the Florida courts to interpret the cognate provision of the state Constitution more restrictively than the Fourth Amendment. Florida Constitution Art. 1, §12:

Searches and seizures

“. . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution. Amended, general election, Nov. 2, 1982.”

5. “*Bostick* warnings.” In his *Bostick* dissent Justice Marshall suggested warning individuals that they do not have to cooperate with police inquiries during bus sweeps. “Alternatively, they could continue to confront passengers without suspicion so long as they took simple steps, like

advising the passengers confronted of their right to decline to be questioned, to dispel the aura of coercion and intimidation that provokes such encounters.”

This may seem logical because it would go a long way towards eliminating the problem, referred to above, of resolving after the fact whether the cooperation of the individual was truly voluntary. Nevertheless if a rule analogous to *Miranda* were devised, a mountain of issues like the endless litigation about the application of *Miranda* may be expected. Also, the requirement of warnings in *Miranda* is an exception to what is normally required of police, not the rule. *Miranda* applies only if there is “custodial interrogation.” Further, there is no requirement of warnings for consent searches, although awareness of a right to refuse is a factor to be taken into account in assessing voluntariness.⁸ As a generalization the police have the right to speak to citizens and to seek voluntary cooperation in the discharge of their duties. If individuals do not wish to converse with the police they can say so. In the abstract that is hard to argue with. Whether courts are well equipped to distinguish voluntary cooperation during bus sweeps from encounters that result from “the aura of coercion and intimidation” is another matter.

6. *Legalize drugs.* From time to time articles appear in magazines and the popular press about legalization of drugs, at least “soft drugs.” It is always good for a headline, especially if the suggestion comes from a seemingly unlikely source. “Police chief says: legalize pot.” Those suggestions have a common theme. The war on drugs is irretrievably lost. We’re just enriching drug kingpins, giving rise to collateral crime, such as break-ins and muggings by users seeking money to buy drugs. Legalize and control the distribution of at least some drugs, the suggestion goes. The situation would not be ideal but it would be better than where we are now and where we seem to be heading. One suspects that such proposals are often born of frustration, put forward by individuals who lack the authority to implement them and without expectation that the suggestion will be acted upon.

The time may have come to take such suggestions seriously.⁹ One side benefit would be to eliminate or at least

⁸*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

⁹For a concise but excellent overview of drug decriminalization see V. Bugliosi, *Drugs In America* 175–203 (1991). This book also contains a highly worthwhile treatment of the drug problem generally and deserves close attention. While the author’s discussion of the arguments in favor of legalization inevitably contains much familiar material, he begins with a back-to-basics distinction between offenses *malum in se* and *malum prohibitum*. Bugliosi argues that using narcotics is no more intrinsically evil than using liquor or tobacco. The failure of the public to understand this has made candid public discussion of the merits of drug decriminalization impossible. Thus, one who suggests legalization of drugs should not be treated as if he suggested legalizing rape or murder.

While Bugliosi seems to be convinced at least provisionally in favor of legalization he suggests that a presidential commission be appointed to study the matter. With this suggestion the author is not backing off from his own arguments but simply following through on his belief that there has been a sort of taboo against serious consideration of legalization by those in government. Serious study should precede action.

Acknowledging that arguments that seem sound in theory may prove otherwise in practice, Bugliosi argues that if legalization is decided upon implementation could take the form of suspension of enforcement rather than repeal of drug laws, just as certain other laws are not usually enforced. Repeal would follow if the trial period proved successful. The author’s general point that drug legalization is not necessarily irreversible is important. Suspension of enforcement of existing laws, however, might not be practical or desirable. Not practical, in the sense that other laws that are not enforced, either because they are eccentric and obsolete or pertain to matters of private conduct where there is now a consensus against enforcement, did not abruptly stop being enforced. It was a process not an event. Who is to blow the whistle and say from now on certain drug laws will not be enforced? Also, suspension of enforcement may be undesirable because we would then have a *de jure* category of laws that are not enforced, as opposed to an unspoken understanding based on police and prosecutorial discretion. This would be a puzzle if not a scandal to the people. Perhaps the solution is new legislation with a sunset provision. Old drug laws would be repealed. Some new laws would be needed since no one suggests that the drug area be totally unregulated. A sunset clause would require that the matter be thoroughly revisited after a designated period of time.

lessen the inclination to quiz Supreme Court nominees and other appointees on whether they used marijuana at some point in the past. Bus sweeps, airline and train lobby sweeps, employee drug testing – these are our present lot. Yet, while the enforcement methods are ever more assertive, the war on drugs apparently does not go well. Buses are being swept yet reports persist that in many communities drug transactions go forward on certain street corners more or less unmolested.

A degree of deregulation may be no worse than this. No one suggests that it is an all or nothing thing. Presumably, we are not about to let our pilots fly “high.” Nevertheless, a lot of Fourth Amendment law is being made these days. It is influenced at least sub silentio and in some cases openly by judicial recognition of the urgency of the nations’s drug problem. If, happily, we manage to make strides in resolving the drug problem in the coming years this Fourth Amendment jurisprudence will not simply evaporate. Nor, if we take on some of the trappings of a police state will those trappings automatically go away with the drugs. If put to the choice the people would likely prefer some sacrifice of privacy vis-a-vis the police than to see our cities controlled by drug criminals. In some neighborhoods this choice is already being presented in a stark form. We should not be put to the choice, however, unless we are sure that all other alternatives have been explored.

Another alternative – a move very much in the other direction – is harsher sentences for major drug offenders. One week after deciding *Bostick* the Supreme Court decided *Harmelin v. Michigan*.¹⁰ Harmelin was convicted of possessing more than 650 grams of cocaine. (He had 672). As a result he received a mandatory sentence of “life in prison without possibility of parole.” The Supreme Court rejected claims that the sentence violated the “cruel and unusual punishments” provision of the Eighth Amendment. Justice Kennedy in his concurring opinion observed that “this amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses.” Justice Kennedy went on to note the various connections between drugs and crimes of violence, including: “(1) A drug user may commit crime because of drug induced changes . . . ; (2) A drug user may commit crimes in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture.”

In particular cases mandatory life without parole may seem very harsh even where substantial amounts of narcotics are involved. If harsh sentencing solved the problem it would be worth it. Whether it would solve the problem is another matter.

On the surface it may appear schizophrenic to introduce stricter sentencing and decriminalization into the same

discussion. But, of course, normally the decriminalization suggestion is not that all drug laws be repealed. Also, drug laws are not intrinsically unjust. It is just that some of them may be unenforceable without buying into other problems that we would be better off avoiding.

Choices have to be made and they are interrelated. Do we once again want to be a country that practices capital punishment on a widespread scale? Do we want to fill prisons even more with drug offenders. Perhaps draconian punishment practices implemented over the short term would have the desired long term deterrent effect. Decriminalization is another avenue. Increased police encounters on a random basis with citizens – more or less consensual - is yet another choice.

Perhaps the ineluctable reality of the drug menace is that one way or another its solution will entail some sacrifice of freedom.

7. *The dissenters in Bostick should have claimed victory.* As noted above, strictly speaking the Court in *Bostick* did not uphold the “working the buses” program. It merely set forth a general norm for what constitutes a seizure under the Fourth Amendment, a norm with which the dissenters had no quarrel. It is true, of course, that the Court intimated that what went on in *Bostick* was a consensual encounter and that this is true of the bus sweeps generally. Still the Court did not actually say that. Perhaps the dissenters missed an opportunity to whistle past the grave yard. They could simply have said that while they disagreed with the Court’s conclusion that the Florida court had announced a per se rule, they had no problem with the Supreme Court’s standard for what constitutes a seizure. They could then simply have encouraged the Florida courts in this case, and courts generally, to find that there is a seizure on facts of the kind presented in *Bostick*. It would have been an excellent form of damage control.

8. *Visiting foreigner test.* Suppose friends come to visit you from some more or less civilized country such as Britain. Suppose, as in *Bostick*, you take them on a bus from Miami to Atlanta with a stopover in Fort Lauderdale. Oh, I know, fat chance you would take a bus. In a way, that is the point; we always think of these things as happening to other people. Anyway, indulge me. You are on the bus with your friends. The police come on to “work the bus.” Perhaps the police would be slight and unimpressive in appearance, modest or even diffident in demeanor. But don’t count on it.

¹⁰111 S. Ct. 2680 (1991).

How would you react as you and your visiting friends became participants in the bus sweep? You would be embarrassed. As quoted above: "This is not America." We used to read that the Soviet Union, even in the darkest days of repression, had a Constitution that generously defended various civil liberties. Sensibly enough, the world judged that nation by its practices, not by guarantees written on paper. This is not to suggest that "bus sweeps" are even an early warning sign of Stalinist terror. They may be, however, one of many signs that we are becoming familiar with

and accepting of intrusions that a short while ago we would have associated with authoritarian governments. Much of this is attributable to the drug problem. This should not happen imperceptibly and without consideration, if it is to happen at all. Perhaps the ineluctable reality of the drug menace is that one way or another its solution will entail some sacrifice of freedom. If that is true we had better know what our alternatives are and make thoughtful choices.

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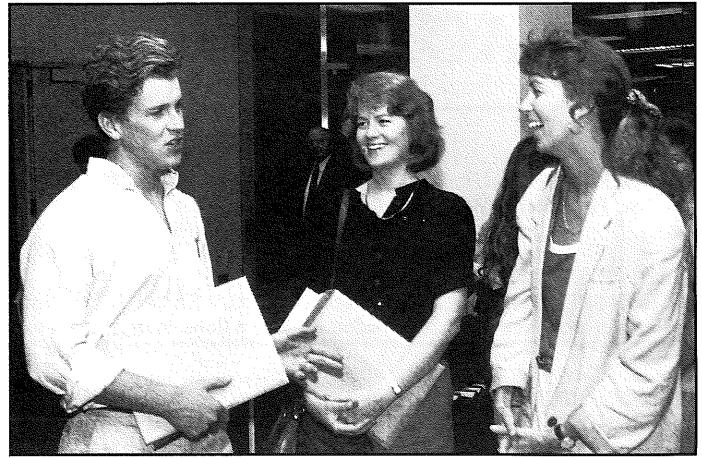
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