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The Advocate, Vol. 22, No. 2, 1992

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Suffolk University Law School, "The Advocate, Vol. 22, No. 2, 1992" (1992). *The Advocate*. 66.
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theAdvocate



Patricia Brown Retires

theAdvocate

Volume 22, No. 2
Spring 1992

The Suffolk University Law School Journal

Joseph D. Cronin
*Professor of Law
Editor-In-Chief*

Editorial Board:

Gerard J. Clark
Professor of Law

John C. Deliso
Dean of Admissions

Charles E. Rounds, Jr.
Professor of Law

Michael J. Slinger
*Law Library Director and
Associate Professor of Law*

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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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Appeals Panel Sits At Suffolk Law School

The Appeals Court held a session Friday, November 15, 1991 in Suffolk University Law School's Moot Courtroom on the third floor of the Frank J. Donahue Building. On hand to greet the three sitting justices were (standing from left) Associate Dean Charles P. Kindregan, Jennifer Sobel of Newton Upper Falls, director of the mock trial program, Sharon Farrington of Boston, president of the Moot Court Board, and Law School Dean Paul R. Sugarman. Seated are (left to right), Justice Charlotte Anne Perretta, Chief Justice Joseph P. Warner, and Justice George Jacobs. The court heard arguments on six cases during its sitting.

LETTERS

The Advocate has received a number of letters pertaining to Professor Clark's interview of Professor Rounds in the Fall issue on the subject of IOLTA. The letters are reproduced below.

We were surprised that the reader reaction was so generally favorable to the position espoused by Professor Rounds. No doubt there are other points of view out there as well. Readers wishing to continue this IOLTA dialogue in letter or article form are invited to contact the Advocate.

To The Advocate:

I read with interest the Advocate's interview with Professor Charles Rounds, on the subject of IOLTA (An IOLTA Eye Opener: Fall, 1991 Edition). I fully agree with Mr. Rounds that the use of client monies (interest) to fund public service agencies, many of which engage in political actions and activities, without client knowledge is, to say the least, ethically questionable.

By way of background, I became aware of the issue when I read a piece by the late Warren Brookes in the April 8, 1991 edition of the Washington Times, titled, "Legalized theft to fund the left?" Shortly thereafter I questioned several attorneys on the subject, every one of whom admitted privately to being personally troubled by the ethical implication of the little deceit they were forced to practice on their clients.

This led me to contact Professor Rounds of Suffolk Law School. I had heard from a friend that Professor Rounds was an expert on the subject of trust Law and that he would be willing to provide additional background on the subject of IOLTA. I have since written about IOLTA in several of my weekly columns in the South Boston Tribune, and continue to be interested in the outcome of the recent federal lawsuit on the subject.

It seems to me that those who support current IOLTA practices do so on the grounds that the money is (a) being used for good purposes, and (b) the amounts are nominal. With respect to the latter I would agree that it is nominal when viewed from an individual perspective. When viewed in the aggregate, however, a picture which emerges is altogether different (\$10 million yearly in Massachusetts, and a quarter-of-a-billion dollars annually nationwide), hardly nominal amounts. As to the former, namely, that these monies are being used for a good public purpose, I question the very integrity of this argument. What constitutes a good purpose? Would a lawsuit challenging forced busing, or mindless racial quotas, or contrived findings of housing discrimination in public housing be the type of cases likely to find enthusiastic support from determined advocates at, say, the Boston Bar? Or the Lawyers Committee for Civil Rights Under Law? Hardly! Neither do we see many actions defending the rights of property owners, or gun owners. I suspect a good public purpose to many in the le-

gal profession is really little more than a safe "politically correct" public purpose.

But putting the question of purpose aside, because I don't believe this money should be used for the administration of justice in our courts either, there is a larger question, one which goes to the heart of the matter and was touched upon eloquently by Professor Rounds in his interview. The question is this: Who's money is it? If you were asked to answer the following question: The interest earned on a client's account belongs to the _____? How would you answer? (a) The courts? (b) The Mass Bar? (c) The Mass Bar Foundation? (d) the Boston Bar or (e) The client?

Those who argue other than (e), the client, are pressing precariously close to the edge of the ethical sphere in which lawyers are presumed to be operating. The interest earned on a client's account by right belongs to the client. After all, these are not public funds we are discussing, but rather private monies – interest on CLIENT accounts. What's so hard to understand about that?

That the SJC says otherwise, and that courts have upheld this "legal theft," to borrow a term from Warren Brookes, is of no surprise to me. As an elected official I can say what many in the legal profession state privately but dare not utter in public: The courts are as political and philosophically biased as the legislature – perhaps even more so. But the fact that a court has decided wrongly in the past, is no reason to believe they are bound to decide wrongly in the future. At some point, one would hope the judiciary would come to its senses and right a grievous wrong of its own making.

In closing, I again applaud Professor Rounds for bringing this matter to the forefront. It is indeed unfortunate, though not surprising, that so many in the legal profession prefer to play it safe rather than publicly question the serious constitutional and ethical issues raised by his arguments. Lawyers should not look to the courts to solve this problem because the courts are part of the problem, and will continue to be a part of the problem as long as those who practice before the bar remain silent.

James M. Kelly
Boston City Council
Boston, MA

To The Advocate:

As one of the Plaintiffs in the pending action in the United States District Court I was pleased to see a discussion of the issues In the Fall issue of The Advocate.

As Professors Clark and Rounds noted, the pending case does not deal with a few issues of interest to those of us at the Bar of Massachusetts. Furthermore, Professor Rounds overlooks the very real property of members of the Bar in a portion of the IOLTA deposits. The reason for this is that the Washington Legal Foundation seeks issues of more than Massachusetts-wide application. As in the Scopes trial, victory on the wrong issue would be a defeat for it.

I originally sought to attack IOLTA directly in the Supreme Judicial Court. Faced with the obvious conflict in the SJC position I tried to think of a way to bring it before them without their decision making the matter res judicata. Using the United States Constitution as a guide I called my petition a Petition to Redress Grievances. After collecting filing fees from me the SJC turned it into an adversary proceeding, so I dropped that approach.

Of course, the sharp separation of powers in the Massachusetts constitution and the SJC's own decisions as to what constitutes a tax would both seem to affect SJC power to mandate this IOLTA. It also, as in the matter of support for an organization representing illegal aliens, trespasses upon reserved Federal powers in the Constitution. Many other advocacy groups have no concern with the representation of the indigent or management of the Courts.

In my initial effort I stressed the fact that part of the money concerned was my money. As a conveyancing lawyer I am affected by that portion of the United States Code called the Real Estate Settlement Procedure Act which requires itemization of various legal fees on lines 1101 through 1107 and a gross check from buyer on line 303, which is the amount required to be deposited in the IOLTA account together with the mortgage proceeds, if any. This, obviously, is my money.

These are minor footnotes. The Washington Legal Foundation and Professor Rounds are pointing to the correct way to focus on the national problem of PC extortions by Politically-inclined judges.

Timothy J. Howes
Springfield, MA

To The Advocate:

Congratulations. The interview with Prof. Rounds "An Iolita Eye Opener" was an article that should be reprinted and widely distributed. Since filing a lawsuit challenging the constitutionality of Interest on Lawyers Trust Accounts (IOLTA), I have learned that most attorneys and even fewer of their clients have any knowledge about IOLTA. Prof. Rounds has eloquently alerted the Advocate's readers that it is a scheme imposed by the Supreme Judicial Court (SJC) to fund the court's favorite political and ideological causes at the expense of the constitutional rights of attorneys and their clients. Thanks to the Advocate the word is now out about what IOLTA is and hopefully attorneys will now at least inform their clients as to how their clients' money is being spent.

If any of your readers want to learn more about IOLTA or the lawsuit, I would be happy to provide them more information. I can be reached at the Washington Legal Foundation, 1705 N Street, N.W. Washington, D.C. 20036.

John C. Scully
Counsel
Washington Legal Foundation

To The Advocate:

I wish to express my support for the positions taken by Professor Rounds during his recent interview with Professor Clark which appeared in the Fall 1991 edition of the Advocate ("An IOLTA Eye Opener"). For those of you that did not read this very informative (and in my view accurate) interview, IOLTA stands for Interest on Lawyers Trust Accounts. This, as Professor Rounds correctly points out, is a misnomer. The proper acronym for this scheme "should be IOCTA, Interest on Clients Trust Accounts." The IOLTA system works to skim the interest off of certain clients' funds that are held by lawyers; this is for the benefit of (so-called) charitable organizations that are directly or indirectly designated by the Massachusetts Supreme Judicial Court. Although there may be room for disagreement as to the relative merits of the organizations receiving IOLTA funds, it is impossible to justify this taking of clients' funds. I first learned of the existence of IOLTA during the Professional Responsibility course taught by Professor Ortwein during the summer of 1991. At that time, I could not help but to think that things like this are what give lawyers a bad name. Here we were congratulating ourselves as a profession for being charitable with other people's money! I would have no problem if these funds really did come from lawyers, but these funds come from clients and without their knowledge or consent. The problems associated with the IOLTA program go way beyond the fact that we as lawyers by implementing IOLTA are violating basic trust and agency principles. Other problems include a lack of accountability for IOLTA funds recipients, civil rights problems, and separation of powers problems. Lawyers are the agents of their clients, they should not be essentially tax collectors for a branch of government which has no authority to levy taxes. If the need that IOLTA money is supposed to fill is as great as its proponents claim, and I do not doubt that it is, then it is time to lobby the legislature to raise the money through a legitimate tax and fill this need. I hope that interested students and lawyers will take the time to read the aforementioned article by Professor Rounds and voice their opposition to IOLTA. After all, it is the client to whom we owe our existence as a profession and it is the client who is counting on us to represent their best interests. Except for maybe the few decision makers who get to decide who will and who won't receive IOLTA funding, IOLTA is in the best interests of no one.

George J. McElroy, Jr.
W. Quincy, MA

To The Advocate:

Congratulations on the most interesting interview on Interest on Lawyer Trust Accounts (IOLTA).

Professor Rounds has shown remarkable initiative in exposing bar associations nationwide for their ill-conceived attempt to hijack client and lawyer funds for causes they do not necessarily support. And Professor Clark's questions helped point out the irony of the organized bar's involvement in this scheme.

It is disconcerting that the legal profession, which is sworn to uphold the Constitution, would lead an attack of this sort on the First Amendment.

One would have hoped that leaders of the bar would have had more respect for the Supreme Court's holdings which limit the use of compulsory fees for causes and purposes contrary to the beliefs of compulsory members. *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Beck v. Communications Workers*, 487 U.S. 735 (1988).

Well done to The Advocate, Professor Clark and Professor Rounds for revealing the IOLTA hypocrisy.

Baker Smith
Fishersville, VA

To The Advocate:

It is a typical knee-jerk reaction of the PC to condemn diverse views, opinions and contrary facts as being those of crack-pots or of the fringe element. But, all labeling aside, it nevertheless remains that under the IOLTA scheme property is being taken without due process and is being used for political purposes.

As Professor Rounds noted, the interest income earned on a client's funds belongs to the client who alone has the right to commit the earnings from those funds to whatever purpose. Under IOLTA, the client is not only deprived of income, but may well find that same income used for purposes adverse to his or her own interests or beliefs.

While it might be argued that as to an individual client the property right at stake is de minimis, there does not appear to be a de minimis exception to either the Fifth or First Amendments. Furthermore, when all these de minimis amounts are added up, we are talking about millions of dollars.

Professor Rounds raises other issues which should be of great concern not only to individual clients and members of the legal profession, but to the general public as well. Among them is the issue of accountability. Exactly where is the money going and for what purposes? And to whom should the SJC account? The clients as the rightful owners of the property, the lawyers as fiduciaries for the clients, or the general public?

Are these public moneys? If so, should not the legislative branch be the disbursing agent?

Are the disbursements made for charitable purposes? If so, what are the guidelines of the disbursing agents? Are the disbursements made for political purposes? If so, will proponents of merit-based admissions and core curriculum be given IOLTA moneys to produce their own study of the Boston Latin School?

In April the Federal District Court sitting in Boston will be called upon to decide some of these issues – hopefully in the context of that which is constitutionally and legally correct. The PC can then fund their PC agenda out of their own PC pockets!

Cathy Grant
N. Attleborough, MA

To The Advocate:

My congratulations to *The Advocate* on its publication of the interview of Professor Rounds by Professor Clark. Your publication shows genuine courage, because there are few law reviews, bar association or law school journals which would publish an informative and critical analysis of IOLTA. IOLTA is a major scandal in American law today, and perhaps the worst in which the bench and bar have engaged in American legal history.

IOLTA has achieved this standing, I suggest, because it subverts the independence of judicial review and all that those words have meant. It does this without awareness by the public, which does not understand that, generally, it is judges themselves who have created the apparatus which takes their property and their rights from them.

Moreover, it is a massive wealth transfer from persons who are poor to organizations which are well-financed, and to persons who are, comparatively, rich. And this is done in the name of the poor from whom property is taken.

In Professor Rounds, you have a scholar in whom all of us are proud. Again, my congratulations.

William F. Harvey
Carl M. Gray, Professor of Law
School of Law
Indiana University

INVENTING THE FUTURE – A SUMMARY OF THE REPORT OF THE TECHNOLOGY OF JUSTICE TASK FORCE OF THE CHIEF JUSTICE’S COMMISSION ON THE FUTURE OF THE COURTS

Kate Nace Day
Associate Professor of Law
Suffolk University Law School

On June 20, 1989, Paul J. Liacos was sworn in as the 22nd Chief Justice of the Commonwealth. The new Chief Justice quickly announced his intention to launch a project unprecedented in the Commonwealth – to create a new vision of justice for the future of the Commonwealth’s courts.

The concept was simple. A commission would be created. Its membership would be representative of the community at large, business, academia, the legislature, the executive branch, the bench and the bar. The Commission would look ahead to the next century. It would articulate a vision of the justice system more fair, more responsive and more humane, and would advise the Chief Justice on how to achieve it. The Commission would examine the best available trend data and forecasts to mold its vision to projected socioeconomic and demographic contours of the Commonwealth, c. 2020. Finally, the Commission would return its finding and recommendations to the Chief Justice.

Over the next ten months, the Chief Justice’s Commission on the Future of the Courts took shape. The President of Suffolk University, David J. Sargent, was appointed Commission Chair. Suzanne V. DelVecchio, a justice of the Massachusetts Superior Court, and Ira A. Jackson, Vice President of the Bank of Boston, were appointed vice chairs.

When Chief Justice Liacos created the Commission on the Future of the Courts he made clear to its members that he was not seeking, to borrow a favorite phrase from Commission leadership, “to polish the present.” Nor was he seeking to update the work of the Governor’s Committee on Judicial Needs, The Cox Commission. Rather, Chief Liacos

charged his Commission with creating an entirely new vision of justice for a seemingly remote future.

While the full Commission worked to create an integrated vision of justice, the Commission also had six task forces that served as semi-autonomous laboratories where empirical evidence was examined, public comments were considered, and where new questions arose as quickly as old questions were resolved. The Task Force on Technology of Justice was directed to formulate a strategy for bringing the courts into the mainstream of technology. The Task Force attempted to determine how, in the future, technology can facilitate public and litigant access, improve communications, enhance information processing and storage, and assist in judicial decision-making.

The Technology of Justice Task Force was chaired by Commissioner of Probation Donald Cochran and Sequoia Inc.’s President, Gabriel Fusco. Members included Joseph G. Brady and Alice Richmond. I had the honor to serve as Reporter to the Task Force. My work with the Task Force was a full and exciting education in new and emerging technologies, the current state of the courts, and strategies for achieving our vision of the future of technology and justice. I remain indebted to the Chairs and Members of the Task Force, to the Commission staff, and to President David Sargent and Dean Paul Sugarman for their support and encouragement throughout the duration of the work of the Task Force.

VISION

By the year 2020, photovoltaic cells will convert sunlight directly into electricity.¹ Brain cell and brain tissue trans-

¹Dukakis and Kanter, *Creating The Future: The Massachusetts Comeback and Its Promise for America* (1988).

plants will be used to aid the mentally retarded.² Bloodless laser surgery will decrease hospital stays and medical costs.³ Furniture will move and talk allowing the elderly and the handicapped to live at home.⁴ Chemical and electrical stimuli will be implanted in criminals allowing for constant control over the individual's behavior.⁵ Computers will be able to see and feel objects, move, and accurately generate human speech sounds.⁶ Teraflop supercomputers will perform a trillion calculations a second,⁷ and, there will be a cure for the common cold.⁸

This may be the future, the future of the technology revolution. Biotechnology, robotics, artificial intelligence, telecommunications, and automation may play a part in every aspect of our lives, including our conception of justice. Artificial intelligence, holograms, video technologies, and virtual reality may well provide the foundation for a justice system without courthouses or courtrooms, lawyers or judges. Historically, the courts have only reacted to change, change in social trends, changes in economic conditions, changes in law itself.

For many, the technological revolution raises a specter, the dark vision of machines replacing people, dehumanizing our everyday experience; computers invading individual privacy and rights; technologies creating nightmare consequences beyond our control. "Every new technology is like a sphere of the sun: it has a bright side and a dark side."⁹ While technology threatens ill as surely as it promises good, in our vision of the future the courts will use technology to enhance rather than diminish our sense of humanity.

Information technology—the capabilities offered by computers, soft-ware applications, and telecommunications¹⁰—are particularly relevant to the work of the courts. "Information technology should be viewed as more than an automating or mechanizing force; it can fundamentally reshape the way business is done."¹¹ Technology can cap-

ture and disseminate knowledge to reshape the way we arrive at justice, the way we administer justice, in fact, the very quality of justice.

Enhancing the quality of justice involves understanding and serving the needs of all the constituents of the justice system. Technology will provide easier access to information for the public, for attorneys, and for other constituencies within the justice system. It can already transfer information and images rapidly across great distances, making justice largely independent of geography. And it promises much greater efficiency for court management, thus improving the quality of work life for those within the justice system. Technology will reduce the cost and increase the speed, efficiency, and effectiveness of the administration of justice. The courts will also use technology to bring new and alternative means of dispute resolution to a changing population.

All citizens must have confidence that the courts will protect their rights and liberties, that the courts will treat them fairly, regardless of the language they speak, their race or gender, regardless of their physical impairments. Technology can ensure a justice system that is responsive to the individual needs of our citizens and accountable for their fair treatment. Technology can educate the public about the justice system. Technology can restore public confidence by helping to create a justice system that remains worthy of the public trust.

THE PRESENT

In the last several decades, Massachusetts has become one of the high-technology centers in the United States and the world. Massachusetts companies have contributed a large share of the new technology to the world market,¹² and are now developing new artificial intelligence technologies.¹³ The Commonwealth is home to several academic institutions recognized as world leaders in technological development.

²M.J. Cetran, W. Rocha, R. Luckins, *Into the 21st Century* in *The Futurist* 29 (July/Aug. 1988).

³*Into the 21st Century* at 29.

⁴*Outlook '90 and Beyond*, *the Futurist* 53 (November 1989).

⁵*Outlook '90 and Beyond*, *The Futurist* 53 (November 1989).

⁶*Strategic Investments for Our Future: Building an Information Infrastructure for Massachusetts*, Report of the Senate Special Committee on Long Range Planning (1988).

⁷John Markoff, *Supercomputing's Speed Quest*, *New York Times* D5-6 (May 31, 1991).

⁸S. Siegelman, *Magic Bullets, Better Drugs, Growing Markets*, *Chemical Week* 92 (September 27, 1989).

⁹Timothy Ferris, "Virtual Reality: The New Computer Revolution," *Suffolk University Lowell Lecture Series* (March 27, 1991).

¹⁰Ernst and Young at 17.

¹¹Thomas H. Davenport, James Short, *The New Industrial Engineering: Information Technology and Business Process Redesign*, Ernst and Young, Vol. 31, No. 4 at 12 (Summer 1990) (hereinafter "Ernst and Young").

¹²M. Dukakis and Kanter, *Creating the Future: the Massachusetts Comeback and Its Promise for America* (1988).

¹³Report of the Senate Special Committee on Long Range Policy Planning, *Strategic Investments for Our Future: Building an Information Infrastructure for Massachusetts* (1988).

The state court system's proximity to technology's leading edge is, at best, ironic since the state of technology within the justice system is little more than the telephone and the typewriter. The delay in bringing technological innovation to the justice system has long been recognized as central to the problems of the justice system as a whole.

The slow pace of automation in the Massachusetts courts is not news. The Cox Commission and the Senate Ways and Means Committee fully documented this problem in 1976 and 1987 respectively. Since then, there has been progress. Probation's systems are highly regarded, as is the jury management system. The Superior Court has recently entered into a contract for automated comprehensive case management and remote access to computerized dockets. The District Court and the Supreme Judicial Court are also automating. What is puzzling and worrisome, however, is that by and large these efforts are uncoordinated. Each system is the product of separate vendors. Internal and external interfaces are uncertain at best.

In any event, more needs to be done. To arrive fully in this century, to say nothing of the next, the courts need to make far better uses of technology in such areas as caseflow management; statistical reporting on caseflow; internal communications; communications aimed at enhancing public understanding and access; data management; and information storage.

STRATEGY FOR CHANGE

The present inefficiencies in the courts are a nightmare of long-standing. The people deserve a justice system that is efficient, effective, and fair. Technology will play a major role in the system's redesign. Our recommendations for bridging the gulf between present and future follow.

We Begin Today

The Chief Justice of the Supreme Judicial Court should chair a standing Task Force on Technology and Justice to coordinate and integrate existing and emerging technologies into court operations.

Technological change is impossible without a profound and sustained commitment from those responsible for the administration of justice.¹⁴ Technological change is the easy part: successful adoption of technological innovation requires the understanding and broad-based support of all those involved. A permanent Task Force on Technology and Justice, comprised of judges, court personnel, lawyers, law librarians, the general public, and technology researchers and applications specialists, will manifest the courts'

commitment to technological advancement for the benefit of all the courts' constituencies.

A permanent Task Force on Technology and Justice could foster technological innovation within the justice system. In many instances, members of the judiciary have been responsible for technological innovation. For example, Arizona Judge David Phares, working with IBM and Anderson Consulting, developed a judicial workstation—a computer capable of assisting judges in all their various functions—now being piloted in the Arizona courts.¹⁵ Judge Phares found that courtroom information technology systems were developed for clerks not judges, even though judges function in managerial roles.

The impression was judges have no business touching keyboards, that's what clerks do. Judges touch gold Cross pens. We've been systematically ignored when it comes to developing things that would help us do our job.¹⁶

While Judge Phares lectures throughout the country attempting to enlist other members of the judiciary in technological innovations that will improve the justice system, the judiciary is often perceived as resistant to change. A permanent Task Force would expose the judiciary to the possibilities for technological innovations that would be of direct assistance to the judiciary and all those working within the justice system.

A permanent Task Force would also reduce judicial isolation and educate the judiciary regarding technology. The Task Force would bring the judiciary into contact with the public and those researching and developing new technologies and new applications for existing and emerging technologies. This exposure, in turn, would help identify the emerging educational needs of judges. At the Future of the Courts Conference in San Antonio, for example, the panel on The Future of Judicial Education highlighted the impact of dramatic technological change on the future of judicial education.¹⁷ One panelist termed the present, "an age of information overload," requiring that the judiciary formulate a mechanism for on-going judicial education about technology and its impact on both their administrative and decision-making roles. A permanent Task Force would create the necessary dialogue between the judiciary, the public, and the developers of new technologies.

Candidates for judicial appointment should increasingly be computer literate. Once appointed, judges should receive continuing education in computers and emerging technologies.

¹⁴Ernst and Young at 23.

¹⁵W. Hanson, *Here Comes the Judge—And He's Carrying a Laptop*, Government Technology 14 (1990).

¹⁶W. Hanson, *Here Comes the Judge—And He's Carrying a Laptop*, Government Technology 14 (1990).

¹⁷National Center for State Courts, *Summary of the Future of the Courts Conference, San Antonio, Texas 68-69* (1990).

Technological change is impossible without a judiciary that is increasingly computer literate. The judges of today and tomorrow must understand the role of technology in the future of the courts, and the improvements that can result from the successful application of technology to a judge's everyday work.

In Massachusetts, judges are appointed for life terms by the Governor. The procedures governing judicial selection and appointment, revised in 1991 by Governor Weld, include the participation of the Judicial Nominating Council, an entity of non-paid individuals, the Joint Bar Committee on Judicial Appointments, which includes representatives of the Massachusetts and Boston Bar Associations, the Governor's Council, an elected body, and finally, the Governor.¹⁸

Within this selection process, consideration must be given to the computer literacy of each candidate and the candidate's overall attitude toward technological innovation within the justice system. Candidates must be computer literate and, furthermore, must express a willingness to continue their education about emerging technologies.

Once appointed, the members of the judiciary should receive continuing education, including specialized training in information technology. At the Future of the Courts Conference held in San Antonio in 1990, the panel on the future of judicial education highlighted the impact of dramatic technological change. One panelist termed the present "an age of information overload" requiring a mechanism for on-going judicial education about technology and its impact on both the administrative and decision-making roles of judges.

Currently, the main source of judicial training is the Flaschner Judicial Institute, a private nonprofit organization operating as an independent division of the Massachusetts Bar Foundation. This Institute, which is well-respected and privately funded, should be encouraged to expand its efforts at continuing education of technology. Furthermore, funding should be provided for judges to attend courses involving technology at the National Judicial College in Reno, Nevada. Finally, the courts themselves should promote and provide such on-going education.

There should be a comprehensive review of court rules, regulations, and statutes to remove barriers to a more technology-based system.

There will always be rules surrounding the resolution of disputes in the courts and through alternative means.

These rules have a significant role in determining the impact that technology may have on the justice system. Each new technology requires the re-examination of rules and procedures. An extensive and broad review of the rules and decisional law affecting technological innovation within the justice system should be undertaken.

Existing technologies highlight the problem. The transmission of documents by fax machines, for example, raises problems regarding: the payment of filing fees; requirements of signatures; legibility; proof of receipt and adequacy of service of process; and, the validity of fax-ed warrants and orders.¹⁹ Other existing technologies, such as, video transcription of trials, and image scanning technology which scans documents onto optical discs, thereby eliminating the original document and all subsequent need of paper, raise similar problems and speak to the need for a comprehensive adjustment of rules and decisions.

The possible problems are as varied as the technologies, existing, emerging, and not yet imagined. Supercomputers, which are capable of performing several hundred million calculations per second, can now produce powerful three-dimensional simulations of past events. When these are reduced to video format, they can provide computer simulated accident reconstruction as evidence at trial.²⁰ In the literature on computer-generated visual evidence, Massachusetts is often cited as using "an antiquated basis for admissibility."²¹

The transition to a technology driven justice system, where information is transferred electronically, and not by paper, places the concomitant burden on all for an immediate review of rules that can impede or facilitate this transition.

LIFTING THE SPECTER OF TECHNOLOGY

The judiciary must assume a leadership role in assessing technological and scientific advancements to ensure that the justice system can address the legal issues of tomorrow.

As society changes so will conflict. The judiciary must take a leadership role in understanding the implications and rewards of advancements in fields such as biotechnology, molecular biology, robotics, and artificial intelligence, and what these changes will bring in the way of new legal issues.

Biotechnology embraces a number of technologies that enable living cells to produce specific products. The most

¹⁸Harbridge House Report at 26-27.

¹⁹National Center for State Courts, Report on Trends in State Courts 11 (1990).

²⁰Louis Lehr, *Admissibility of a Computer Simulation* in *For the Defense* 8 (1990).

²¹Kathlynn Faedly, *Use of Computer-Generated Visual Evidence in Aviation Litigation: Interactive Video Comes to Court*, 55 *Journal of Air Law and Commerce* 839 (1990).

common method used in biotechnology, gene splicing, allows scientists to place the DNA from one species into the DNA of a second species. Some predict that technology will also allow humans to merge with their technologies. Cyborg technology, for example, will directly link humans to technology that assists malfunctioning body parts. Cyborg technology implies a kind of "conscious technology." Humans combined with computers essentially represent a new species. The fears of such science fiction possibilities exist today. If technological advancements are to be used for our benefit, the judiciary must be informed and prepared to confront the surrounding legal issues.

A subgroup of the permanent Task Force on Technology and Justice should explore the interdisciplinary field of artificial intelligence and the law and recommend justice applications.

Massachusetts is home to many of the preeminent researchers in the inter-disciplinary field of Artificial Intelligence (AI) and the law. Our courts can no longer afford to exist separately from the vast body of knowledge and technologies known as AI. AI has been defined as "the study of cognitive processes using the conceptual frameworks and tools of computer science."²² Or, as one of the founders of AI put it: AI is "the science of making machines do what would require intelligence if done by man."²³

Research in the field of AI and the law has the goals of both understanding legal reasoning and building computer tools for legal practice, teaching, and research. The promise of AI for judicial decision-making is that AI can "automate that part of legal reasoning that deals with rigid formal rules, thus leaving to the judges resolution of questions involving interpretation, ambiguity and credibility of witnesses."²⁴

The Task Force on Technology has had the opportunity to meet with and review the work of several of the researchers in AI and the law. An AI subgroup of the Task Force on Technology and Justice could work to improve our understanding of the relationship between AI and legal reasoning, and specifically examine how AI can assist in judicial decision-making.

An AI subgroup could also help overcome one of the most significant obstacles to understanding AI and the law, human resistance and fear. One AI researcher has writ-

ten that lawyers have greeted the advancements in AI with "apathy, ignorance or resistance."²⁵ Edwina Rissland, Associate Professor of Computer and Information Science at the University of Massachusetts and Lecturer at Harvard Law School, has addressed certain human fears regarding AI and the law:

[S]ome might be concerned that the use of AI models will somehow trivialize legal reasoning by making it appear too simple, undermine the importance of lawyers or judges by relegating them to the role of mere users of systems which do all of the interesting reasoning, or dehumanize us by describing intelligent behavior in well-defined terms. . . .²⁶

As Professor Rissland concluded, however:

There will always be a need for human lawyers and judges. The goal is to assist, not to replace.²⁷

An AI subgroup will educate attorneys, the judiciary, and the public to ensure AI's contribution to the effectiveness of a humane justice system.

The judiciary must assume a leadership role in initiating educational programs in the public schools to introduce children to the justice system, including its technology.

The children of today are the leaders and users of the justice system of the future. They could also be its victims. When we look at today's children, playing with video games, working on personal computers, the lesson is clear: technology need not diminish our humanity. Children are not fearful of technology. The pen replaced the quill; computers will replace the pen. Adults dread; children delight.

The specter of technology for the children of today is not technology itself but the fear that only some children will be taught how to use technology. We must begin today to ensure that children understand both the principles of justice and the technology that ensures justice. Educational programs should be introduced into the public schools to educate children about justice. For example, cable television can bring live trials into the public schools.

The educational program should also ensure that children are computer literate. Teaching children about the

²²Edwina Rissland, *Artificial Intelligence and Law: Stepping Stones to a Model of Legal Reasoning*, 99 Yale L.J 1957 (1990).

²³Rissland at 1956.

²⁴Vishwas Pethe, Charles Rippey, L.V. Kale, *A Specialized Expert System for Judicial Decision Support* in The Center for Law and Computer Science, Northeastern University, *International Conference on Artificial Intelligence and Law* 190 (1989).

²⁵Rees Morrison at 35.

²⁶Rissland at 1980.

²⁷Rissland at 1980.

technology of justice can be accomplished through interactive videos that bring children into the justice system, either by interacting with a screen computer, or video conferencing with a clerk of court as a trial is about to begin. Children should have the opportunity in their schools to play and experiment with technology: artificial intelligence technology can be provided so that children can develop expert systems of their own.

ENHANCING THE EFFECTIVE MANAGEMENT OF JUSTICE

Technology planning for the future of the courts must be fully integrated with the business, financial, and human resource planning.

Designing the future necessarily involves conceptualizing change. Technological change is an integral part of a comprehensive plan for the future of the courts. Such comprehensive planning requires centralized, committed management that will provide the policy at the foundation of technological innovations.

The Task Force has been fortunate to be exposed to many different ways of strategizing about the future. Most problem solving involves identifying a particular problem and seeking innovative solution. Technology, on the other hand, presents itself and the concomitant question of what problem it might solve. Technology without progress or technology for technology's sake is an error. In order to know what problem a particular technology might solve, we must keep the goals and objectives of the courts in mind. This requires an initial task of focusing on the various functions of the justice system and the goals and objectives for each function.

In their paper on information technology and redesigning business processes, Thomas Davenport and James Short of Ernst and Young reasoned that redesigning business processes "is a straightforward activity, but five major steps are involved: develop the business vision and . . . objectives, identify the processes to be redesigned, understand and measure the existing process, identify IT levers, and design and build a prototype of the new process."²⁸

Similarly, the Ministry of the Attorney General for the Province of British Columbia, in its strategy for technological change, initially focused on the particular functions of the judicial system. The strategy defined the business functions of the courts as: Management, Record Management, Judicial, Security, Financial, and Information. The strategy then focused on better ways of doing business through technology, identifying opportunities for major

enhancements and improvements within each business function of the court. This examination led the strategic planners to adopt short, mid, and long-term goals, with the idea that knowledge gained from short-term initiatives would enhance the quality of longer term efforts.

Finally, the strategy recognized the need to manage the transition from the functional reality of the present to the planned vision of how the courts should function.

Because of the inherent impact of change brought about by an increased use of technology, the [Court] will also need an Operation Plan, an Organizational Plan, a Human Resources Plan and a Financial Plan. A Communications Management Plan will assist in keeping everyone informed, establishing confidence and identifying further opportunities. These plans must be flexible enough to respond to new opportunities and changing circumstances.²⁹

The transition to a technological justice system requires that we begin integrated planning now.

The Task Force on Technology recommends the immediate initiation of a pilot project for the development and construction of the courthouse of the future.

Courthouse design is a basic and critical stage in integrating technology and justice. The courthouse of the future should use existing and emerging technologies to provide improved access to justice, as well as more efficient court administration. The development of a prototype courthouse would allow us to see the future in operation today. As a pilot project, the courthouse of the future would provide focus for on-going communication with all the constituencies of the justice system. Furthermore, the regular re-examination of the problems and achievements of the pilot project would provide sustained learning about information technology in the courts. Many of the components of the courthouse of the future are already available.

The courthouses of the future are almost certain to be "paperless." Image scanning technology is available now for converting the printed word into an electronic image which is then stored on a computer disc.

Electronic Image Management (EIM) begins with scanning. A scanner takes a picture of a document much as a fax does, but an electronic copy is produced, which is stored on a computer disk. Like other computer graphics, the electronic image of the document can then be called from the disk to the screen for viewing. It can also be printed out on paper. . . . The principal benefit of EIM is that it provides instant access to documents.³⁰

²⁸Ernst and Young at 13.

²⁹The Ministry of Attorney General Court Services Branch, *Information Technology Strategy: A Vision for the 90's* at ii (1990).

³⁰Ron Solyntjes, *Putting the Disc in Discovery*, California Lawyer 59 (Sept. 1990).

In addition to facilitating document retrieval and reducing the problems of storing court documents, image technology will be integrated into the courthouse computer system so that a clerk sitting at a single screen will be able to call up scanned documents, as well as have access to word processing support, electronic mail, visual teleconferencing, network and graphics interfacing.

In time, the courthouse of the future may have a library of holographic crystals that store court documents and information. Holography is finding new ways to store information: laser light is used to record data images, like pages from a book, on light sensitive crystals. The data are stored as complete images etched into the molecular structure of the crystal.

Computer scientists dream of holographic memories that would pack libraries of digital data as 3-D arrays inside crystals. Lasers would retrieve the data in a flash: Today's fastest magnetic disk drives take hours to fetch 200 million bits—roughly 40 novels' worth. By contrast, [holographic memories can] do that in a second.³¹

In the courthouse of the future all information will flow electronically: electronic case initiation and filing; electronic case file folders will receive information from keyboards, touch screens and human voices.

The ultimate goal [is] an integrated justice system where data is entered only once, at its source, and where this data is immediately accessible to those who need it. . . .³²

The court computer will have the capacity to receive, capture, and retrieve: data, such as case data, case tracking information, and juror information; text, such as complaints, motions, judgments, court orders, rules of court; and, images of documents, such as proof of service and documentary evidence which has been scanned.

In the courthouse of the future, judges, court clerks, and court administrators will all have access to the court computer through workstations. Judges, for example, will have judicial workstations, located both in chambers and on the bench, where they will be able to inspect case file, make case notes, research legal questions and rules. The clerk will

have technology that will be able to call up the case file, evidence lists, and the orders signed in the discovery process.

The courthouse of the future will either have a computer room serving as a telecommunications relay station that allows attorneys to bring their own computers into the courtroom, or attorneys will be provided workstations at the counsel tables which provide litigation support materials. Attorneys will be able to do legal research, and also searches on non-legal data bases. At all phases of litigation, the court computer will be able to receive information from the state agencies, the police, and law firms.

The courtroom of the future will have all necessary video equipment. The courtroom will have a built-in voice-activated audio-visual recording system integrated into the courtroom construction. Video technology is already playing a significant role in judicial proceedings, including videotaping depositions,³³ videotaped confessions,³⁴ and videotaped trial records.³⁵ Interactive video-conferencing permits communication between the courtroom and remote sites, supplementing traditional in-person courtroom and hearing room proceedings by allowing testimony from detention facilities, arraignments, or parole hearings.³⁶ A high-resolution projection system will be used for the display of exhibits or video-taped depositions. Jurors will be able to view these on a large screen or individual small screens; jurors will also be able to review video transcripts of witness testimony and also inspect documents introduced into evidence.

While this courthouse will utilize many of the technologies available today, the courthouse of the future must be designed in anticipation of change, technologically, functionally, spatially, and environmentally.³⁷ We must build flexibility into the plans for the courthouse of the future. For example, one participant at the San Antonio Conference on the Future of the Courts recommended that we "design courthouses in anticipation of night court, split shifts and other changes."³⁸

The Superior Court in San Mateo County, for example, constructed three hi-tech courtrooms with movable walls to fit the available space.³⁹ Much of the courtroom furnish-

³¹Robert Buder, *Tomorrow's Memories May be Made of . . . ?*, Business Week 128 (May 20, 1991).

³²The Ministry of Attorney General Court Services Branch Information Technology Strategy: A Vision for the 90's at iii (1990).

³³Mary Ellen Tearney, *Videotaped Depositions Become Sophisticated—But Watch for Glitches*, National Law Journal 29 (Feb. 18, 1991).

³⁴Rorie Sherman, *Technology, Emotion Key in Jogger Case*, The National Law Journal 8 (Aug. 20, 1990).

³⁵National Center for State Courts, *Videotaped Trial Records*, Report on Trends 24 (Aug. 1990).

³⁶National Center for State Courts, *Nynex Enters Strategic Marketing Agreement with Docu-Vision, Inc.*, Court Technology Bulletin 7 (Nov./Dec. 1990).

³⁷New Technologies and the Courtroom of the Future, 65 Summary Report on The Future of the Courts Conference, San Antonio, Texas (June, 1990).

³⁸San Antonio at 65.

³⁹National Center for State Courts, *The Modern Courtroom*, 3 Court Technology Bulletin 7 (April 1991).

ings, including the jury boxes, counsel tables, seating for the public, and witness stand are all movable. The floors were raised to accommodate future technological changes. The courthouse of the future must accommodate shifting demands for space, both for people and new technologies.

We recommend the immediate evaluation of the existing court computer systems to upgrade and integrate them into a systemwide computer-based information management and communications network.

Technologies currently exist that can be used to improve the management of the courts and the litigation process. While these existing technologies may be replaced over time, the courts in Massachusetts must begin developing, integrating, and implementing existing technologies and assessing promising technologies as they emerge. The courts in Massachusetts must be dragged into the 20th century before the arrival of the 21st.

Many of the information technologies for successful case management have existed for quite a while. Almost five years ago, one writer described a plan to modernize the courts in Victoria, British Columbia:

The management of cases involves the ability to effectively manage cases as they move through the system and to address the problem of document filing and the maintenance of court records. Computer-based systems will be developed and introduced for civil and criminal cases. . . . These systems will allow for the tracking of the progress of the case, aid in case scheduling and list management, the maintenance of court records, and the electronic production and storage of court documents.⁴⁰

Similar information systems in the United States have been operational long enough to have been studied by the National Center for State Courts.⁴¹ These systems, which have often exceeded the original requirements and expectations, were designed in response to the requests and with the participation of court clerks. The active involvement of court personnel is important to the successful development and implementation of information technology.

Court administration systems typically provide for the monitoring and administration of cases from initial filing through adjudication. The systems are fully integrated, online, real-time processing systems that allow authorized

users to add, maintain, display, and print information.⁴² The system features include: docketing, case indexing, automatic assignment of cases for scheduling, calendar preparation. The system also generates forms and notices, managerial and statistical reporting information, state mandated reports, scheduling for the prosecutors and public defenders, as well as judgments.

One criminal justice information system supports pre-trial services, all criminal courts, the clerk, the prosecutor, law enforcement, and the county jail.

Information is integrated throughout the system and shared wherever possible to eliminate redundant data entry and to take full advantage of the interdependence of data processing in the justice system. Data from arrests are used to initiate court cases, court events are comprised in the computerized criminal history, and court actions drive the jail's management of prisoners. This system tracks all information from the time of arrest or issuance of a summons through the final disposition of a case. . . .⁴³

Such systems are possible today.

Other technologies that could dramatically improve the efficiency of the trial process are also available today. For example, several states have experimented successfully with electronic filing of cases. The National Center for State Courts conducted a year-long study of the use of facsimile technology in five state courts.⁴⁴ The study found that interest in facsimile technology in these states, among the very first to adopt fax for both administrative and legal purposes, came about for a number of reasons, including the need to provide speedy communication in rural judicial districts, the desire to improve access to the courts, and the need for effective use of judges' time.

The study found that fax is playing an increasingly important role in communication between courts and attorneys for filing court document and in helping judges, court administrators and clerks, attorneys, and other justice system agencies to overcome the difficulties, expense, and delay entailed in long-distance communication. The success of experiments with direct fax filing of pleadings and other court documents depends on the specific provisions of court rules, equipment used, and operational practices.⁴⁵

⁴⁰Timothy Pinos, *Law Courts Computerization*, Law Institute Journal 196 (March 1987).

⁴¹National Center for State Courts, *Court Technology Reports* (1989).

⁴²National Center for State Courts, *Court Technology Reports* 3-5 (1989).

⁴³National Center for State Courts, *Marion County Justice Agency* in Vol. 2 Court Technology Bulletin 6 (Nov. 1990).

⁴⁴Susan Koenig, *Courts in the Fax Lane: The Use of Facsimile Technology by State Courts*, State Court Journal 14 (1991).

⁴⁵Susan Koenig, *Court in the Fax Lane* at 14.

The trial courts of Massachusetts must evaluate such existing technologies.

ENSURING GREATER ACCESS TO JUSTICE

Easy-to-use multi-lingual information systems should be available by telephone and at all courthouses to facilitate access to comprehensive justice system information.

America's image as the melting pot is being replaced by the image of a mosaic, one people comprised of many, a nation of diverse cultures and many languages. Our courthouses must be equipped so that all our citizens, regardless of the spoken language, have access to information. When the public calls or arrives at the courthouse, they should be greeted by interactive computers.

Interactive voice response systems, a telecommunications system, could provide information to telephone callers. The justice system should develop and implement multi-lingual voice response systems to provide information about the courts and other justice system agencies, direct calls to specialized answering groups, and enable callers to interface with various data bases via touchtone technology.

In the courthouse itself, there should be audio-visual reception stations, which provide information in several languages. Interactive computers can provide the public with information about the courthouse itself, such as maps and directions, as well as information about court procedures. In Colorado, for example, a bi-lingual touch-screen interactive computer currently provides information to the public regarding the operation of the courts and the procedures in specific types of litigation.⁴⁶

Similar to the Colorado project, data-base linked monitors should be located in carrels in all courts, to meet the basic information needs of the public, especially in courts dealing with a high level of people who cannot afford to have lawyers represent them. On entering a computer carrel, one sees a screen that gives a choice of languages. After touching the computer and making a language choice, the computer can proceed in the selected language: voice instruction reinforced with the written words on the screen give the necessary instructions. In addition to providing general information about the justice system, these computers can help people fill out court forms, such as for small claims court, and perform calculations.

Public libraries, law libraries, and public schools should offer remote access to court information.

With the automation of court records and other public records, a comprehensive program for public access should be undertaken. Several jurisdictions are experimenting with allowing attorneys to access all computerized records from their offices.

The [remote access] program results in substantial time savings for attorneys. Without having to go to the courthouse, attorneys can check the status of cases and schedule hearings, avoid conflicting court dates, and examine real estate and other public records. The remote access program has resulted in notable improvements in the quality of service to the public, in the efficiency of court administration, and in savings in the number and cost of court personnel.⁴⁷

Similar computer systems should be available at public libraries, law libraries, and public schools to enhance public access to computerized public records. The public should have access to the courts' case tracking system so that an individual with only the name of a party or a case number can search for the case, copy case information, and get case updates.

Access to justice requires the use of technologies to facilitate remote access to justice.

With current video technology it is possible to make geography irrelevant in many phases of litigation. In the future, two-way audio-visual microwave links could allow judges to carry on court business with parties and defendants at places remote from the courthouse. Long-distance video depositions are already a reality.⁴⁸ Video teleconferencing makes it possible to assign judges to remote areas, without actually sending them. With a computerized judge tracking system, judges can be made more consistently available where the need arises.

Other video technologies, such as holographs, 3-D video images, and virtual reality can create three-dimensional judges. Preeminent in the field of holography are researchers at the Spatial Imaging Group of the Media Lab at Massachusetts Institute of Technology. Three-dimensional holographic images are generated by a computer from data it receives from a magnetic-resonance imaging device. Holography creates new ways of displaying information visually. The approach to making 3-D videos in use at the MIT lab involves:

taking the image of an object from a special camera and converting it into data a computer can understand. The data are then translated into electrical signals, which are sent to a series of crystals. The electricity changes the transparency of the

⁴⁶IBM Corporation, *Colorado's Self-service Resource for the Courts* (1990).

⁴⁷National Center for State Courts, *Remote Computer Access to Automated Court Records and to other Public Records*, in Report on Trends 21 (Aug. 1990).

⁴⁸National Center for State Courts, *Video Teleconferencing*, Report on Trends 25 (Aug. 1990).

crystals, depending upon the voltage. Laser light, reflected off a rotating mirror, is passed through the crystals, forming a 3-D holographic image that appears to be suspended next to the output lens. The device requires a complex combination of optical, mechanical, laser, and computer technology.⁴⁹

Holographic images are currently being used in neurosurgery at the Brigham and Women's Hospital.

Using a 3-D image to reconstruct the original on a TV monitor can help you appreciate the shape of the object as well as the disease. It nicely compresses all the information into one image.⁵⁰

Holography will allow human judges to be in two places at once, increasing access to justice by creating a new kind of "mobile courtroom."

"Virtual reality" creates artificial environments through powerful computer workstations and special devices, such as motion-sensing gloves and stereoscopic goggles. Though such worlds exist in the computer, you can visit them with equipment that lets you see and interact with the synthetic environment. Litigants can visit the world of the courtroom within the computer and present their case to "virtually real" judges and jurors. Televirtuality makes it possible for two people in two different locations to interact in the same synthetic environment.

Televirtuality is the sharing of virtual worlds by two or more people in remote places or even different times. . . . This world exists in computer memory, which is stored somewhere on a communications network, and the people partake of that model to experience the place as if they were really there.⁵¹

In the future, remote videoconferencing centers, remote holographic judges, and remote virtual reality centers will make justice accessible to all, anywhere.

ENSURING THE FAIRNESS OF JUSTICE

The courts and the public sector bar should enjoy the same technological advantages available to the private bar.

Technology has changed the practice of law. Consider, for example, the savings in time and labor afforded by automated on-line legal research services, not to mention voice-

recognition dictation systems, which even today are beginning to convert the spoken word to the written word almost instantaneously.

As information technologies develop, it is important that the advances in technology do not put the courts and the government and the public interest bar at a disadvantage in information creation, storage, and retrieval. The judiciary, the legislature, and the public sector bar should have the same access to these advancements as private law firms and businesses.

Judges should be provided with expert and other computer systems.

Professors Donald Berman and Carole Hafner of The Center for Law and Computer Science at Northeastern University have argued that expert systems can "increase the consistency of legal decisions by providing relevant and persuasive information to decision makers . . . [thereby decreasing] public perception of unfairness and capriciousness in the legal system."⁵² Providing the judiciary with all available expert systems will ensure the public perception of fairness.

Expert systems are an invaluable aid to a fair justice system. By making the outcomes of judicial decision-making more determinate, expert systems provide consistent, legally sound, and speedy judicial decision-making. For example, expert systems that provide sentencing guidelines are currently in use in Canada and elsewhere.

Expert systems have a wide range of capabilities. They can:

- Indicate the relevant evidence and findings that must be pursued in a particular case,
- ensure that the reasoning is consistent with the letter of the law,
- provide a ready reference to citations and relevant definitions at the points where they are needed,
- suggest parts of decisions that seem to follow from the intermediate findings either by the judge or inferred by the system and endorsed by the judge, and
- assemble program suggested and user created language into a final decision format complete with such items as caption, identification of counsel and notification of appeal rights.⁵³

⁴⁹ Glenn Rifkin, *Computerized Holography: A Gimmick Grows Up*, New York Times, Technology Notes 8-9 (November 4, 1990).

⁵⁰ Glenn Rifkin, *Computerized Holography: A Gimmick Grows Up*, New York Times, Technology Notes 8-9 (November 4, 1990).

⁵¹ Gregg Keizer, *As Good As There*, 13 Omni 39 (April 1991).

⁵² Donald Berman and Carole Hafner, *Legal Expert System and Discretionary Decision Making* in Social Implications of Artificial Intelligence (1988).

⁵³ Pethe, Rippey, and Kale at 190.

Early uses of expert systems approach in law included a system called LDS (Legal Decision-making System), that assessed the worth of a case for settlement purposes and an English project of representing large, complicated statutes to uncover problems within specific legislation, including undefined terms and loopholes. Other uses of expert systems include a Hearsay Rule Advisor, a Canadian project designed to test various theories about the hearsay rule.⁵⁴

The rule-based reasoning of expert systems has also been used to develop other software of use to the judiciary, as well as attorneys and prosecutors. Document assembly programs ask questions of the user and, then, on the basis of the answers, develop and assemble a document.⁵⁵ Other rule-based software for lawyers includes: Personal Information Manager (PIM), that collects and organizes information; hypertext, an information management system that resembles a data base that can link text, graphics, and other information according to rules; Groupware, that allows colleagues to share messages and information.

Rule-based reasoning, however, including that used in expert systems, has its limitations. Other work in AI and the law, therefore, has involved other approaches. Case-based techniques, involving characterizing questions as hard or easy, has been applied to classic contract law questions regarding the existence of offer and acceptance. Other developments have included the work of Kevin Ashley at the University of Massachusetts who developed a program called HYPO to model certain aspects of case-based reasoning embodied in arguing with legal precedent.⁵⁶

All technologies adopted by the justice system must possess security systems to protect the systems and the confidentiality of information.

Although computer security is a mature technology, concerns remain. It is not certain, for example, whether the privacy of video-conferencing can be ensured today. In image processing, even though optical discs are non-erasable, index systems are vulnerable because false index entries can be entered and index entries can be erased. In remote access programs, safeguards must ensure that access is limited to those with a legitimate need.

No less than future adjudication, alternative dispute resolution should be technologically enhanced.

In the Anglo-American system, the process of resolving disputes in the courts is adversarial. This model is premised upon the sequential interplay between opposing parties who ultimately present their sides to a neutral fact finder, either a judge or a jury. Built into this adversarial litigation model is a series of sequential activities, where litigants often have reasons of their own for delaying the process.

Alternative Dispute Resolution (ADR) involves a number of formalized alternatives to litigation for resolving disputes. The Massachusetts court system has recognized the value of ADR mechanisms.

The use of ADR mechanisms can result in cost savings both for the individual litigant and the system as a whole by resolving disputes more quickly and without involving the most expensive resource in the system, judicial time.⁵⁷

Massachusetts currently has several different Alternative Dispute Resolution (ADR) programs in operation. In Middlesex County, for example, one of the four national "multi-door" courthouses in operation schedules over 80 cases a month for individual screening conferences. The ADR program at the Superior Court in Suffolk County provides mediation for over 1000 contract and tort cases a year. Other court systems, without formal ADR programs, have created informal ADR mechanisms, such as hiring retired judges, special masters, or volunteer attorneys.

ADR may present an even more attractive arena for technological innovation than the litigation model. One of the most valuable characteristics of information technology is the capacity to make activities that were once performed sequentially occur simultaneously. Thus, a system of dispute resolution that is not dependent upon sequential activities might well be the most exciting arena for information technologies. ADR provides an arena where both parties are served by speedy access to full information. Information technologies can expedite these ADR mechanisms, making ADR more attractive to people than the litigation

⁵⁴Marilyn T. MacCrimmon, *Expert Systems in Case-Based Law: the Hearsay Rule Advisor*, in The Center for Law and Computer Science, Northeastern University, *International Conference on Artificial Intelligence and Law* 68 (1989).

⁵⁵Rees Morrison, *Market Realities of Rule-Based Software for Lawyers: Where the Rubber Meets the Road*, in The Center for Law and Computer Science, Northeastern University, *International Conference on Artificial Intelligence and Law* 33 (1989).

⁵⁶Rissland at 1971.

⁵⁷Harbridge House Report at 21-22.

model. ADR programs must be expanded and equipped with the same types of information technologies as the traditional trial process.

The Task Force recommends the development of artificial intelligence system for public ADR programs.

When the justice system is marked by delay, people turn to alternative means of resolving their disputes. Despite the innovative ADR programs in the state which bring ADR within the public sphere, the delays in the justice system have increased the use of private mediation services. This has given rise to the concern regarding a two-tiered justice system, where those who can afford it buy private justice. The development of specific AI systems for ADR will increase the effectiveness of the ADR programs within the public justice system.

AI embraces a variety of technologies including: expert systems, robotics, neural networks, vision, natural language, artificial life, and artificial reality.⁵⁸ Of particular relevance to ADR programs are expert systems that can assess and evaluate cases. Many of the early landmark projects in AI and the law involved the use of expert systems.

An expert system is a special-purpose computer program, which can be said to be expert in a narrow problem area. Typically, such a program uses rules to represent its knowledge and to reason. . . . In the rule-based approach, a rule is encoded in a simple, stylized if-then format: If certain conditions are known to hold, then take the stated action or draw the stated conclusion.⁵⁹

The development of an AI system of case evaluation can increase the savings for both the public and the system. Expertise in case assessment is a relatively scarce resource. An AI system would allow the interviews and assessments to be conducted by inexperienced users. An AI system could lead the user through an initial interview, identify facts that need to be gathered, and make a recommendation as to the appropriate means for resolving the dispute.

The Task Force recommends the development of Community justice centers that are technologically sophisticated.

Increasingly, the courts are being asked to become involved in issues that were once addressed within families and communities or by social service agencies. Technology can help bring issues of justice back into the community. Community justice centers, equipped with all the technologies available to the court system and the private bar, can help inform the public and guide them to the resolution of disputes within their communities.

Today, information technology makes geography irrelevant; expert systems can help predict the likely outcomes, and help determine whether a case is suited for settlement, litigation, or ADR; legal research is already automated. Inter-active video conferencing makes possible community justice centers where the public can sit within their communities and discuss their problem with a representative of the justice system. Individually, or together, the parties to possible legal dispute could get the advice necessary to resolve the dispute without involving the justice system.

If the individuals cannot resolve their dispute, a community justice center equipped with video-conferencing would allow parties to have a preliminary hearing before a judge. As holographic video images become available, a 3-D image of a judge could determine the matter for them. The resolution of the dispute would be recorded on holographic crystals and stored in the permanent records of the court system. Community justice centers might provide virtual reality technology so that the parties can enter the computer and adjudicate the case before a "beamer" court, a court of judge and jury comprised of computer digitized and reconstituted people.

IN SUM, WE MUST BEGIN TODAY TO CREATE THE JUSTICE SYSTEM OF THE FUTURE—A JUSTICE SYSTEM THAT RESTORES, MAINTAINS, AND CULTIVATES THE PUBLIC TRUST.



⁵⁸Larry Webster, *Artificial Intelligence*, Vol. 3, No.2 Court Technology Bulletin of the National Center for State Courts 5-6 (1990). For a glossary of terms, see, Robert Sprague, *Artificial Intelligence*, Trial 38 (1990).

⁵⁹Rissland at 1965.

INTERVIEW WITH PATRICIA BROWN

February 19, 1992



In January 1992, Patricia I. Brown retired as the Law Library's Associate Director, ending 40 years of service to Suffolk University and its Law School. Pat's remarkable career at Suffolk began in 1951 as an undergraduate student and part time worker. While an undergraduate, Pat was credited with beginning the University's first physical education program for women. In

1953, Pat became a full time library employee, holding many different titles over the next 38 years, including Acting Library Director. In 1985, she attained the title of Associate Director.

Pat Brown holds B.A., J.D., and M.B.A. degrees from Suffolk, and a M.T.S. degree from Gordon-Conwell Theological Seminary. She is a member of the Massachusetts Bar, and holds certification as a teacher and a law librarian.

Pat should be credited with participating in every major Law Library decision. She is responsible for developing a modern system of classification within the Law Library which turned an unorganized group of books into a usable research collection. Over her career Pat also served the Law Library as an outstanding administrator and budget person. Many of our Alumni will remember Pat for the time she spent teaching them how to do legal research when they were students.

In addition, Pat brought notice to Suffolk University through the many awards she has received. In 1988 Pat was included among the first group of women inducted into the Baseball Hall of Fame in Cooperstown, New York, in recognition of her playing career in the All American Women's Baseball League. In 1990 she was given an award for "Outstanding Service to Women's Sports" by the Women's Sports Foundation, at the Governor's Annual Massachusetts Women in Sports Day. In 1991 she was selected to throw out the first ball at a Boston Red Sox baseball game. Also in 1991, Pat was honored for her contribution to wom-

en's sports at Suffolk on the occasion of the first women's basketball game in Suffolk's own gym. Pat is also listed in *Who's Who in American Law*, *Who's Who in the East*, and *Who's Who Among American Women*.

In recognition of her numerous contributions to Suffolk University Law School, the University's Board of Trustees, upon the recommendation of Dean Paul Sugarman, bestowed upon Pat the title of Associate Law Librarian Emerita. In addition the Law Library created the Patricia I. Brown Library Service Award to be given annually to a student law library worker who has made meaningful contributions to the Law Library in the spirit of Pat Brown.

Professor Michael J. Slinger, Suffolk's Law Library Director, spoke with Pat Brown on February 19, 1992 about her recollections and current thoughts pertaining to Suffolk University.

Advocate: Pat, how did you come to Suffolk?

PB: When I graduated from high school, I was only about sixteen years old. I wanted to go to college and I didn't have any money. I ended up working for a while and playing ball for a while and I still didn't end up with any money because I had to help my family. So one day I decided, "I want to go to journalism school." I looked in the yellow pages and there were only two programs listed: Boston University and Suffolk. So I made an appointment to see Dean Goodrich at Suffolk. I went in to see him and I said, "I would like to go to college but I don't have any money." And he said, "Well, we'll see what we can do about that." He told me all about scholarships. Then he found out I was a ball player, and that helped a lot because they did a lot of publicity for the school, and so they gave me a scholarship. That's how I came to Suffolk; it was really through Dean Goodrich's help.

Advocate: Pat, what was Suffolk like forty years ago?

PB: Well as I said earlier, I came because I wanted to go to the journalism school. However, I never did end up in journalism. At the time, Suffolk consisted of one building—the Archer Building. Everything was in there, law school and college. One building. The teachers were in two big rooms with a connecting door. The desks were all around as if you walked into a big insurance company. There was one phone at the front of each room. They had to share the phones. The faculty called it the bullpen, and that's what it was like. No separate offices, no private things. Law students and college students practically al-

ternated in the classrooms. The faculty was very small. You knew everybody. All the administrative offices were in the building. Everything was in one building, which I don't think people can really picture now. The Law Library and the College Library were in one place, which is the Pallot Library now. Along the balcony or mezzanine would be the college collection arranged by the Library of Congress class system. The other side would be in alphabetical order without any sort of classification numbers. Downstairs was some shelving that had law books. That was it.

Advocate: Pat, obviously we have a different type of physical plant arrangement than we had forty years ago. Can you comment how the Law School and the University have changed over the forty years that you spent at Suffolk?

"But you can imagine the change from having just one building, and one office for the entire faculty, and now looking at six or seven buildings on the Hill with offices all over the place."

PB: Well the latest change and the happiest of my life is the new gymnasium that was built on Ridgeway Lane. When I began as a student here there was no physical education program for the girls. There was a program for the boys, but they had to rent the Cambridge YMCA. I think you know that I was instrumental in starting a physical education program for women at Suffolk. But you can imagine the change from having just one building, and one office for the entire faculty, and now looking at six or seven buildings on the Hill with offices all over the place. Of course, spreading out means that you're not in close contact with everybody, and you don't know everybody like you used to, but obviously it has been for the best, and to the advantage of the school to grow the way it has. They can offer more programs and activities. Understand, I was amazed when they built the Donahue building. I was just totally amazed to watch how fast it went up, and at the time I thought it was really awesome that we now had all this extra space. A whole new library for the Law School! Of course, we quickly outgrew that, but yes, I think the addition of all the buildings and the increase in the faculty, especially the increase in the number of women faculty is close to my heart.

Advocate: Pat, can you reflect on how the Law Library has developed since the time that it was just some rows of books in what is now the Pallot Library. How did it grow over forty years?

PB: Well, when I first came here we used to work at the circulation desk servicing both college and law people. The check out system for both schools was right there to-

gether. The library was really more of a reading room for law students. I mean, they picked what books they wanted, or they asked you for them, but there was no reference help for them in any manner. I discovered I didn't know enough

"But I went to law school in order to be able to help the law students and to make the Law Library into more than just a reading room."

to help them with their work outside of class. There were no programs for legal research. There was nothing like that. There was a course in it occasionally, but really no help with it outside of class, and that's one of the reasons why I decided to go to law school. Not to be an attorney. That just came as a secondary aspect of going to law school. But I went to law school in order to be able to help the law students, and to make the law library into more than just a reading room. The College Librarian at the time was Dr. Hartman and he was all for the students. He was a great guy. He taught me a lot about librarianship. But he was limited in that he didn't know the law. Then when Dick Sullivan was hired as the Librarian when Hartman left, he also didn't know the law. We didn't have a Law Librarian, so they kind of left the law collection in my hands. So I went to law school and I started helping the students with research projects, and tried to encourage them to come to me when they had problems. Unfortunately, we were still limited because there was only myself to help them. I saw the importance of it, and I'm not trying to say that I had any kind of vision about the thing. I just knew there was a need. I didn't know it was going to grow into all it has become. I just knew there was a need, and that the Law Library should be more than just a reading room. When we grew into the new Donahue building, we began to reflect a more helping philosophy, because we got people to begin to see the library as more than just a place to read. You must remember that at this time the Law School itself had no clubs, no groups or anything to help students outside of class. They only had something they called the Wig and Robe Society which was in another building. It was across the street on Temple down in a basement. This group had a little library all their own, and they could go in and use it twenty four hours a day. Members had their own keys. Unfortunately, membership was restricted to males only. There were very few women at the school. But as the library began to grow physically, we kept in mind the school's weaknesses, and tried to compensate by utilizing these ideas I had about service. We were able to make it work because as the library began to grow, the staff began to grow along with it.

I'd also like to say that subsequent Law Library Directors, John Lynch and Ed Bander, contributed greatly to the growth of the Suffolk Law Library. John Lynch did a great deal of work to expand the law library collection. Ed

Bander was responsible for bringing a computer lab to the law school, and for bringing in LEXIS and WESTLAW for students to use. Ed always had the interests of the student body at heart. He did everything he could with what he had to help the students.

Advocate: Pat, what do remember as some of the most memorable moments over your time at Suffolk?

PB: OK, that question does take me a little bit by surprise. Nobody has ever asked me that one before. One thing I remember was our accreditation. Suffolk's Law School wasn't officially accredited by the ABA yet. They had some kind of provisional accreditation. The thing that was holding back the accreditation was that Suffolk had a five year program, two years in the college followed by three years in the law school, and when you ended your first year of law, you got your college degree. Also, the college wasn't fully accredited at the time by all the appropriate agencies, because the library needed to be brought up to par a little bit more, as did the ratio of faculty to students. Anyhow, the school went all out to do what was necessary, and the most memorable occasion for me is when the University became fully accredited, and right after that the Law School became fully accredited. That was really a happy time for everybody. We worked *very* hard on gaining accreditation, everybody from the top to the bottom worked very hard.

Another memorable moment was the construction of the Donahue building. It was a big job to move the library into it after we had been down on Ridgeway Lane for a while. Of course, as I told you before, a new memorable moment was the building of the gym. I never thought I would live to see that.

I also must include my work as a member of the University's Heritage Committee with people like Dave Robbins, Dr. Hartman, Stan Vogel and Art West. We were responsible for collecting historical data on Suffolk since the school began. This material was scattered all over the place. Dave Robbins (who's a Dean now) took the material we found and wrote a book covering the history of Suffolk. The other Committee members contributed as editors and wrote articles. The culmination of the whole thing was the celebration of the 75th anniversary of Suffolk University. We had a number of ceremonies to commemorate this historic event, and we presented medallions to retirees who had done outstanding work while they were at Suffolk. Working on the Heritage Committee was a great experience.

Advocate: Pat, I realize that this may be an unfair question, but which alumni, students, faculty, administrators, and benefactors really stand out in your memory as interesting personalities?

PB: Well, Judge Donahue for one. A lot of people didn't get to know Judge Donahue too well. He seldom

came to the school and he wasn't an academically minded person, yet he was really the backbone of the school when he was with the Board of Trustees, and he did a lot behind the scenes. It was Judge Donahue that I fearfully met with when I was a freshman and needed money to start the girls' basketball team. He was the controller of the money and I had to go over to the courthouse and meet him in his office. He presented kind of a stern appearance, but he was really a nice guy and he OK'd everything, and just like that we got the rental of the Y and got our basketball team. But I also understand that there were a lot of things that the school wanted to do that Judge Donahue didn't want to do so there was that type of conflict. The Trustees were a strong group at that time and they really dominated and ran the school. I remember him as being outstanding.

As far as Presidents of the University go, I've been here through every President except the first one, which was Gleason Archer himself. I remember Walter Burse, but I was young at the time and going to school and working and trying to make the two things mix, and I really didn't pay too much attention to what each person in the Administration was doing. I learned more of our history through my service on the Heritage Committee than by actually being there, but I do remember that the President's office was behind the Library Circulation Desk where the two conference rooms now exist at the back of the Pallot Library. Both stairway doors entered into the Library where the Circulation Desk was. The Librarian's office was behind the Circulation Desk where Cecelia Tavares' office is now, and the President's office was where the classroom and that inner room with the oak paneling are located in Archer. So we got to see the President coming in and out of his office every day and chatted with him. It was an open door policy and you could go in and see him, but the only time I can remember really going to the President in anger, because I wasn't that brave, was to see President Munce. Dr. Hartman had resigned as Librarian/Director of Libraries and they hadn't hired a replacement yet, and so I was doing the job, but after about six months I got angry because no interviewees were coming in the door and nothing was happening. So I did go into President Munce and I said "Come on, we've got to get this moving. We *need* a Librarian. I'm not the Librarian. I don't want to be the Librarian." In fact I didn't even think I was going to be staying. I was just marking time to finish school. President Munce got on the ball and we started interviewing librarians. I think that's when I got my first title as Assistant, and I helped to pick the new Librarian. Actually, I remember this distinctly, these memories come back now, one of the interviewees we had, I do not remember his name, but I took him upstairs and showed him the college books were all classified by Library of Congress numbers, and he said "Oh, well we can change this all over to the Dewey Decimal System with no problem." That killed him as far as I was concerned. I didn't have the final decision, but I carried a lot of weight at the time. They didn't have a committee, so it was just the administrative heads who were conducting the search, and

then they asked me my opinion. Of course, Dick Sullivan came along and he was an excellent librarian, but not law trained, so law always kind of took a back seat at that time. But, yeah, that did it. Dewey Decimal System! Changing the whole thing over! Luckily for us we didn't hire him, because we would be in trouble now. The whole library would be classified by the Dewey Decimal System.

"I had Dave Sargent for Wills and I had John Fenton, Jr., who is now the Commonwealth's Chief Administrative Judge, for Evidence. They are such great teachers! When I took the bar exam and an Evidence question came up, I could almost hear the words that Fenton would say in class."

Some of the outstanding alumni from Suffolk that I've known personally would include Dick Voke, who was chairman of the Ways and Means Committee in the House of Representatives, and Patty McGovern, who's chairman of the Ways and Means Committee at the Senate. I went to school with Patty McGovern. She was a year or two behind me, and Dick used to work in the Library. I think that the dedication that these people showed in their library work and at school is what makes them successful when they go on in their careers. Almost all of our library workers have gone on to Law Review, to politics or to some outstanding degree of service to the community. I remember Johnny Powers; he was the Clerk of the Court in Massachusetts. I know a lot of people without a legal background think of "clerk" as being, "typist and clerk," but it's a prestigious job and he was Clerk of the Court. He went to law school here at night. I went to Law School with him. Dick Underwood and I went to law school together and he became the head of the BRA.

When we went to law school, there were not very many faculty members, so sooner or later you were going to get every teacher on the staff. Classes were given Monday, Wednesday and Friday night from 6-9pm. Tuesday and Thursday there were no classes, so you could catch up on your studying. I will tell you about three outstanding teachers I remember. The first is Al Maleson, and I tell this story many, many times. I had him for two or three courses: Taxation, the UCC, things like that. He used the library a lot and, we got really friendly. When I was ready to take the Bar Exam I didn't do a bar review course and I hadn't even graduated from law school. I took the bar examine before I graduated. I asked Maleson, how do you prepare for the bar? Everybody else seemed to be running to the bar review course, but I didn't because I was taking the December bar and I wasn't graduating until January. Al told me to write for the bar exam the way I write for law school ex-

ams. He said that different bar examiners look for different things just like different teachers look for different things. I had done fairly well in law school, so I took his suggestion and I didn't ask any advice of anybody else. I just did what he said and I passed the bar. I thought it was excellent advice. We didn't have multiple choice questions; it was two days of essays for six hours a day. Also, I have to admit I was lucky on the bar. I had about eight questions on Wills, Evidence and Taxation. I had Dave Sargent for Wills and I had John Fenton, Jr., who is now the Commonwealth's Chief Administrative Judge, for Evidence. They are such great teachers! When I took the bar exam and an Evidence question came up, I could almost hear the words that Fenton would say in class. He was so clear. Evidence in Massachusetts is almost all statutory, as is Wills, so the questions stressed the statutes instead of case law. I think I passed the bar because eight questions were on taxation, wills and evidence. I will always remember these three outstanding faculty members.

Advocate: Pat, what do you think are the best things about this Law School and University?

PB: The first thing I have to say, so you know where I'm coming from, is I'm definitely "pro-Suffolk." They've been really good to me and I think they've been good to their staff and their workers - all their workers - students and everyone. One of the things I like best about Suffolk, although it's grown a little away from this now, is that we called this the "Suffolk family," and that was certainly true. If people were sick, Suffolk came to your aid. They didn't throw you out in the cold. They didn't fire people arbitrarily. They just took care of their own. Granted, I know the weaknesses in the system: there weren't many women administrators; their salaries were low; and when women did get higher ranks, their salaries were not made equivalent.

"I think the way that Suffolk has taken care of its people, the way they care about staff and students, I think that that's the best thing about this school."

But there was never any personal animosity. It wasn't like "Pat Brown's a female so we're not going to give her a raise," "Cathy Judge is a female so we're not going to let her teach." It wasn't picking on people; it just was something that was never done before. So as a consequence, we had to work our way through that. But I think it's a good testimony to Suffolk that we never had to do it violently, with demonstrations, or actions against the school or anything like that. It was done within the school's framework that Cathy Judge became the first female law teacher, that Cathy and I became administrative personnel. I think the way that Suffolk has taken care of its people, the way they care

about staff and students, I think that's the best thing about this school. They're very generous with scholarships when they can be. They do everything they can for the students, even though the students don't think things moves fast enough. Again, if the students had been here when there was nothing, they might be more patient. Resistance to improvements is not because the Suffolk Administration doesn't want improvements. We didn't have a gym because the Administration was against a gym; they had to fight the Beacon Hill Association for twenty years before they could get a gym. The minute that Suffolk got money, or got the OK, they did something for the students, either in financial aid, or by building a new student hall, etc. And I always liked that approach, the fact that they're so caring about the students.

Advocate: Pat, what things would you like to change about the law school if you could?

PB: I really don't know if I could answer a question like that because I've never been responsible for the whole law school. A lot of the things that I was unhappy about are already taken care of. More females are in the school; the law classes include a lot of females now. More minorities are in the school both on staff and in classes. And salaries are more competitive. I feel there's no longer any discrimination, either intentional or unintentional, against women or minorities. As far as changing the Law School, I can't answer that question. I would have to apply the same non answer to the University. I sort of lost touch with the university since we split and they moved over to their other buildings. I would like to see the school's administration continue the same caring attitude that they have had for students and staff, and I would like to see Suffolk continue to grow.

Advocate: Pat, what can the Law Library do to better serve the Law School and University community?

PB: Well, I don't think that the Law Library has, in the past, had a close enough relationship with the University. I don't think there is a close enough relationship. I think that there's a little animosity on the part of some within the University who believe that the Law School gets too much, so I think there should be a closer working association between the two schools, and it can start with the Law Library. The Law Library could be a little more open to college students. I don't mean that they should come over to study. I know we're short on seats. But a lot of material we have they need for their classes, and sometimes when college students come over here, the staff isn't always as open and generous with them as I think they should be. I don't think it should matter whether it's a college student who walks in the door for help or it's a law student that walks in the door. So I would like to see a little more cooperation on that score. I'm not for joint cooperation on joint cataloging and joint technical work, just service. I think the service should be a little more open. Right or wrong, that's what I think.

In my opinion, what the Law Library can do to better serve the Law School is in the process of being done. In the past, we haven't had enough help, and we also haven't had enough opportunity, to interact more closely with the student research programs. We've never had time to send a Reference Librarian to a class to explain how to effectively use legal material. We certainly didn't have the new learning centers that we now have for LEXIS and WESTLAW. So, to keep it short, I think that the Law Library is on the way to better serving the Law School — students, faculty and alumni- by the changes that have already been made. The only way I can see better serving them is again already on its way, and that's communicating to the law community what the Law Library has to offer. That's being done by new newsletters and other information channels, so you've already beaten me to the punch on that. Michael Slinger already started all that.

"The Law Library can definitely better serve the Law School, the faculty, students, staff and alumni, if it could get a computerized automated system to create a computer catalog, to keep track of the budget, and to handle book ordering, Reserve/Circulation transactions and serials check in. Only when the library becomes totally computerized will the staff be able to reach their full potential to help our patrons."

There is one other thing I did want to add. The Law Library can definitely better serve the Law School, the faculty, students, staff and alumni, if it could get a computerized automated system to create a computer catalog, to keep track of the budget, and to handle book ordering, reserve/circulation transactions, and serials check in. Only when the library becomes totally computerized will the staff be able to reach their full potential to help our patrons. I would really love to see that happen.

Advocate: Pat, what role do you think the Law Librarians play in the educational and research mission of this Law School?

PB: Again, I have to start with the past. I think that the Law Librarians have been underrated. I think that they have been greatly underrated. I don't think that people know what makes up the work of a reference librarian or any librarian. I don't think they understand how really complex it is, and how much time and effort is needed when somebody asks even a simple question. It might take two hours to find that answer, and yet the librarians are willing to do whatever it takes. I don't think that the administration and the law community sometimes realize the *education* that a reference librarian must possess to be able to answer all of these questions. In most cases the librarian

needs a law degree and a librarian's degree or equivalent experience. I think that people sometimes think that the librarians are just there to answer questions off the top of their head, or to hand out a book, or maybe copy something for somebody, and they don't appreciate the skills the librarians really do have. I think that the perception of the role of law librarians is starting to change under Michael Slinger's administration. It's beginning to change now that the reference librarians, and technical service librarians and the Director of the Library are offering more service to the faculty and the students, and I think that the faculty and the administration should respond by giving them the necessary resources and finances to continue to grow. Definitely.

Advocate: Pat, do you think the alumni can play a part in making the Law Library better?

PB: Well first I'd have to say, especially for people who are new to the school, that the law school alumni and the university alumni are among the strongest groups of alumni around. They're very loyal to the library. They're very loyal to the school. I can't speak as much for the university, but I've heard that their alumni are loyal too. I know that the law alumni have been very loyal, very faithful, and very generous to the school. I get called by the telephone every year, and the list is put out of who donates, and whenever there are alumni functions, they all come. I mean, they're really very loyal to the school. The problem with alumni giving, is that it's a general giving situation. The alumni collect money and they donate to the school's general fund. I would like to see the alumni take on projects, or donate money for specific purposes, or to specific departments. I would like to have the alumni designate say, a hundred thousand dollars this year to the Law Library to do a specific thing. If they don't want to name a specific project, let them give the money to the Law Library for unrestricted use to supplement the regular budget. I would like to see them begin to designate certain areas where the money could go. They could find out what is needed. They could ask around; they have meetings; they meet with the trustees. They could ask and they could see which departments need funds. I think this is preferable to the whole alumni fund going into the general pot. Now maybe they do designate gifts in some cases that I haven't heard about, but I would think that it would have been in the papers if they had done that. This is not meant to be a criticism of alumni, because I do think that they are very, very generous. I just would like to see them have the option to channel their gifts into certain areas.

Advocate: Pat, when you retired an award was established in your name to honor students who have done an exemplary job as library workers. Can you tell us what the establishment of that award meant to you?

PB: If you could see the picture they took of me holding the award you would know! I was in a state of

shock! I never had anything named after me for one thing. I thought it was an excellent idea. I really do. A lot of the new things taking place in the library now, as a librarian, I've known they should have been taking place and I wish we could have done it sooner, but we didn't have the staff or the money or the facilities, but the establishment of an award is one I never even thought about. It never even entered my head. I was totally surprised. I do think the award will be something for the students to aim for, to have their name on the plaque. I'm very honored. Nancy Ignazi, who is the first student to receive the award, told me that she was honored to receive it in my name, and I was just as honored that she was the first one to receive it, because she was a very deserving student worker.

Advocate: Pat, you said many things which all point to the same thing, that you're really a Suffolk person. Do you have any regrets about staying all these years?

PB: No, not at all. At first I was going to leave—in fact I had quit once. Dr. Hartman was the Librarian and I had given my notice. I was graduating from school. I had one class to finish, which ended in August, and I was leaving. Dr. Hartman came to me and said, "I want to leave. I want to teach full time." He said, "Would you stay on? I've got to take my summer vacation, and since you have one class in the night that you're taking, would you just stay on for the summer so that I could take my vacation, and we'll talk about it in September." I said, "OK, I have to finish the class anyhow, so you go ahead and I'll finish the class, and then I'll leave in September." I was a college graduate now, and I wanted to get on with my life. He came back in September, but they didn't release him to teach. They told him to wait another year. So he asked me if I would stay on, and I said, "Dr. Hartman, I can't stay on. I'm making something like thirty bucks a week." It was a very low salary, but while I was going through school it was fine. Also, I didn't even have a title. So he got me an increase in salary and I thought at that time, "Well, maybe I'll do a Master's in History." I was still unsure of my career plans. So I said "OK, I will stay another year." They said I could take some graduate courses here in history and transfer them later to another school. So I stayed on, took some graduate courses in history, and I knew I didn't want to be a "history person" after that. Then Dr. Hartman finally got his OK to teach. So he said, "They don't have another librarian so will you stay?" I said, "I can't stay on without a title." So, I think they named me Assistant Librarian but I'm not sure if that was the title I got at that point. It might have been Library Assistant, but it was a title anyhow. I wasn't just an anonymous person anymore, and so I stayed. Then I ended up running the whole library for about eight months or so until they finally got a new library director. The new Director Dick Sullivan was a good librarian and I started getting interested in a career in library work. Now that I was finished with college, I began to realize the problems the law students were having using the legal materials, and I really began to get interested in

going to law school. I didn't start law school until 1960, and I graduated in 1965, but the thought of going to law school kept me at Suffolk. Then after I started going to law school I was hooked. That was it. When I started going to law school nights, knowing I could better help the students to answer their questions, I was totally hooked. I knew I wanted to be a Law Librarian.

With that in mind, you asked why did I stay all of these years? Granted, after I graduated from law school I began to receive offers from other places. Not only for law libraries, but for law firms, and even one time a little further on in my career, after I had been here about ten years, and I had become officially Assistant Law Librarian, I had an offer from a Wall Street firm that was almost *three* times the salary I was making here. But by this time, not only did I know I wanted to be a law librarian, I was hooked at Suffolk. I liked the people. I liked the atmosphere. I was taking care of my mother. I was bringing up my nephew. I didn't want to move to another state. I just liked Suffolk and I liked what I was doing. I was dealing on a day to day basis with the students. I used to be on the floor helping the students with their moot court research because we didn't have an official research program at the time. In fact, every October I would have laryngitis from talking so much with the students. I just really liked Suffolk and liked helping the students. And then I decided to start on a Master's in Business because I felt that business courses would help me with budgets, and finances and other things in the library. So I went to Business School and graduated.

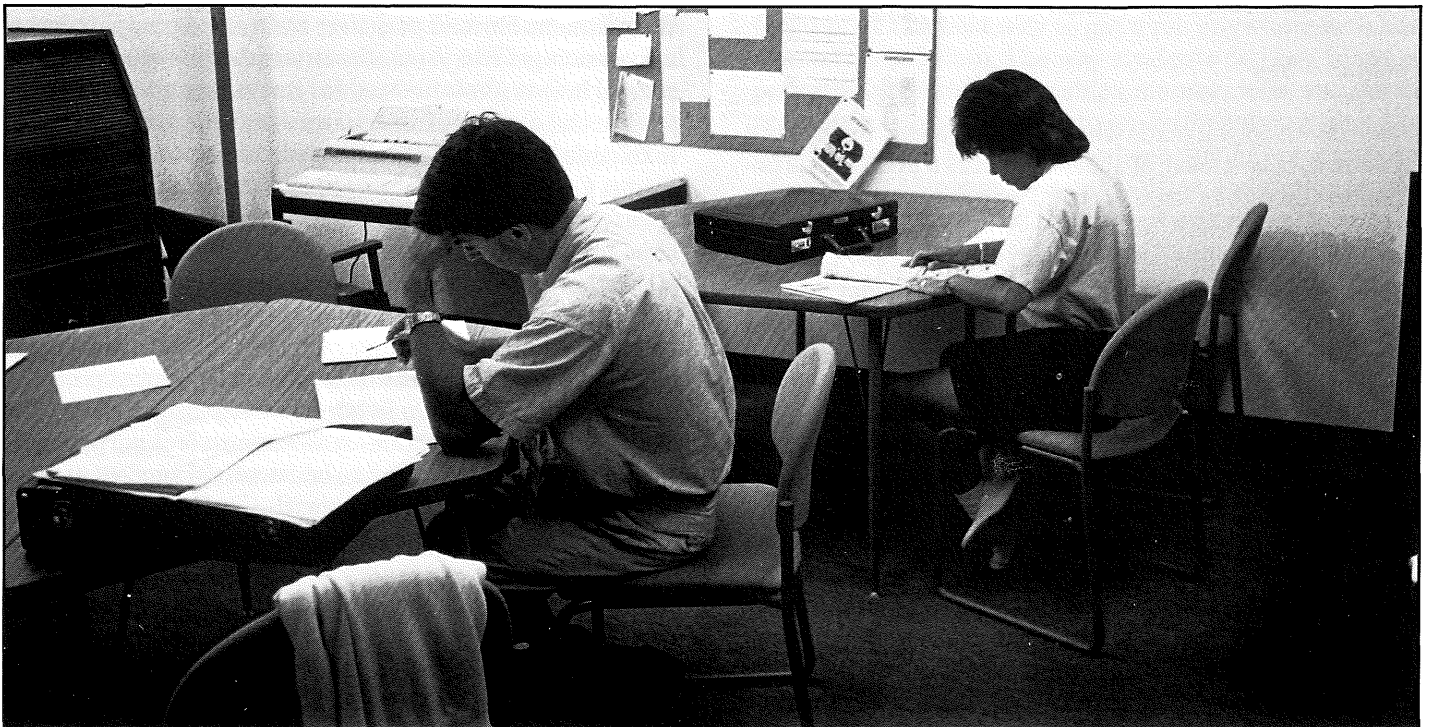
It just was sort of an evolution; I enjoyed it and turned down all other offers. But I do again have to say I stayed primarily because the people were great. I think the longevity that a lot of people have had here is for that same reason.

Advocate: Pat, now that you are retired what are you planning to do in the future?

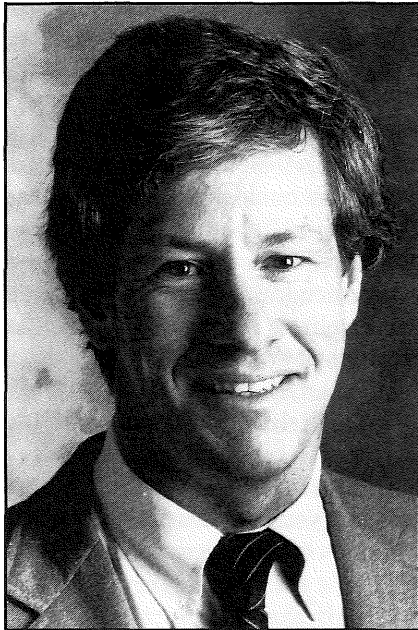
PB: I started my church's library last year and it's starting to grow, and now I'll have a little more time to make sermon tapes available to the congregation. That's never been done before at my church. I've only been at my church in Winthrop about two and half years so there's a lot of growing that can be done. I hope to do some writing. I would like to do some writing about libraries. Pitfalls of early days of libraries, maybe historical aspects or the future applications of electronic technology for libraries. One goal is I'd like to get an article published in Mass Law Review or the Boston Bar Journal on something in legal research. I don't want to practice law. In fact, I've retired from the Bar. I intend to do a little bit of traveling, to fix up my house, and just not work everyday.

Advocate: Pat, on behalf of the *Advocate* I would like to thank you for taking the time to talk to me. On behalf of Suffolk University, I would like to thank you for forty years of memorable service and wish you the best of luck on your retirement.

PB: Thank you.



THE PROFESSOR AS GOVERNMENT LAWYER: AN INTERVIEW WITH PROFESSOR DWIGHT GOLANN



Professor Dwight Golann is currently on leave from the Suffolk University Law School faculty to serve as Chief of the Government Bureau of the Massachusetts Attorney General's Office. Recently, he talked with Suffolk Law Professor Joseph Glannon about his experiences in government practice.

Advocate: On behalf of the Advocate

and the Law School I would like to thank you for agreeing to talk about your experience as Chief of the Government Bureau of the Attorney General's Office. You had been a professor at Suffolk for four years prior to going to the Attorney General's Office, I believe?

Golann: Yes.

Advocate: And you made what I think is a very interesting decision to take a leave of absence to take a prestigious position in the public legal sector. I wonder why you chose to do it at this time?

Golann: Essentially Scott Harshbarger called. He described what would be an exciting attempt to rework the Attorney General's Office, to turn it into a top-flight professional office, which it had been in the past, but which some felt had slipped in recent years. Scott made it sound like an exciting experiment, one that would come only once in a decade and maybe only once in a career. That was persuasive. Also, I had worked in the Attorney General's Office for several years in the Public Protection Bureau and had always thought of the Government Bureau as being the lawyer-scholars, the people who dealt with the most complex and difficult legal theories and appeared regularly in the appellate courts. The idea of being asked to be Chief of that bureau was a compliment. Also, Scott had a vision

of the Government Bureau as being different from what it had been in the past, as more integrated with his positive agenda, rather than sitting off as the lawyer for the Governor and state government, somewhat separate from everyone else. And that sounded like an interesting idea to try to make work.

Advocate: Could you elaborate on that idea of a positive agenda for the office and how it has worked out in your experience?

Golann: Scott came in with what he calls the "Green Monster," a long list of things that he intends to accomplish in the office. Luckily for me, less than a quarter of them relate directly to the Government Bureau. But, there is a large variety of items, ranging from dealing with urban violence, which we try to do through the agencies we represent; dealing with health care costs, through cases that implicate health care rates; and professionalizing agency practice.

The first few months were spent on Operation Rescue, in which we civilly prosecuted anti-abortion protestors for blockading an abortion clinic. The case was not typical Government Bureau practice, and raised complex issues of balancing First Amendment and privacy rights. But several lawyers volunteered for it and we had a three week trial in the early spring. That was our first big test of affirmative litigation. We also filed suit against the United States Census to try to retain an eleventh Congressional seat for Massachusetts. We filed suit against New Hampshire in the U.S. Supreme Court over New Hampshire's Nuclear Power Tax, which affects exclusively out-of-state consumers.

There has actually been a surprising amount of proactive litigation. The one area in which we haven't litigated very much involves the Federal Government. Not surprisingly, the Weld Administration has had unusual success at working things out cooperatively with the Bush Administration.

Advocate: That raises an interesting and perhaps delicate question, Dwight. Have you found it complex to be working for a Democratic Attorney General along with a Republican Administration? Does that create tensions?

Golann: It could have been very difficult. There seemed to be an effort in the prior administration to take policy positions different from the Governor's. That caused a great deal of stress and a perception that the Attorney General was a politician more than a lawyer. Scott Harshbarger came in with a pledge to do things differently, giving professional legal representation to state government. For example, I was warned by my lawyers at the very beginning that we really shouldn't refer to our agencies as "clients" — that term hadn't been favored in the past. Scott and I had no trouble deciding that they were clients and should be treated as such even though the Attorney General has the power to override the wishes of agency clients in order to set a consistent legal policy.

Sometimes we've had to tell the Weld Administration that we couldn't defend their policies. An example was a statute passed last year that imposed welfare residency restrictions, which was barred by a line of Supreme Court decisions and simply couldn't be defended. They've often argued vigorously for defense, but understand, I think, that when we say no it's really on the merits and not because we disagree with a particular political agenda. Overall, we've done very well and in fact the Weld Administration has just agreed to fund extra lawyers in our office. I think that represents a level of appreciation for the representation they've received.

Advocate: So the ground on which you would refuse to represent the administration would be that you considered the position legally untenable. Is that correct?

Golann: Yes. Our view of the wisdom of the policy involved is irrelevant — as it should be for judges. In fact, even in some instance where we consider the merits legally untenable we have successfully defended actions on the ground, for example, that an injunction wasn't called for because there was no irreparable injury. This causes a real tension for me and other lawyers who often sharply disagree with the social policies being challenged, for example that taxes should be cut when social needs of school children in poor communities aren't being met. It's a special concern for Scott Harshbarger who gave up a career in the ministry to attend law school.

Another example of where clashes have occurred is the state's decision to furlough state workers. I was among the persons furloughed, and at the same time had to appear in court to argue against requests for injunctions to block the program. I disagreed with the policy, as did Scott. But there wasn't much doubt in our minds that an injunction was not appropriate — it was the Governor and Legislature's decision to make.

Advocate: As the head of the Government Bureau, do you actually practice law or do you find yourself doing mostly policy and administrative work?

Golann: It varies. During the first six months I practiced a great deal, partly because, as a Remedies teacher, I was very interested in arguing injunction cases. And I did argue a half-dozen cases. In the middle of the year we decided to combine the Civil Bureau of the Office, which represents the state in tort, contract and real estate cases, with the Government Bureau, which handles administrative and constitutional issues. That doubled the number of lawyers, to 46, and forced me to do more administration than I want to do. I carry about a dozen cases at this point, including the furlough cases, a challenge to the 1990 Census, and a dispute with the counties over payments for courthouse maintenance.

Advocate: We hear a lot these days about how hard it is to be in public service law practice. Could you comment on that for the benefit of students who may be interested in getting into a public service law practice?

Golann: I think that the worst strain is financial — salaries simply were not increased for several years during the 1980's, particularly in the Attorney General's Office, and are now extremely low. In other parts of state government, lawyer salaries are better, although they are still a fraction of the private sector. On the other hand, the issues are fascinating and the responsibility can't be duplicated. The Attorney General has more than a hundred resumes for each opening. The Bureau's typical new hire is either a former federal law clerk who's dissatisfied with big firm practice or an outstanding Assistant D.A.

Advocate: Do you have any suggestions for students who are interested in getting into public service practice — either in terms of how to find the work or the kinds of courses they should take in law school?

Golann: The best way to get a job anywhere is to have worked there before. The way students do that, in my experience, is through internships, summer jobs, and clinical programs. I am very happy to see Suffolk doing what Boston College and Harvard have been doing for perhaps ten years in the Attorney General's Office, and that is to start a clinical program. That lets the lawyers who will make the hiring decisions see how good the students are and builds the kind of emotional bond that leads to a job offer.

In terms of courses, I think that Suffolk students have always had some advantage because their curriculum was so broad. Taking at least some Commercial Law helps people who apply for positions in the Consumer Division, for example, because they know something about the transactions they scrutinize, as well as having a desire to do good. On the other hand, our large group of lecture courses has prevented some students from developing top-notch writing skills, which are crucial to handling complex business and administrative cases. I'd also like to see intensive trial advocacy training for graduates who want to go into the courtroom.

Advocate: Dwight, I know that at Suffolk you've taught courses in Alternative Dispute Resolution. Have you had the opportunity to invoke any of those methods in your work with the Government Bureau?

Golann: We're just starting a project to do that. We've asked each attorney to nominate at least one case for ADR, according to criteria that I have drafted. Cases that involve important public principles, precedents that will last for decades, are clearly hard to settle. But more cases than you would think, even in the public sector, turn on either money or personnel decisions or other kinds of conflicts that frankly could be better resolved by agreement than by a court judgment.

Advocate: Is there anything unique about the nature of the practice in the Attorney General's Office that affects your ability to use ADR?

Golann: In some ways it's easier and in some ways it's much harder. It's easier because the Attorney General has the authority to settle cases over the objections of his clients. That is a big club, although it's wise not to use it all the time.

Advocate: Is that true as a matter of statute?

Golann: It's true as a matter of Supreme Judicial Court decision that the Attorney General has the right to set a consistent legal policy for the state, and the fact that a particular agency or office holder objects isn't usually determinative. So we can and do sometimes tell our clients that if they don't agree to settle, we will settle the case for them.

What makes it harder to do ADR is that the agencies don't pay for our services. So for them litigation is a free good, and to some extent, people are less likely to settle cases when they don't bear the cost of litigating them. It's also true that agency officials, like corporate executives, sometimes put off decisions hoping that the judgment will come in another fiscal year or after they have left office. Again, in the meantime they're often not paying the cost of going ahead with litigation. That's why the Attorney General sometimes has to force the issue.

Advocate: What kinds of ADR techniques are you trying to use to resolve cases?

Golann: I've suggested two kinds of processes. One is mediation, in the sense of someone serving as an honest broker to cut through emotional obstacles in negotiations. The other is early neutral evaluation, which is an advisory opinion about the merits of the case. That kind of opinion makes it easier for agencies to feel comfortable with our decisions to settle cases, and it can make either side drop unrealistic expectations about the outcome at trial. Those are the two techniques we are using the most.

Advocate: Where will you be finding your neutral case evaluators?

Golann: The easiest sources are the Suffolk and Middlesex Court Mediation Programs. I have occasionally proposed, and we have used, Professors Greenbaum and Baker, from Suffolk, and retired judges. We can and do find people ad hoc. But it is easier if there is an established, court-related program to which to send cases; it seems less suspicious to the other side.

Advocate: How do you think your experience at the Attorney General's Office will affect your teaching when, as we all hope, you return to Suffolk?

Golann: It's already made a difference to my teaching of Equitable Remedies, which I am doing again in the evening division this semester. For example, recently the Supreme Court handed down a decision in a case involving a Suffolk alumnus and adjunct Professor, Suffolk County Sheriff Robert Rufo ('75), concerning the standards for modifying public consent judgments. We argued the case with Bob in the U.S. Supreme Court last fall, and were happy to see the Court change an outmoded standard for modifying public judgments. I'm going to ask my students to read that case and to talk about how it has changed some of the rules in the casebook.

I'm also starting to use some of the pleadings from injunctions that I've argued. I was astounded to find on the very first injunction that I actually won on an argument of "unclean hands"! I think by showing people how these principles are actually used, I can raise the level of interest in my course.

Advocate: Dwight, have you had the opportunity to work with other Suffolk alumni in the Attorney General's Office?

Golann: When I arrived, out of the four Bureau Chiefs, two were Suffolk alumni, Barbara Anthony ('77) and Bill Mitchell ('77). Bill left to go into private practice, and his bureau has been folded into mine, so now there are three of us, two of whom have Suffolk affiliations. A number of my lawyers are Suffolk graduates. Bill Pardee ('78), is one of the most respected lawyers in the Government Bureau. He handles our most complex cases, and provides a wealth of knowledge and advice to the younger lawyers. And there are other alumni as well, such as Tom Samoluk ('85) our Director of Communications.

Advocate: Do you think you might have the opportunity to argue in the Supreme Court yourself during your time at the AG's office?

Golann: In December, I argued our claim against the Federal Government over the loss of a Congressional seat in the U.S. Census. The case is under advisement now be-

fore a three-judge panel. An appeal from that decision would go to the Supreme Court. Whether we will need to appeal, and whether we may be pre-empted by another case, I don't know. That is the most likely case to reach the Court.

Advocate: How do you think your experience will influence the kinds of research and writing that you do on returning to academia?

Golann: Most of my writing has been in financial services and alternative dispute resolution. The experience in this job will lay the basis for an article about practical obstacles to the implementation of ADR. I've also been thinking about the connection, the way in which Alternative Dispute Resolution is in some sense the "New Equity." It represents a break from the legal rules and legal forms which some people see as shackling judicial decision making. There may be an article there as well.

Advocate: Do you recommend this kind of a quasi-sabbatical to other law faculty members?

Golann: I definitely do. There are fascinating issues, particularly in the public sector. I think it refreshes your teaching. I was genuinely happy to come in last night and teach my first class in Equitable Remedies, which I hadn't done

for six months. It was just a change of pace, it was refreshing, made me appreciate the joy of talking to students as opposed to negotiating with adversaries.

Advocate: Dwight, a lot of our alumni are involved in practice that requires interaction with State Government. Do you have any advice for them in their dealings with the State Government or its lawyers?

Golann: People shouldn't assume that state government is a closed system. One of Scott's primary goals for the Government Bureau is that we should be open to the public and our adversaries; we should be available to talk, and often when you discuss a potential law suit it turns out either that it can be brought to a decision much more quickly and less expensively or that sometimes an entire dispute can be resolved without litigation, as our adversaries and client agencies better understand the situation. That has happened during the past year. And people should take advantage of our openness.

Advocate: We appreciate your willingness to talk with us, Dwight. We certainly look forward to seeing you again at Suffolk.

Golann: I do too.



SETTING THE RECORD STRAIGHT ON THE PUNITIVE DAMAGES CRISIS IN PRODUCTS LIABILITY

Michael Rustad
Professor of Law
Suffolk University Law School
Boston, Massachusetts

Thomas Koenig
Associate Professor of Sociology
Northeastern University
Boston, Massachusetts

Robert Granfield
Assistant Professor of Sociology
University of Denver
Denver, Colorado

I. INTRODUCTION¹

The Supreme Court has considered the constitutionality of punitive damages on a number of occasions in recent years. In *Bankers Life & Casualty Co. v. Crenshaw*², the Court refused to review an insurer's claim that a punitive damages award violated the Due Process Clause of the Fourteenth Amendment, ruling that those claims had not been properly raised in the lower court.³ However, several of the Justices indicated that they would revisit the due process issue if a proper case arose. Justice O'Connor, joined by Justice Scalia, invited a substantive due process challenge to punitive damages:

In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause. . . . This

due process question, serious as it is, should not be decided today.⁴

In the 1989 term, the Supreme Court decided that the Excessive Fines Clause of the Eighth Amendment did not limit punitive damage awards, but again declined to pass on the question of whether awards of punitive damages were reviewable under the Due Process Clause.⁵ The Court in *Browning-Ferris Industries Inc. v. Kelco Disposal Inc.*⁶ upheld a \$6 million punitive damages award against Browning-Ferris Industries, Inc. (BFI) which had attempted to monopolize the industrial-waste disposal business in Burlington, Vermont through predatory pricing. When a former employee, Joseph Kelley, founded a rival firm, Kelco Disposal Inc., and gained 43 percent of Burlington's waste disposal business in only nine years,⁷ a top BFI official ordered his subordinates to: "Put [Kelley] out of business. Do whatever it takes. Squish him like a bug."⁸ In

¹ Professor Rustad would like to express his appreciation to the many Suffolk University Law School students, faculty and staff who assisted in creating the Punitive Damages in Products Liability Data Base. Without the efforts of my extremely able and hardworking students, the study could never have been completed. Specific mention of the students' contribution is referenced in Professor Rustad's monograph published by the Roscoe Pound Foundation: *Demystifying Punitive Damages in Products Liability*, 1991.

²486 U.S. 71.

³*Id.* at 78.

⁴*Id.* at 87-89.

⁵*Id.* at 277.

⁶109 S.Ct. 2909 (1989).

⁷109 S.Ct. at 2912.

⁸*Id.*

attempting to destroy Kelco, BFI violated both federal antitrust and Vermont state law.⁹

The jury awarded Kelco \$51,146 in compensatory damages and \$6 million in punitive damages.¹⁰ The Second Circuit affirmed the verdict, noting that punitive damages were justified because BFI had "wilfully and deliberately attempted to drive Kelco out of the market." The appellate court found no evidence that the award was a product of passion or prejudice.¹¹

In its petition for a writ of certiorari, BFI asked the Court to consider the issue of whether this punitive damages award violated the Eighth Amendment's prohibition against excessive fines. The Excessive Fines Clause had never before been applied in civil lawsuits between private parties, but BFI presented a novel argument. BFI asserted that the clause "derives from limitations in English law on monetary penalties exacted in private civil cases to punish and deter misconduct."¹²

BFI's position was based on the fact that the Magna Carta prohibited excessive fines imposed by the King. The money from these amercements went into the King's treasury, giving him an incentive to assess unfairly large fines. BFI argued that since punitive damages verdicts are fines designed to punish bad behavior, they are functionally similar to amercements. It is irrelevant, the corporation asserted, that the large fine was levied by a civil jury rather than by the state and went to the wronged individual rather than to the government.¹³

The Supreme Court rejected BFI's contentions, holding, "on the basis of the history and purpose of the Eighth Amendment, that its Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties."¹⁴ Justice Blackmun, writing for the majority,

found the meaning of "fine" as used in the Eighth Amendment to be "a payment to a sovereign as punishment for some offense,"¹⁵ and therefore not applicable to lawsuits between private parties.

A second argument made by BFI was that the Due Process Clause of the Fourteenth Amendment limits the jury's discretion in awarding punitive damages.¹⁶ The Court did not rule on this issue but invited the submission of a future substantive due process challenge to punitive damages awards.¹⁷ The question of "jury discretion to award punitive damages in the absence of any express statutory limit,"¹⁸ the Court stated, was an inquiry that, "must await another day."¹⁹

The first case to examine the possible due process dimensions of the punitive damages remedy was *Pacific Mutual Life Insurance Co. v. Haslip*.²⁰ In its opinion the U.S. Supreme Court provided little satisfaction to the pleas of the business community for more limitations on the remedy of punitive damages. The business community's contention that unfettered punitive damage awards are unconstitutional was rejected.

In *Haslip*, an insurance agent secretly pocketed his clients' premiums rather than sending them to Pacific Mutual Life Insurance Co. He concealed from his "customers" the fact that his dishonesty had caused their policies to lapse. Cleopatra Haslip, the principal plaintiff, learned of the agent's malfeasance only after her hospital bill was rejected by the insurance company.²¹ After unsuccessfully attempting to resolve the matter, she and her co-victims sued both the dishonest agent and Pacific Mutual.²²

Pacific Mutual countered with the argument that it was fundamentally unfair to hold the firm responsible for its agent's fraudulent acts, since the company had also been

⁹*Id.* at 2913.

¹⁰*Id.*

¹¹*Browning-Ferris Industries v. Kelco Disposal, Inc.*, 845 F.2d 404, 410 (2d Cir. 1988).

¹²Brief for Petitioners at 17, cited in 109 S.Ct. at 2916.

¹³*Id.* at 2914.

¹⁴109 S.Ct. at 2912.

¹⁵*Id.* at 2915.

¹⁶*Id.* at 2921.

¹⁷*Id.*

¹⁸*Id.*

¹⁹*Id.*

²⁰111 S.Ct. 1032 (1991).

²¹111 S.Ct. 1032, 1036-37 (1991).

²²111 S.Ct. 1032, 1036.

victimized.²³ The company proved that it had not even been aware of its agent's dishonesty until the plaintiffs filed their lawsuit.²⁴

An Alabama jury found that since the agent "was acting as an employee of Pacific Mutual when he defrauded the respondents,"²⁵ the firm was liable. It awarded compensatory damages to all of the plaintiffs. Cleopatra Haslip was awarded an additional \$1,040,000 in punitive damages because the insurance company had made it excessively difficult for the impoverished woman to pay her medical bills.²⁶

The Court affirmed the award of punitive damages by a 7-1 majority. Justice Blackmun, writing for the majority, rejected Pacific Mutual's argument that as a fellow victim it should not be assessed punitive damages:

Imposing exemplary damages on the corporation when its agent commits intentional fraud creates a strong incentive for vigilance by those in a position "to guard substantially against the evil to be prevented."²⁷

The fact that punitive damages awards have long been accepted in American law was important to at least one member of the Court in rejecting Pacific Mutual's claim that the lack of clear jury guidelines for the awarding of punitive damages violated the Fourteenth Amendment. In the oral argument, Justice Scalia questioned Pacific Mutual's appellate counsel's argument that punitive damages were constitutionally forbidden:

That's been going on since 1791 as I understand it. Who said . . . its been going on so long and now, after 200 years, it violates due process?²⁸

Counsel responded, "The impact of the practice on society has changed dramatically."²⁹ Counsel's answer did not convince Justice Scalia that the remedy has changed sufficiently to undermine its legitimacy as a long established remedy:

Although both the majority and the dissenting opinions today concede that the common-law system for awarding punitive damages is firmly

rooted in our history, both reject the proposition that this is dispositive for due process purposes. . . . I disagree. In my view it is not for the Members of this Court to decide from time to time whether a process approved by the legal traditions of our people is "due" process, nor do I believe such a rootless analysis to be dictated by our precedents.³⁰

A titanic struggle is underway over the "reform" of the remedy of punitive damages. The anti-punitive damages "tort reformers" are a well-heeled coalition composed of business interests, insurance representatives, and the defense bar.

Neither Justice Scalia nor appellant's counsel could provide the sustained historical and empirical study which must be a first step in deciding whether this remedy needs to be revamped. We agree with Justice Scalia that "rootless analysis" is inadequate, but his assertions lack the factual foundation necessary to begin any evaluation of whether the current applications of punitive damages are appropriate. Lacking systematic data about the incidence of punitive damages awards, there has been no way to evaluate the defense attorney's contention that punitive awards are having an unprecedented impact on American society because of the new ways that the remedy is being used.

Opponents of punitive damages have also been forced to rely on unproved assumptions. Justice O'Connor, in her dissenting opinion in *Browning-Ferris v. Kelco*,³¹ wrote that "punitive damages are skyrocketing" and need to be reined in. For evidence she could only muster the fact that: "As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was \$250,000. Since then, awards more than 30 times as high have been sustained on appeal."³² Even the Supreme Court lacks any systematic data on the pattern of punitive damages awards in products cases and is forced to resort to a few dramatic examples.

²³Brief for Petitioner at 29, cited in *Haslip*, 111 S.Ct. at 1040.

²⁴111 S.Ct. at 1032, 1040.

²⁵111 S.Ct. at 1040.

²⁶111 S.Ct. at 1037.

²⁷111 S.Ct. at 1041.

²⁸U.S. Law Week, *Arguments before the Court: Punitive Damages (Pacific Mutual Life Insurance Co. v. Haslip)*, No. 89-1279, argued 10/3/90, 59 U.S. Law Week 1 (Oct. 30, 1990).

²⁹111 S. Ct at 1047.

³⁰*Id.* at 1047, 1049 (J. Scalia, concurring). (citations omitted).

³¹492 U.S. at 257, 282 (1989).

³²*Id.*

Concerns about skyrocketing punitive damage awards in product liability cases have been the focus of tort reform efforts at both the federal and state level. The defense bar, insurers, the media, and legal academics have all asserted that excessive punitive damage awards in products cases are now routine and are an important reason for American industry's lack of international competitiveness. For this reason, President Bush's Council on Competitiveness has recently announced a proposal to abolish jury awarded punitive damages.³³ A number of states are considering restricting or eliminating punitive damages in products cases. Unfortunately, the current policy debate is based largely upon anecdotal scholarship and reports of individual tort horror stories rather than the kind of systematic study necessary to establish whether there is a real crisis.

Much of the confusion and controversy surrounding punitive damages in products cases comes from the fact that the application of punitive damages against manufacturers is only a quarter of a century old. Before 1965 punitive damages in products was only applied to goods which had been purposely designed to harm the user. Such cases did not involve corporations producing dangerous products. They resulted from attempts of one individual to harm another such as the man who put "Spanish fly" into the wine of a rival.

The first modern punitive damages awards in products liability stemmed from the marketing of an anti-cholesterol drug called "MER-29." We interviewed several plaintiff's counsel in the MER/29 cases. William F.X. Geoghan, plaintiff's lawyer in *Ostopowitz v. Richardson-Merrill*³⁴ told us that punitive damages stemmed from the fraudulent acts of a drug manufacturer:

Evidence was admitted at trial indicating aggravated misconduct on the part of the defendant. Evidence from their own internal documents that the company lied to the FDA in getting the drug on the market and then lied to the public until they were caught was introduced. Thousands of users of the product suffered serious symptoms such as cataracts, skin eruptions, and loss of hair.³⁵

Counsel attributed his success in obtaining punitive damages to the fact that, "the government swooped down on Richardson-Merrell before they had a chance to destroy 30 or 40 smoking guns."³⁶ Top officers of the company were indicted for defrauding the Food and Drug Administration. They had engaged in such activities as falsifying animal studies. They pleaded nolo contendere and paid the maximum fine, a mere \$60,000.³⁷

Geoghan attributed Merrell's motivation for violating FDA regulations and thus injuring the consuming public to "absolute greed."³⁸ However, in contrast to the earlier punitive damages awards in products cases, the

Punitive damages are rarely awarded and even more rarely collected.

firm hadn't set out to hurt anyone. They simply concluded that the profits were worth the risk. Punitive damages were awarded because of a feeling that such a small fine was insufficient to punish the firm and to deter others from adopting similar practices.

Since its birth, the doctrine of punitive damages in products liability has engendered controversy. In *Roginsky v. Richardson-Merrell, Inc.*,³⁹ the Second Circuit reviewed a MER-29 case on identical facts. A jury had awarded \$17,500 in compensatory damages and \$100,000 in punitive damages. Judge Henry Friendly, writing for the court, reversed the award of punitive damages. He found insufficient support for punitive damages under New York law and stated that the court had "the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be administered so as to avoid over-kill."⁴⁰ Judge Friendly also raised the specter of a host of other evils which might stem from punitive damages assessed against product manufacturers: including unfairness to stockholders, over-punishment, and bankruptcy.

³³Model State Punitive Damages Act, 2 Office of the Vice President, Washington, D.C., February 1992.

³⁴(Sup. Ct. Westchester Co., N.Y, 1966), 9 ATLA L. Rep. 364 (1967).

³⁵Plaintiff's Questionnaire sent to Professor Rustad from William F.X. Geoghan, Counsel for Plaintiffs in *Ostopowitz v. Richardson-Merrill*. (July 1990).

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹254 F. Supp. 430 (S.D. N.Y. 1966), *aff'd in part, rev'd in part*, 378 F.2d 832 (2d Cir. 1967).

⁴⁰*Id.* at 838-41.

The issues still remain unresolved. To date, there has been an uninterrupted and unending struggle concerning the appropriateness of punitive damages in products cases. Tort reformers argue that punitive damages create unpredictability and confusion for American manufacturers, placing them at a competitive disadvantage vis-a-vis their European and Japanese counterparts.⁴¹ In a recent survey of 2,000 Chief Executive Officers conducted by the Conference Board, the respondents claimed that fear of product liability results in "useful products . . . being discontinued, decisions not to develop new product lines or not to continue product research, and a fear to innovate."⁴² Punitive damages have been cited as the cause of insurance cancellations as well as the scuttling of corporate acquisitions, research, and products.⁴³

A titanic struggle is underway over the "reform" of the remedy of punitive damages. The anti-punitive damages "tort reformers" are a well-heeled coalition composed of business interests, insurance representatives, and the defense bar. The "reformers" contend that punitive damages are common and that they are nearly always excessive. Victor Schwartz, who heads the Product Liability Alliance, a tort reform group, adds: "The system is irrational . . . All the studies have shown that more money ends up going to the lawyers than to the victims."⁴⁴ In fact there are few such studies and those that exist are based on very limited samples.

The reformers continue to press Congress for a national products liability bill which would significantly cut back the remedy. Executives from the chemical, small aircraft, tobacco, pharmaceutical and insurance industries are particularly active in this movement. The Insurance Institute has produced a series of television commercials at a cost of \$6.5 million dollars on the subject of tort reform.⁴⁵ Such activities have produced much heat but little light. If punitive damages or any other aspect of the civil justice system need to be re-

formed, the case should be made on the basis of data and not emotional argument.

Dan Quayle has seized upon the issue of punitive damages to increase his popularity with the corporate community. As keynote speaker at the American Bar Association's Atlanta meeting, the Vice President proposed a range of legal reforms to bolster American competitiveness. He maintains that punitive damages assessed against manufacturers are "a self-inflicted competitive disadvantage."⁴⁶ He proposed to cap "punitive damage awards at an amount not to exceed the amount of the plaintiff's actual harm." Quayle claims: "Even a casual observer knows that, in the last several decades, punitive damages have grown dramatically in both frequency and size."

In sharp contrast to the tort reformers' view that punitive damages in products case are careening out of control, supporters of the current tort system see no need for scaling back punitive damages. Professor Andrew Popper testified before the U.S. Senate recently that:

there is no tort crisis and particularly no punitive damages crisis. The amount of dollars paid out for punitive damages is so insubstantial that it barely appears in any major studies of the tort system. Nevertheless, punitive damages are a rallying cry for "tort reform."⁴⁷

Some judges also believe that the remedy of punitive damages functions appropriately. As the California Appeals court observed in *Grimshaw v. Ford Motor Co.*,⁴⁸ the remedy advances consumer safety:

Punitive damages . . . remain as the most effective remedy for consumer protection against defectively designed mass-produced articles. They provide a motive for private individuals to enforce rules of law and enable them to recoup the

⁴¹In May, 1991, both the American and Japanese delegations urged that Congress enact product liability fairness legislation to improve America's competitiveness. See, U.S.-Japan Group Report On the Structural Impediments Initiative, May 1991, See also, e.g., Statement of Wendell Wilkie II, General Counsel, Department of Commerce, *Product Liability Reform Act: The Committee on Commerce, Science and Transportation, 101st Cong., 2d Sess. 3 (1990)* (Statement of Wendell L. Wilkie II, General Counsel, Department of Commerce, February 22, 1990 at p. 37).

⁴²McQuire, *The Conference Board, Research Report No. 908: The Impact of Product Liability 19* (Table 19) 1988.

⁴³See, e.g., Coccia & Morrissey, *Punitive Damages in Products Liability Cases Should Not Be Allowed*, 22 *Trial Law. Guide* 46 (1978) (brief outlining arguments against punitive damages); Sales & Cole, *Punitive Damages: A Relic That Has Outlived its Origins*, 37 *Vand. L. Rev.* 1117, 1154 (1984) (Depicting the remedy of punitive damages as destructive to business and the legal system).

⁴⁴Isikoff, *Defective-Product Claims Cause Legal Morass; Lawyers, Not Victims, Are Source of Most Problems When Punitive Damages Are Sought, Critics Claim*, *Washington Post*, September 1, 1985, p. M-2.

⁴⁵Charles Wasilewski, *Tort Reform: Courting Public Opinion*, 87 *Best's Review: Property-Casualty Insurance Edition* 14 (June 1986).

⁴⁶Vice President Danforth Quayle, *Remarks at the Meeting of the American Bar Association*, Atlanta, Georgia (August 13, 1991) (available through the Office of the Vice President).

⁴⁷*Product Liability Reform Act: Hearings on S. 640 Before the Subcommittee on the Consumer of the Committee on Commerce, Science and Transportation*. 101st Cong. 2d Sess. 3 (Statement of Andrew Popper, Associate Dean and Professor of Law, Georgetown University).

⁴⁸119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981).

expenses of doing so which can be considerable and not otherwise recoverable.⁴⁹

Defenders reject the argument that competitiveness is significantly damaged by the U.S. torts system. John J. Curtin, Jr., the past president of the American Bar Association (ABA), notes that a recent study by the Congressional Office of Technology Assessment identified a very different set of causes for the weakness of American manufacturing: "The critical factors hurting us in world markets are capital costs, the quality of human resources, and technology-transfer diffusion, not the tort liability system."⁵⁰

Two leading law and economics scholars have endorsed punitive damages as an efficient remedy for intentional and reckless torts in situations where the probability of detection is very low and the probability of harm is very high.⁵¹ They state:

In general, punitive damages are appropriate in these circumstances for the same reasons punishment is appropriate for criminal offenses. . . . Damage awards equal to the victim's damages provide inadequate deterrence against such deliberate, concealed harms, since the wrongdoer's expected damage payment is frequently less than his immediate gain.⁵²

The doctrine is also supported as a crucial market incentive to maximize safety. Professor Michael Wells argues:

[E]conomic analysis does endorse a role for

punitive damages. Insofar as corporate misconduct is concerned, their function is to see to it that the corporation does not undervalue negligently caused accidents for which the corporation does not pay the full costs in the form of compensatory damages.⁵³

Other law and economics scholars, however, believe that the high costs of litigating these cases outweigh their benefits.⁵⁴

There have been many untested assumptions on all sides of the punitive damages in products liability debate. When this study was conceived, no one had any real idea of how many punitive damage verdicts there were in products cases. The American Trial Lawyers Association maintained that there were a hundred or fewer punitive verdicts in products litigation. Stephen Daniels and Joanne Martin's American Bar Foundation study, "Myth and Reality in Punitive Damages," reported that the incidence of punitive awards in products cases was almost 9 percent in the largely urban jurisdictions they studied in the mid-1980s.⁵⁵ However, this estimate was based on only 34 cases uncovered in their sample. The other empirical studies performed by the GAO⁵⁶, the Institute for Civil Justice of the RAND Corporation,⁵⁷ and Judge Richard Posner and William Landes⁵⁸ have concluded punitive damage awards in products cases are few in number and not "crushing" in size. Landes and Posner found two percent of the products cases resulting in punitive damages, while the Rand study found only 1/10th of one percent in Cook County and even less in San Francisco.⁵⁹

⁴⁹119 Cal. App.3d at 810, 174 Cal. Rptr. at 382-83.

⁵⁰Editorial, *The Washington Post*, 28 August 1991 (citing U.S. Congress, Office of Technology Assessment, *Making Things Better: Competing in Manufacturing, OTA-ITE-443* Washington D.C.: U.S. Government Printing Office, February 1990).

⁵¹W. Landes & R. Posner, *The Economic Structure of Tort Law* 160-61 (1987).

⁵²Landes and Posner, *New Light on Punitive Damages*, *Regulation* 33, 33 (October 1986).

⁵³Wells, *Comments on Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 *Ala. L. Rev.* 1073, 1076 (1989).

⁵⁴See Priest, *Insurability and Punitive Damages*, 40 *Ala. Law Rev.* 1009 (1989); Elliot, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 *Ala. Law Rev.* 1053 (1989).

⁵⁵Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 *Minn. L. Rev.* 1, 38 (Table V) (1990).

⁵⁶In 1989, the U.S. Government's General Accounting Office ("GAO") tracked punitive damages verdicts in a five state sample of products cases and observed that, "judicial review currently built into the tort system eliminates many punitive damage awards." GAO, *Product Liability: Verdicts and Case Resolution in Five States*, 31 & 47 (Sept. 1989).

⁵⁷RAND researchers found only six instances of punitive damages awards in product liability cases (during a 15 year period in Cook County and San Francisco County) and determined that the increase in punitive damages had occurred in cases involving business and contract torts, reflecting both the recent development of insurance bad faith law and the fact that "[m]any punitive damages now go to businesses suing other businesses for unfair practices." *Id.* Furthermore, an American Bar Association torts section report using Rand data concluded that: contrary to the common perception, punitive damages awards are neither routine nor routinely large, especially in personal injury cases including product liability and malpractice litigation. While punitive damages awards have grown in frequency and size over the past 25 years, the bulk of this growth has been in cases of intentional torts, unfair business practices or contractual bad faith. The punitive damages picture in personal injury cases has changed very little in 25 years. Moreover, while the size of punitive damages awards has increased, most are moderate in amount and the ratio of punitive to compensatory damages is generally not excessive. American Bar Association (Section on Torts), *Report of the Special [ABA] Committee on Punitive Damages, Punitive Damages: A Constructive Examination*, at 2-1 (1986).

⁵⁸Richard A. Posner, formerly a law professor at the University of Chicago, and currently a Seventh Circuit judge and his University of Chicago colleague, William Landes, concluded that "punitive-damages awards appear to be rare in reported products liability cases and other cases of accidental torts. Landes and Posner, *New Light on Punitive Damages*, *Regulation*, 33, 36 September/October 1986,

⁵⁹Landes and Posner, *New Light on Punitive Damages*, *Regulation*, September/October 1986 at 36.

RESEARCH METHODS

Professor Rustad teamed up with two sociologists, Professor Thomas Koenig of Northeastern University and Robert Granfield of Denver University, to conduct this survey of punitive damages in products cases. Our research strategy has been to treat popular perceptions about punitive damages in products cases as hypotheses and to collect systematic data in order to test them. To do so, we needed the largest sample ever gathered so that we would not be confined to research by "anecdote" or "isolated fact."⁶⁰ In this report, which draws from a larger work in progress, we report some of our basic findings based upon patterns of punitive damage verdicts.

Our research, which has located ten times as many punitive damages verdicts as the largest previous study, indicates that punitive damages awards rarely limit or penalize the corporation that takes reasonable precautions. Punitive damages in products liability is a remedy rarely imposed, but important to our legal system as a deterrent against trading safety for profits.

We searched all available computer-based statistical sources,⁶¹ regional verdict reporters,⁶² law reviews and other scholarly sources,⁶³ state products liability practice guides,⁶⁴ generalized case-reporting services,⁶⁵ court records,⁶⁶ asbestos reporters,⁶⁷ and media reports. In addi-

tion, we surveyed all attorneys in reported cases,⁶⁸ to locate further cases.⁶⁹

II. MAJOR FINDINGS

No legal remedy is expected to perform perfectly, but before preempting the states' freedom to establish the limits to which they will protect their citizenry, opponents have the burden of producing evidence of widespread misuse of the remedy. We found no such pattern.

Our major empirical finding is that punitive damages are generally working appropriately. Punitive damages are rarely awarded and even more rarely collected. When they are awarded, they are generally richly deserved. In most cases, punitive damages were assessed against corporations because they had prior knowledge of a developing or known risk and failed to take remedial safety steps. The popular perception of vast wealth being awarded in the form of punitive damages to greedy or extremely careless plaintiffs contrasts sharply with the profile that emerges from our study. The typical plaintiff was permanently disabled or killed by a product known by the manufacturer to be unnecessarily hazardous.

In the great majority of the product cases we studied, punitive damages were assessed only when a manufacturer

⁶⁰Professor W. Kip Viscusi coined these terms to refer to schools of tort reform. We agree with Professor Viscusi that such approaches obscure "the policy debate of product liability reform." See, W.K. Viscusi, *Reforming Product Liability Law* 3 (1991).

⁶¹Our research team used hundreds of hours of WESTLAW, LEXIS and NEXIS connect-time to locate verdicts which were not available in printed form. The American Trial Lawyers Association Exchange (ATLA Exchange) conducted five separate computer-based runs on trial and appellate cases. In addition to these sources, Louis Laska, President of the Judicial Advisory Services of Louisville, Kentucky, performed a computer-based search of more than 3800 jury verdicts (including, but not limited to, product liability cases) collected predominately in the southeastern states. Separate computer searches of Montana and Tennessee were conducted by verdict services in those states. Not only were many cases located not available through manual searches, but these reports allowed information from other sources to be cross-checked for accuracy and completeness.

⁶²The search also included a large number of state verdict reporters published by private organizations including: California; *Jury Verdicts Weekly* 1970 to present, covering all of California, *The Gavel: California Jury Verdicts*, 1973-89 (covering Northern California, Hawaii & Nevada); Colorado; *Jury Verdict Reporter of Reporter of Colorado*, 1983-present; D.C./Baltimore: *Metro Verdicts Monthly*; 1989-90; Florida; *Florida Jury Verdict Reporter* 1981-90; *Jury Trials and Tribulations* 1970-90 and *Florida Law Week* 1985-90; Georgia; *Georgia Trial Reporter*, 1987-90; *Kansas City Jury Verdict Reporter*, 1982-91; Michigan; *The Michigan Trial Reporter*, 1988-90; Montana; *Montana Law Week* 1980-90; New England States; *New England Verdict Reporter* (Massachusetts, Connecticut & Rhode Island); New York; *New York Jury Verdict Reporter*; Ohio; *The Ohio Trial Reporter*, 1987-90; and Tennessee; *Tennessee Verdict Reporter*.

⁶³We searched the LAWREV data base of Lexis for all Kansas products cases where punitive damages were mentioned. We also searched the *Index to Legal Periodicals* from 1960 to the present. Any mentions of punitive damages in a products case were investigated to determine whether an award was actually made.

⁶⁴The following are a few of the state bar materials searched: California CLE, *Products Liability Action* (rev. ed. 1975); Illinois ICLE, *Illinois Product Liability Practice* (1990); University of Missouri Kansas City Law School, *CLE Missouri Products Liability Law* (1988-89); Weinberg, *New York Products Liability* (1982); Oklahoma Bar CLE, *Handling a Product Liability Case* (1988); and Powers *Texas Products Liability Law* (1986).

⁶⁵*Lawyer's Alert* 1987-90; Matthew Bender, *Personal Injury Newsletter*, 1975-90; *Prod. Liab. Rep.* (CCH) 1973-90; *Products Liability Journal* 1985-90; *ATLA Law Journal* 1965-90, *Toxic Law Reporter*, 1984-90, and *Leader's Product Liability Law & Strategy*, 1982-90 were searched manually.

⁶⁶In Miami, San Diego, and Los Angeles, courts records were also searched manually for punitive damages in products cases. Early in the research, we determined that the lack of indexing and the storage of records in separate sites made this method generally impractical. However, we were able to determine final disposition in some cases not located through other methods.

⁶⁷We searched Mealey's *Litigation Reports: Asbestos* and the *Asbestos Litigation Reporter*, which claim to publish reports of all asbestos litigation nationwide.

⁶⁸Any attorney who was listed on the record of any products case where punitive damage awards were made was surveyed. Telephone and personal interviews supplemented the mailings. Plaintiffs' and defense attorneys were asked to provide us with information on any additional punitive awards. This provided yet another check on the completeness of our sample.

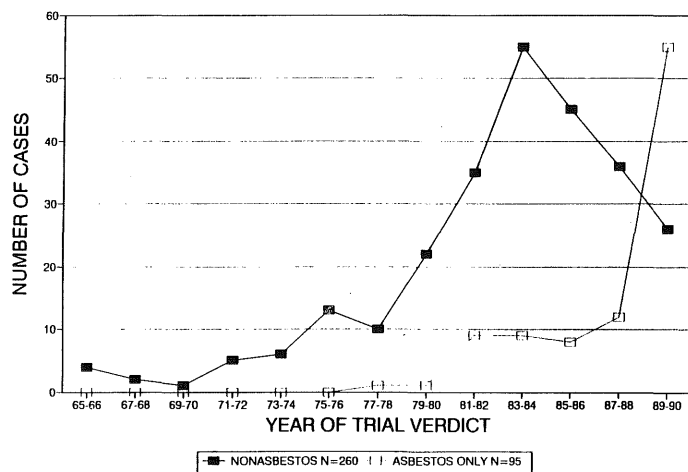
⁶⁹Because there is no nationwide reporting system, some punitive damage awards were undoubtedly missed. If there is any systematic bias, it would be that small awards would be unreported and not located. We urge that the Federal Judiciary Center and the National Center of State Courts begin reporting on the number, size and disposition of punitive damage awards, since this remedy has become an issue of national controversy.

went well beyond ordinary negligence.⁷⁰ The documented cost-benefit analysis such as was found in the Ford Pinto case⁷¹ or the "I don't care attitude" displayed by the manufacturer of infant formula who removed sodium chloride causing retardation in babies were typical of the kind of corporate misconduct which led to punitive damages. (The juries in these infant formula cases were particularly enraged when the company asserted that it had removed the salt to protect the infants from high blood pressure.)⁷² Dangerous products which were not recalled despite field reports showing a high rate of failure were a common scenario resulting in punitive damages. In a typical case, the manufacturer of an industrial crane failed to use a more durable alloy despite cracks in a majority of the models in use. The inevitable accident resulted in a bystander suffering permanent brain damage.⁷³

Our most striking finding is that only 355 punitive damages verdicts were located in state and federal courts. Because there is no national reporting system, the actual number of punitive damage verdicts in products cases is unknown and unknowable but the fraction of one percent of awards found by Rand appears to be close to the mark. Thus, the impact of punitive damages on international competitiveness or American business profits appears to be minimal. Other findings include:

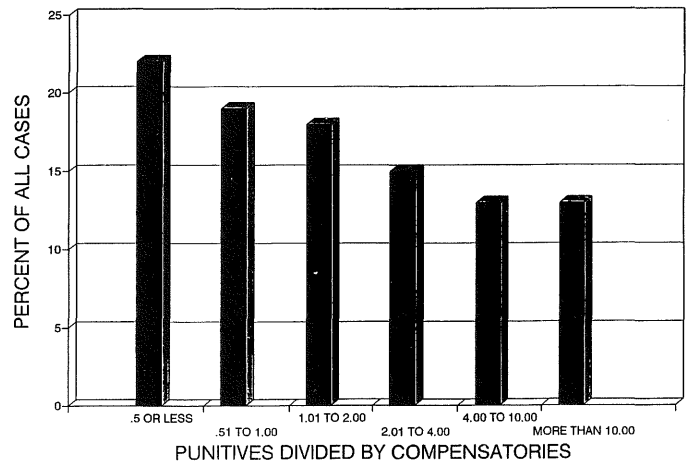
There were no reported cases of punitive damages in products liability cases prior to 1965. The number of awards has risen since the mid 1970s but from a minuscule base. With the exception of asbestos cases, the number of punitive products verdicts has been falling in the last six years.

NUMBER OF VERDICTS BY YEAR - NONASBESTOS VS. ASBESTOS CASES



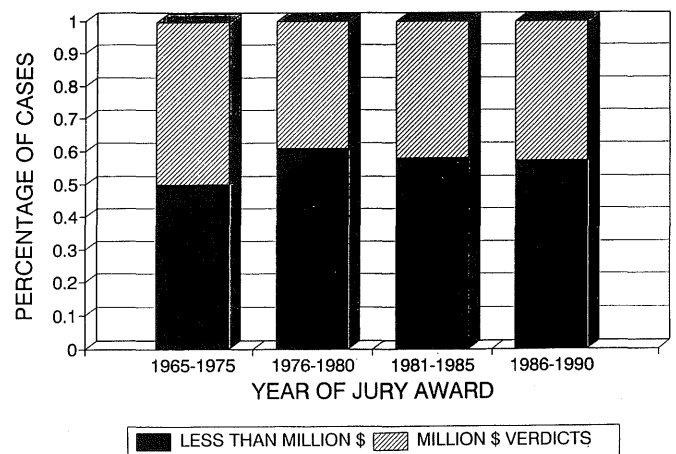
The median size of punitive damages awards for all products liability cases was \$625,000. Actual damages, of which the median award was \$500,100, were greater than punitive damages in 36 percent of the cases. Punitives are ten or more times compensatories in only thirteen percent of the cases. Thus, the punitives were not generally excessive.

RATIO OF PUNITIVES TO COMPENSATORIES AWARDED AT TRIAL (N=355)



The proportion of products liability cases in which punitive damages awards exceeded \$1 million remained constant throughout the 25-year period when such awards were adjusted for inflation, showing that awards are not skyrocketing.

PERCENTAGE OF MILLION DOLLAR JURY AWARDS OVER TIME-1983 DOLLARS



⁷⁰The fact that punitive damages are very rarely awarded and not assessed for ordinary negligence is hardly surprising. As Professor Richard A. Epstein has observed, "[i]n all jurisdictions allegations of negligence have been regarded as wholly insufficient to support punitive damages. Rather, proof of some conscious wrongdoing by the defendant has been required." Richard A. Epstein, *Cases and Materials on Torts*, 799 (5th ed. 1990)

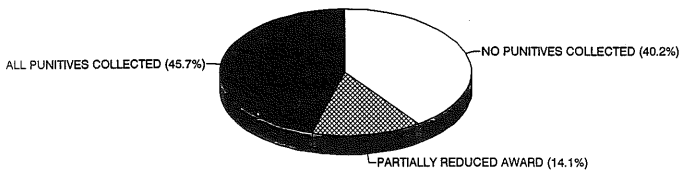
⁷¹*Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (Cal. App. 1981).

⁷²*Dudleston and Sheridan v. Syntex Labs., Inc.*, No. 80-L-57726 (Cir. Ct. Ill., Feb. 28, 1985); *Pickren v. Syntex Labs Inc.*, No. 83-303 (Cir. Ct. Fla. 1987).

⁷³*Camillo v. Olympia & York Property*, 554 N.Y.2d 532, 157 A.D.2d 34 (1990). (Reversed and remanded).

Punitive awards were often uncollectible. In the great majority of cases, post-trial activity (post-trial motions, appeals, and post-trial settlement negotiations and agreements) resulted in a significant reduction in the size of punitive damages awards. Indeed, plaintiffs received the full amount of the punitive damages initially awarded to them by juries in only 44 percent of the cases. More than a one third – 38% – of all plaintiffs did not collect any punitive damages at all.

POST TRIAL REDUCTIONS OF PUNITIVE JURY AWARDS (N=276)



Appellate courts frequently reversed or reduced punitive damage awards. In cases that were ultimately resolved on appeal, the average amount of the actual, compensatory damages received – \$175,000 – was nearly double the average amount of the punitive damages received – \$95,000.

Plaintiffs collected a median of 50 percent of the punitive damages awarded to them. Plaintiffs who were initially awarded small amounts of punitive damages ultimately collected the highest percentage.

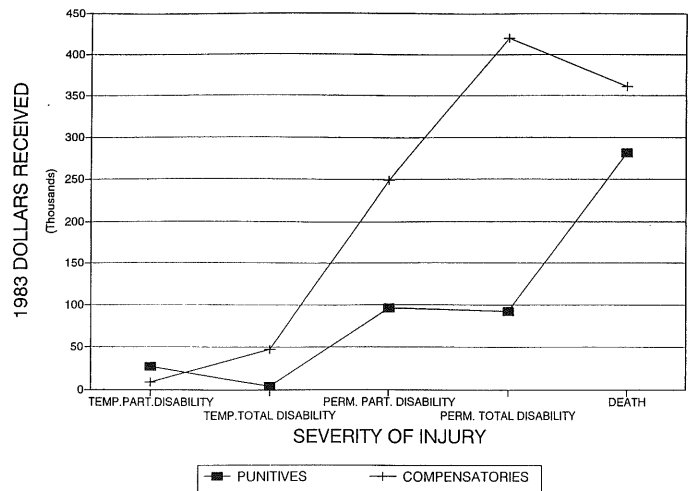
Far from being arbitrary, median punitive damage awards closely track compensatory awards. Although, in cases of wrongful death, punitive damages are awarded in amounts greater than actual damages, this simply reflects the fact that in cases in which death results actual damages are usually much smaller than in cases in which a plaintiff is severely injured but not killed.

III. IMPLICATIONS FOR THE REFORM OF PUNITIVE DAMAGES

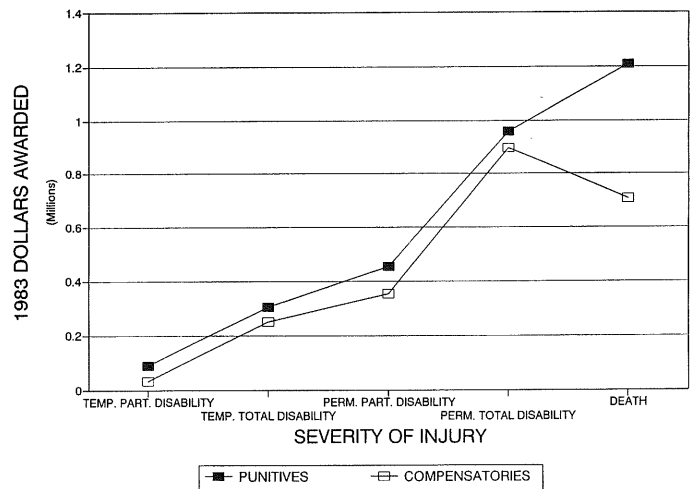
Our empirical findings cast doubt upon the assumption that punitive damages in products liability need to be reformed. The vast majority of manufacturers had some prior notice of a developing or known risk for which they failed to take remedial steps. Whether motivated by greed, indifference or carelessness, the inaction resulted in catastrophic injury or death. Such conduct must continue to be punished and deterred through stern measures.

The qualitative portion of our study leads us to oppose the reform proposals such as Senate Bill 640 providing a “safe harbor” to those manufacturers who comply with

MEDIAN DOLLARS RECEIVED BY SEVERITY OF INJURY



COMPENSATORY AND PUNITIVE DAMAGES AWARDS BY SEVERITY OF INJURY



Food and Drug Administration (FDA) and Federal Aviation Administration (FAA) regulations, but still market their products knowing of excessive, preventable danger. Since almost all the drug cases we studied involved either fraudulent test results, suppression of negative impacts, or withholding information from the FDA, the compliance with the government standard defense would likely have little impact.

However, in a few exceptional cases such a provision would bar punitive damages where deterrence is needed. For example, in one of the cases we studied, patients were blinded by corneal decompensation caused by a defectively designed intraocular lens. A New Mexico jury awarded punitive damages based on evidence that the company continued selling the lens despite its own studies showing a three to five times higher than expected rate of sight-threatening complications. The FDA held hearings in which the poor results of this product were fully aired and

yet ordered no recall.⁷⁴ Some critics have maintained that the FDA is often a "slow starter and a slow runner" when it comes to protecting the consumer.⁷⁵ Similarly, compliance with FAA regulations is not an iron-clad guarantee against aggravated corporate misconduct.⁷⁶ The public should not be denied full protection of the remedy of punitive damages in cases where regulators are lax.

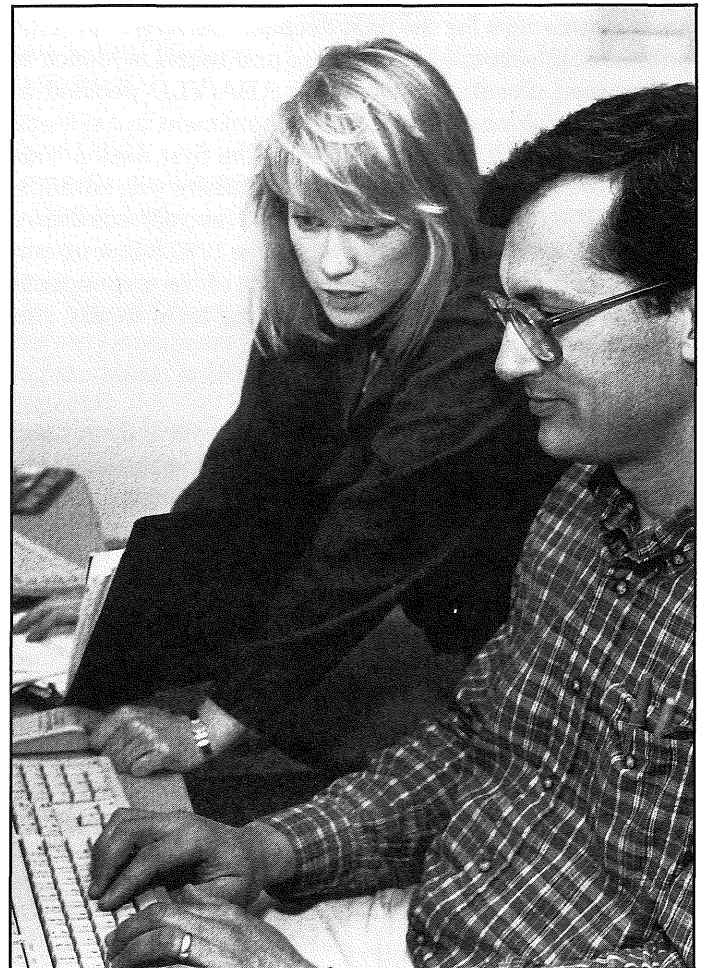
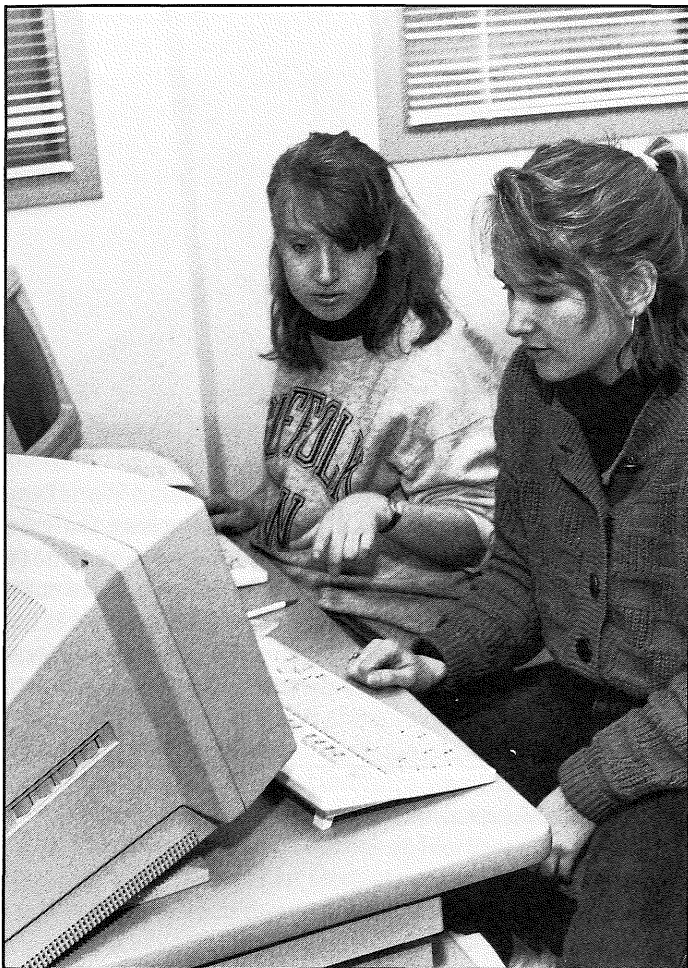
Punitive damages are consistent with the self-interest of the business community in terms of long-run competi-

tiveness. The remedy keeps the ethical corporation from being at a competitive disadvantage. Restricting this remedy might tempt corporations to put profits before public safety. In the long run, the American emphasis on safety, backed by punitive damages against those corporations which violate this important American value, will produce the top quality products needed to compete in the international marketplace.

⁷⁴ *Gonzales v. Surgidev Corporation.*, (CV-88-81, Taos County New Mexico, November 1990). (Interview with Carolyn Merchant, Albuquerque, New Mexico, April 15, 1991).

⁷⁵ Anita Johnson, *FDA: A Slow Starter and a Slow Runner*, *Trial Magazine*, 22 October 1976.

⁷⁶ See, e.g., *Beyer v. Beech Aircraft Co.*, Ala., Jefferson County Circuit Court, No. CV81-2120, October 7, 1985 (\$1.5 million punitive damage award for the wrongful death of a pilot of a Beech Bonanza V-tail plane which disintegrated in flight; Five hundred people have died in V-tail inflight failures, yet the FAA had taken no regulatory action prior to this litigation).



New Computer Laboratory

LIFE AFTER LAW: A COMPARISON OF MALE AND FEMALE SUFFOLK ALUMNI WHO LEFT THE LAW

Gerard J. Clark
Suffolk University Law School

Michael Rustad
Suffolk University Law School

Thomas Koenig
Department of Sociology
Northeastern University

I. Introduction

The American Bar Association's Young Lawyers Division (ABA/YLD) has been studying job satisfaction among attorneys for the past decade.¹ *Barrister*, an ABA publication, surveyed its readers and found evidence of widespread dissatisfaction.² The ABA/YLD decided to study the problem of lawyer disenchantment in a systematic way through periodic surveys. The first nation-wide survey of ABA members and non-members was administered in 1984. The 1984 study of 3,000 lawyers was drawn from a universe of 569,706 lawyers.³ The 1990 follow-up survey, which was designed to track some of the respondents to the 1984 survey and to examine long-term trends, surveyed 3,248 lawyers.⁴

The 1990 survey shows increases in lawyer burnout and chronic job dissatisfaction. When the 1984 respondents were resurveyed in 1990, they showed a decrease in work satisfaction. While forty percent of the 1984 sample reported themselves as being very satisfied with their careers, only twenty nine percent reported a high level of satisfaction in 1990. Only three percent had reported themselves very dissatisfied with their jobs in 1984. This number had risen to eight percent by 1990.⁵



Professor Gerard J. Clark

The ABA/YLD found a variety of complaints. Work/family interference was a cause of significant stress. Only 56 percent agreed with the statement "I have enough time to spend with my family."⁶ Almost half of respondents complained of not having enough time for themselves.⁷ Fifty two percent of all lawyers had taken two weeks or less vacation in the preceding year.⁸ Only a quarter of respondents

¹American Bar Association, Young Lawyers Division, *National Survey of Career Satisfaction/Dissatisfaction*, Chicago: American Bar Association, 1980.

²*Id.*

³American Bar Association, Young Lawyers Division, *The State of Legal Profession 1* (1990).

⁴*Id.* at 4.

⁵*Id.* at Table 68, p. 53.

⁶*Id.* at 17.

⁷*Id.*

⁸*Id.* at 23.

agreed that the "level of pressure/tension on the job [was] minimal."⁹

The principal cause of this rising tide of dissatisfaction seems to be an increase in job demands and hours. The 1990 data indicates that lawyers are working substantially more hours than they did in 1984. The ABA/YLD concludes:

It is interesting to note that the percentage of lawyers who report that they don't have enough time for themselves and their families increased 33% between 1984 and 1990 which corresponds closely to the 43% increase in the number of lawyers that are working 200 or more hours a month in 1990.¹⁰

Considering these increased pressures, it is not surprising that there has been an increase in stress. In 1990, 28 percent of the sample report a high degree of mental and physical distress arising from the work environment. Females fared far worse than males with forty four percent reporting themselves under intense pressure.¹¹

The job satisfaction surveys are limited to practicing attorneys. Very little is known about those who have left the profession or chose not to enter it. What caused them to pursue careers outside the legal profession? Where do they go? Do they consider their legal education to have been a waste of time and tuition dollars? Do they have any regrets about having not pursued traditional legal careers? Can the "law leavers" tell us something about the legal profession?

II. The Questionnaire

In order to seek insight into these questions, the authors placed a questionnaire in the Spring 1990 issue of *The Advocate*. Suffolk University law alumni were asked to respond to the questionnaire if they "no longer actively engaged in the practice of law." Part I of the questionnaire asked for background information such as social and demographic characteristics. It also surveyed the respondent's law school activities and interests. Part II explored life after law school. Respondents were asked whether they ever practiced law, their legal specialty, and the setting. They were asked to describe the reasons why they stopped practicing and whether they had plans to resume practice. They were also questioned about the type of career they are currently pursuing. The questionnaire was jointly designed by Suffolk law professors Gerard Clark and Michael Rustad and a sociologist who teaches at Northeastern University, Thomas Koenig. The semi-structured questionnaire was designed to learn more about the outcome of graduates

choosing non-law careers. The published questionnaire elicited a sample of 26 Suffolk University Law graduates. The limitations of such a small sample are obvious.

The female respondents were highly successful students at Suffolk University Law School. Most had top grades and had played leadership roles in Suffolk's extracurricular activities. They were uniformly positive about their legal education stating that it was useful in their careers, brought them status and legitimacy, brought them self-confidence and provided them with reasoning and writing skills. This pattern surprised us since we assumed that those alumni who had left the law would have tended to do less well in law school. These respondents were the "best and the brightest" of the law school, not marginal students. We were pleased that none of the respondents considered their legal education to be a waste of time and money.

III. Suffolk Female Alumni Responses

Table 1.
Female Law Graduates' Law School Activities
and Opinions about their Legal Education

<i>Law School Honors/ Activities</i>	<i>Value of Legal Education</i>
Moot Court Competition Winner & Dean's List	Improved deductive thinking, powers of persuasion, and use of alternative arguments.
Law School Intern in Private Consumers Organization, & High Honors	Improved self-esteem, heightened competency of citizen.
Cum Laude Graduate	Thought process, analytical and reasoning ability.
None mentioned [one of earliest woman graduates]	Generally very useful
Moot Court Honors, Best Oral Advocate in McLaughlin Moot Court Competition, Dean's List	Very happy with education
Top 10% of class	Highly relevant to doing large-scale real estate transactions.

⁹*Id.* at 18.

¹⁰*Id.* at 23.

¹¹*Id.* at Table 90, p. 74.

Table 1.—Continued
Female Law Graduates' Law School Activities
and Opinions about their Legal Education

<i>Law School Honors/ Activities</i>	<i>Value of Legal Education</i>
Cum Laude	Lends credibility to business transactions; improved knowledge base and method of inquiry.
Editor of Law Magazine, Phi Delta Phi officer	Analytical, research and writing skills
Moot Court	Extension of "liberal education;" greater understanding of world events
Law Review Editor, Cum Laude	Excellent all around education; taught more useful and technical aspects than theoretical ones
Clinical Programs	Use it continually in my position as marketing director
Cum Laude, [minority student]	Reasoning abilities improved, professional credentials raise my status in "eyes of other people."
Suffolk Women's Law Caucus; Newsletter, Co-Founder Women in the Law	Analytical thought, strengthen research, learned
Conference	civil rights law, administrative law
Dean's List, Best Oral Advocate, Moot Court Honors	Reasoning and analytical skills.

Table 2.
Reasons for Leaving the Law
(Female Respondents)

1. Tax Attorney left corporate law to become university professor. Changed careers because of stress and because it sapped "energy for other things I wanted to do." "I choose my present job because it is fun."
2. Corporate lawyer in national law firm. Left to pursue career as law professor and scholar. Enjoys setting "own goals and schedules to a much greater degree than is possible in practice." Disliked long hours and pressure to bill hours; found firm's program to train associates to be "very poor and hence much client time was spent educating us." "I also care deeply about the helping aspect of professionalism which the practice of law allows only in a rarefied and impersonal way."
3. "I have never practiced law and had no intention of doing so when I entered law school." As a manager of investor relations, she "loves the diversity, challenge and excitement of my current position, not to mention the upper-level involvement and exposure."
4. Left practice to take a "position with Supreme Judicial Court editing opinions." "Hours, vacations better as I had a young son which permitted spending more time with him."
5. "Real estate was more appealing than documenting transactions." "I became bored with the law practice." "I love real estate and enjoy negotiations; the challenges of managing a large portfolio are exciting."
6. "Diversity of general practice was not satisfying." "Never got to know a lot about one thing." "Was also overwhelming." "Chose current job because combines background in law and labor relations, is an area of intellectual interest/satisfaction and offers flexible schedule conducive to family responsibilities."
7. Found law "too isolating, competitive, non-collaborative," legal work did not draw on other strengths and skills." Current career is "richer, more varied, less abstract, more personal."
8. "Consistently given less quality work than male colleagues." Had "reached the top of our governmental pay and advancement schedule." Joined family's firm because it was "financially more lucrative and afforded more flexibility so that I could spend more time with my young children."
9. "After first year I did not want to be a lawyer—too much responsibility, hours too long, too little help to clients." Left to become law editor.

Table Two reveals the major reasons for leaving the law were the same stressors identified in the ABA/YLD survey. Respondents frequently mentioned the high volume of work, unpleasant relations with other attorneys, conflictual work relations, and excessive competition as negative features of their law jobs. Several suggested that litigation was unpleasant work for those who did not possess traditionally masculine values. Because the non-law jobs involve finding ways to get people to cooperate in collaborative projects they find them to be both more enjoyable and morally more justifiable. Whenever possible their exact words will be used to preserve the flavor of the accounts.

Table 2.—Continued
Reasons for Leaving the Law
(Female Respondents)

10. "I stopped because I don't want to have to be confrontational; found it was too hard to control the amount of work; and was not client-oriented." Likes new job because "hours are somewhat flexible, I work . . . on a product that is tangible, I work as part of a team."
11. "I knew that as a woman it would be very difficult to become a partner in a mid to large firm and I wanted variety in my work and control over my life. I was not willing to wait to become a partner to gain that control." "I love what I do" preparing multi-national students to pass standardized American tests. "Each new group is a new problem, a new challenge."
12. "I stopped because . . . I didn't like the people with whom I interacted (other attorneys, court personnel, clients)." I also left because "I could go into another job which would accept my sex and appearance and age and judge me on performance." "I am using my analytical skills and persuasiveness in a more pleasant atmosphere."
13. "I still feel like I'm 'helping people' but outside the adversarial system." Currently working in community health center.
14. Work is very similar to legal work. "My 'clients' are the firms that belong to the [trade] association. I must promote my clients' interests in regulation development and influencing legislation."
15. "Took a non-law job that I would hope would be less stressful in order to continue to try to start a family."
16. "Any woman who has practiced or is practicing law who has not experienced the corrosive effect of sexist stereotyping has not practiced much law." "I elected to be home with my children as a full time job rather than attempt to succeed in two jobs."

The work-family conflict identified in the ABA/YLD study permeated these accounts. Several women left the law because the demands of litigation would not permit them to devote enough attention to their children. It is clear that most of the women in this sample have the primary child-care responsibilities in their families. Several of those who left to devote more time to their children expect to return to full-time legal practice when their children are older.

Complaints about sex discrimination in the legal profession were widespread but there were no "horror stories" of sexual harassment. Rather, the women wrote of a general ethos of hyper-masculine legal culture which blocked their

advancement. Several wrote that they left their firms because the only other choice was to adopt these values as their own.

The respondents left their jobs because superior alternatives were open to them. Their current jobs are high profile, high paying, and high prestige. They enjoy the autonomy, team-work, flexibility, and creative aspects of their non-legal careers. Most were not fleeing the law, but using the law in new ways. Few have actually left the law in a broad sense. Most wrote of using the law as an important tool in their current positions.

Table Three reveals that almost all of the women respondents joined small firms upon graduation. As suggested by the previous discussion, the majority of respondents left these firms either because they had an opportunity to take professional jobs which they found more satisfying and profitable or because family responsibilities made law firm work undesirable. Table Three confirms that many of the positions are interesting, prestigious and lucrative.

Table Four shows that the male respondents are substantially different from the women. These are pragmatic individuals who attended law school largely because it was functional to a career which they had previously chosen. The personality difference was reflected in the writing style of these accounts. Male alumni tended to write brief, to the point, matter of fact responses, while female respondents frequently attached additional pages of well-developed accounts of their career progression. As students, the females received better grades, more recognition, and participated more fully in the life of the law school. Males tended to perceive legal education as a way of gaining specialized skills and the "union card" that would bring them immediate career advancement.

IV. SUFFOLK MALE ALUMNI RESPONSES

As Table Five reveals, most male respondents remained on their already existing career path. Either they had no intention of entering law or their legal education failed to open any path superior to one that they had already. Those males who tried law practice in small firms found it be unsatisfying. Unlike the detailed accounts of their criticisms of the legal profession provided by the women, most males did not articulate clear reasons for leaving law.

The ABA/YLD survey found that twice as many females as males were dissatisfied with their legal careers. This was also the pattern for our respondents. Despite their relative lack of success in the legal world, males were unlikely to criticize the profession. Even those males who are marginally employed had nothing negative to say about their legal education. While the females expressed substantial disillusionment with the legal world, the males accepted the

Table 3.
Non-Law Occupations of Female Respondents

<i>Graduation Date</i>	<i>Former Law Practice</i>	<i>Present Position</i>
1988	None	Investor relations manager
1976	National Firm	Housewife & mother; Part-time law professor
1977	Law Clerk	Operations manager of major automobile dealership
1981	Assistant Tax Manager; small law firm	Professor at major state university
1946	General Practice	Research attorney, Office of Reporter of Decisions
1976	Five person firm	Vice President of Personnel & Labor Relations in two community hospitals; labor arbitrator intern
1982	Lawyer for Insurance Carrier	Full-time housewife
1972	Rural General Practice	Manager of Wells-Fargo Banks
1977	Brief Private Practice	Home-maker, previously in public sector
1978	Briefly in small firm	Editor of legal newspaper
1981	Federal clerkship	LSAT test preparation (owns company)
1984	Practiced in small firm, corporate	Bar Review preparation firm, corporate (manager)
1980	Small firm in Boston	Civil Rights consulting firm
1979	None	Manager of Planned Giving, major private university
1987	Corporate Counsel	Director of Government Affairs for Trade Association
1984	Small Firm	House-wife and mother, owns family day care center

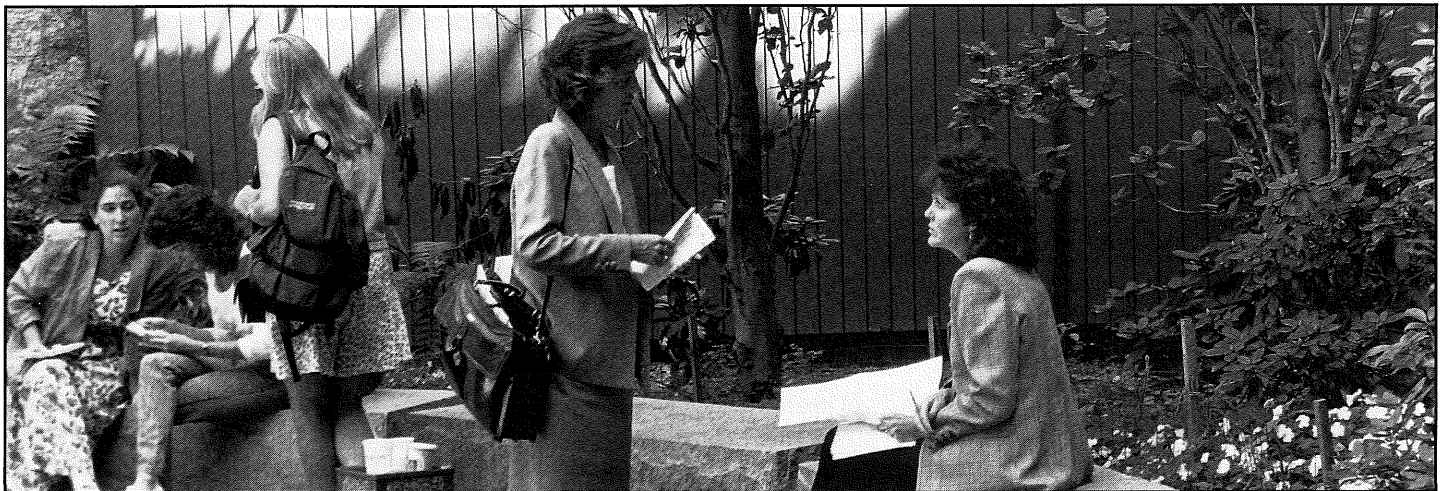


Table 4.
Suffolk Male Law Graduates' Law School
Activities and Opinions about their Legal Education

Student defenders, worked part-time in law school.	Provided "analytical middle approach to problem solving"
Cum Laude Graduate, Evening Student.	"Career options are limitless."
Middle of Class.	Law is "very helpful in my business and personal dealings."
Bottom Third of Class.	Good because I want "to be as well educated as possible."
Dean's List, Prosecutor Program	Use constantly in career.
Top third of class.	Provided "ability to enter many fields."
None Listed	Helpful in career.
Law review, top 10 percent of class.	Intellectual growth and professional advancement.
None Listed	Useful in conducting personal affairs.
None Listed	Skills transferable to career.

Table 5
Reasons for Leaving the Law
(Male Respondents)

-
1. Worked in collections "firm was at best sleazy!" "Present position less adversarial, better job security, and predictability of income."
 2. "Never sat for bar exam. . . . I am a CPA and practice in the taxation area."
 3. "Left practice to concentrate on family's jewelry business when no one was left to take over firm. At first tried to practice law at same time but found it impossible."
 4. "Ambivalent about ethics and the practice of law itself." "I am in a state of limbo." "I have two clients neither of whom has paid any money so far." "I am doing liability and insurance fraud investigations on a part-time basis."
 5. Worked for Federal Bureau of Investigation. Founded own business as an investigative attorney. "I advise clients on the legal aspects of investigations as I conduct them for law firms and insurance companies; much civil litigation defense work."
 6. Elected town clerk, tax collector, treasurer and accounting officer for small Massachusetts town.
 7. "I was in my current position at the time of graduation, and decided to stay for the job enjoyment and retirement."
 8. "As head of a trade association, I constantly engage in advocacy activities – just a different venue."
 9. "Disgust with the court system (but I love juries, God bless them!) and general discouragement of the erosion of our Constitution." Founded advocacy group.
 10. "It was never my intention to leave business which I really enjoy. Because I was involved in leases, contracts, and government regulation, I felt that law school would serve me better than an MBA."
-

Table 6
Non-Law Graduates of Male Respondents

<i>Graduation Date</i>	<i>Former Law Practice</i>	<i>Present Position</i>
1970	Brief Period while awaiting Bar examination results	Manager in international security firm
1983	None	Professor of accounting, major private university
1968	General Practice Firm	Gemologist
1976	Insurance company attorney	Insurance fraud investigations, takes a few legal clients
1976	Assistant District Attorney	Founded investigation firm
1982	Small Firm	Elected town official
1982	None	Federal law enforcement
1973	Counsel to Massachusetts Legislature	CEO medical firm
1979	None	Advocate & activist
1976	None	Executive in national firm

nature of the legal profession. They entered law school with lower expectations than did the women and were therefore not disillusioned.

None of the males in our sample mentioned family life at all. Work/family issues and personal stress are either not problems for the males or, more likely, are not things that the male respondents feel comfortable in sharing. Unlike the females, the males (with one notable exception) did not expect the law to correct societal issues. They tend to take the existing social inequalities as givens, and look for ways to advance themselves within the societal framework.

As in the ABA/YLD findings, our female respondents reported high levels of role strain due to the conflicting demands of work and family. Law, they discovered, is a greedy institution, which cannot be practiced on a part-time schedule. In litigation, case management does not tolerate sick children, aged parents, or Little League championships. In our culture, despite role differentiation, the demands of family life still fall disproportionately on the shoulders of women. Our women respondents often resolved work/family interference by taking law related jobs in government agencies and other bureaucracies. Because these jobs require a predictable 40 hours per week, family activities can be more easily accommodated. All the females have found both personal and career satisfaction outside the law. The experiences and opinions of a 1977 fe-

male Suffolk Law graduate typify the post-law school experience of our female respondents. This woman did well in law school, practiced in a small, local, general practice firm for less than a year, and left the law to become a consultant.

About the practice of law she stated, she "hated it!" She complained that the work was too competitive and isolating. She found that law too frequently takes a win-lose approach to human problems, leaving the loser angry and resentful. The duty of advocacy placed "dishonesty at the core of the lawyer's function" since she could not admit that there was right on both sides. She complained that "self-interest propelled everything that the lawyer does." The competition for clients created ethical dilemmas for her.

Like the other female respondents, it was not sexual harassment, but the general "male" values of competitiveness and combativeness which she abhorred. Her own strengths of finding paths for compromise and collaboration had no outlet in the firm setting. She finds her work since leaving the law more varied, more personally satisfying and less abstract. However, she believes that her legal education was valuable because it improved her powers of analytical thinking and writing ability. She also finds the knowledge of law useful in her current career. This is an almost universal pattern.

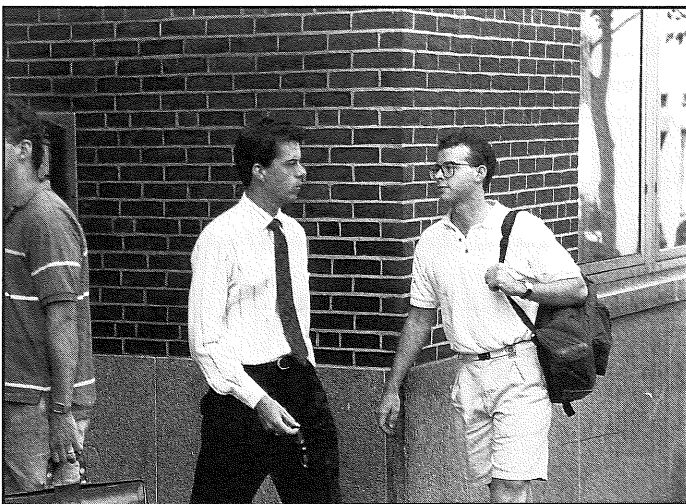
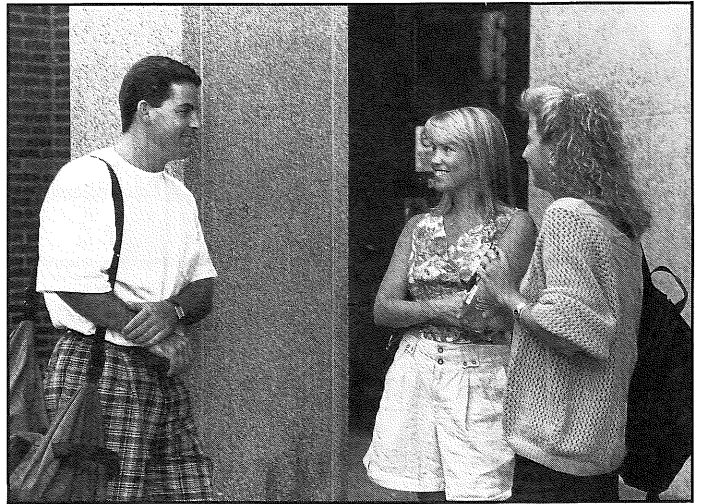
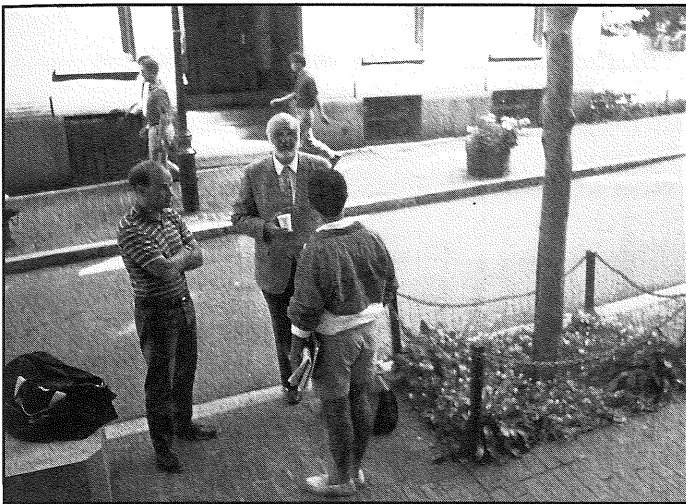
These women overwhelmingly viewed their law school training as beneficial. Many of the females were exceptional students who participated in the extracurricular activities of the law school. Although they experienced alienation while working in the general practice firms they joined upon graduation, they ultimately found happiness by utilizing their legal education in other ways.

CONCLUSIONS

Our study suggests that success in law needs to be defined more broadly. Immediately upon leaving Suffolk, women joined firms whose practice was antithetical to their values largely because this was the path of least resistance. Law school graduates are socialized to pass the bar and join a firm without considering other ways to use their

legal education. Judging from the experience of these women, career opportunities using law and legal training may be more satisfying and more lucrative. Many of the males also discovered ways to combine their legal training and other skills in non-traditional ways. For some law graduates, the smart move might be doing good and doing well by designing an individualized path.

Only limited conclusions may be drawn from these 26 respondents. We are reprinting the questionnaire in the hope of hearing from a wider spectrum of alumni who have either left the law or never entered it. Are you similar to the respondents or are we missing something? We would be delighted to hear from you. Please send your completed questionnaire to Professor Gerard Clark at the law school.



SUFFOLK LAW GRADUATE SURVEY: LIFE AFTER LAW CAREERS

Professors Gerard Clark and Michael Rustad are studying the placement of Suffolk law graduates in non-law positions. We are especially interested in hearing from Suffolk Law graduates who are no longer actively engaged in the practice of law. We would like to learn more about why lawyers leave the profession and what other opportunities they pursue.

If you no longer practice law, please take a few minutes to fill out the following questionnaire and return it to Professor Clark c/o Suffolk University Law School, 41 Temple Street, Boston, Massachusetts 02114. Your identity will be kept confidential. You may photocopy this questionnaire and return the completed photocopy.

LIFE AFTER LAW QUESTIONNAIRE

I. BACKGROUND INFORMATION

Name _____ Year of Law School Graduation _____

Address _____ Day or Evening _____

Date of Birth _____ Race/Ethnicity _____

Father's Occupation _____ Mother's Occupation _____

Undergraduate College and Major _____

Class Rank (please approximate) _____

Honors or Activities in Law School _____

II. LIFE AFTER LAW SCHOOL

A. Did you ever practice law? If not why not? If yes, what caused you to stop? (Use additional sheets if necessary)

B. If you practiced law, describe the setting and the type of law practice. _____

C. Do you plan to resume your practice in the future? When? In what capacity? _____

D. What type of work do you do presently? _____

E. Compare and contrast your present job to the practice of law. _____

F. Why did you choose to attend law school? _____

G. Do you consider your legal education to be useful? _____

H. In your view, what are the strengths and weaknesses of Suffolk Law School as preparation for your present employment? _____

I. Why did you choose your present job rather than pursue other opportunities? What other possibilities did you by-pass in order to take your present job? _____

J. Do you think Suffolk should revise its curriculum to better meet the needs of people like you? In what ways? _____

K. Has your sex, race, ethnicity, class and/or other background variables played an important role in your decision not to practice law? If so, please explain. _____

L. What other factors played an important role in your decision not to practice law? _____

During the course of our study, we hope to interview several Suffolk law graduates working in non-legal positions. If you would like to participate in a telephone or personal interview with us, please leave your name and telephone numbers so that we may contact you.

Thank you for your time spent completing this questionnaire.

PROFESSOR JEFFERY ATIK JOINS THE RESIDENT FACULTY



Jeffery Atik has joined the Suffolk faculty this Fall as Associate Professor of Law. A 1982 graduate of Yale Law School, Atik has practiced corporate law in New York, Boston and Milan, Italy. Immediately prior to joining Suffolk, Atik taught international business transactions, European Community law and corporate finance at Washington University in St. Louis. He was also

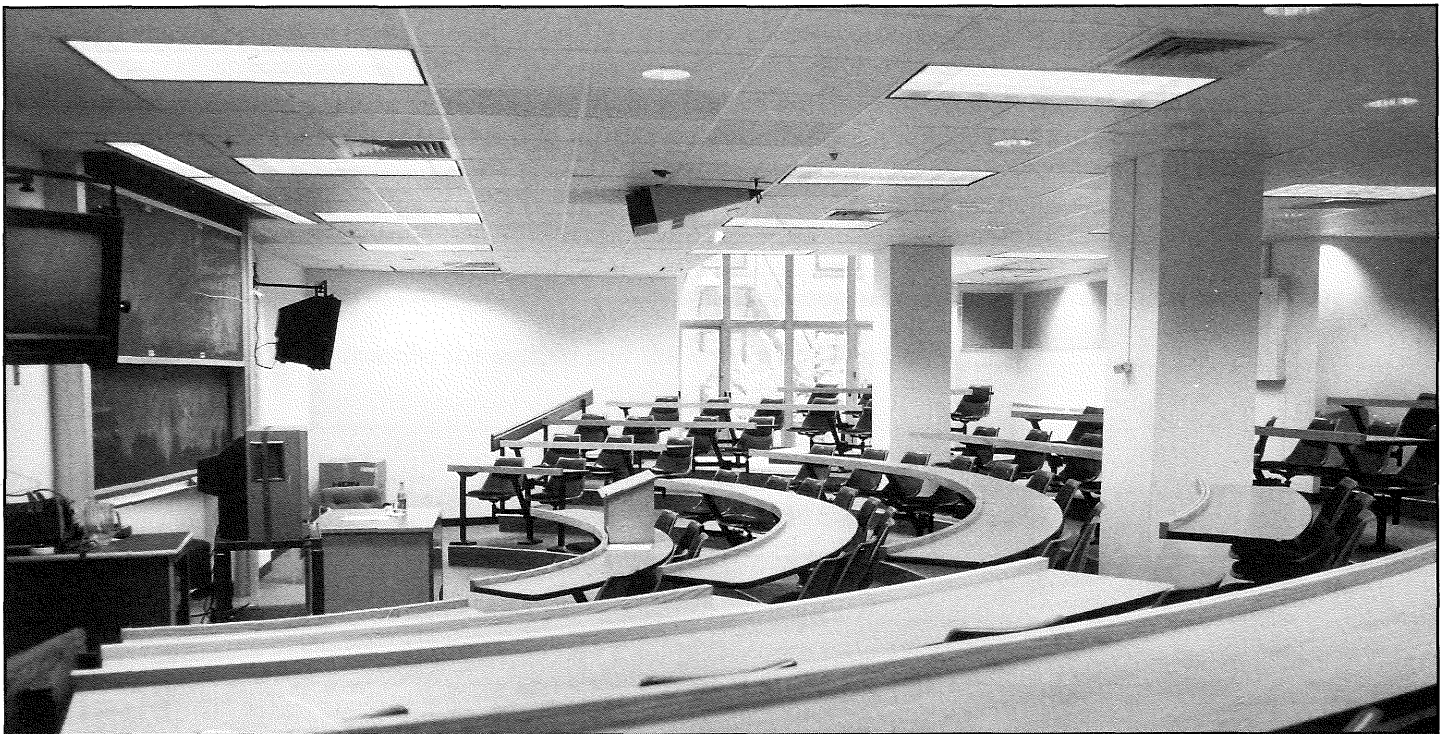
of counsel to the St. Louis law firm of Coburn, Croft & Putzell, where he directed the firm's international practice.

Atik's primary teaching responsibilities at Suffolk will be in the area of international economic law. He has intro-

duced a challenging survey course on International Business Transactions in the Fall 1991 semester, and will offer Suffolk's first course on European Community law in Spring 1992. He hopes to develop additional courses of interest to Suffolk students preparing for practice in an internationalized New England economy.

After corporate practice with Wall Street's Shearman & Sterling and Boston's Testa, Hurwitz & Thibault, Atik joined the Milan office of Brown & Dobson in 1985. While in Milan, Atik helped guide major mergers and acquisitions and joint ventures throughout Italy, and in Switzerland, England and Spain as well. He speaks and writes Italian with high fluency and is also conversant in Spanish and French.

Atik's main research interest is the regulation of foreign direct investment in the U.S. and in Europe. He presented a paper on the competition among European nations to attract foreign direct investment to the European International Business Association in Copenhagen in December, and will reprise his recent Suffolk Law Faculty Workshop talk on 1991 Nobel Prize winner Ronald Coase at Madrid's Carlos III University in May.



SUFFOLK UNIVERSITY LAW LIBRARY RECENTLY ACQUIRED PRACTICE ORIENTED TITLES

Compiled By Susan D. Sweetgall, Assistant Director for Public Services;
Elizabeth Gemellaro, Reference Librarian; and Madeleine G. Wright, Pallot Librarian

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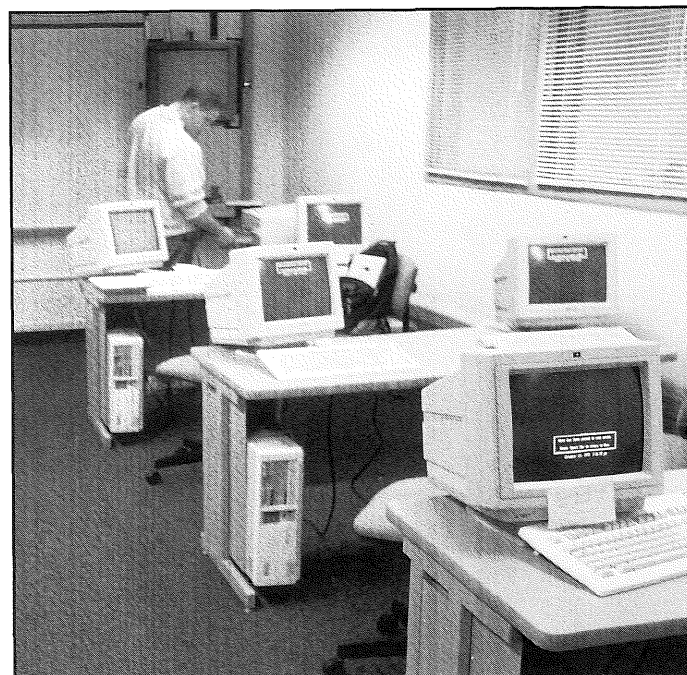
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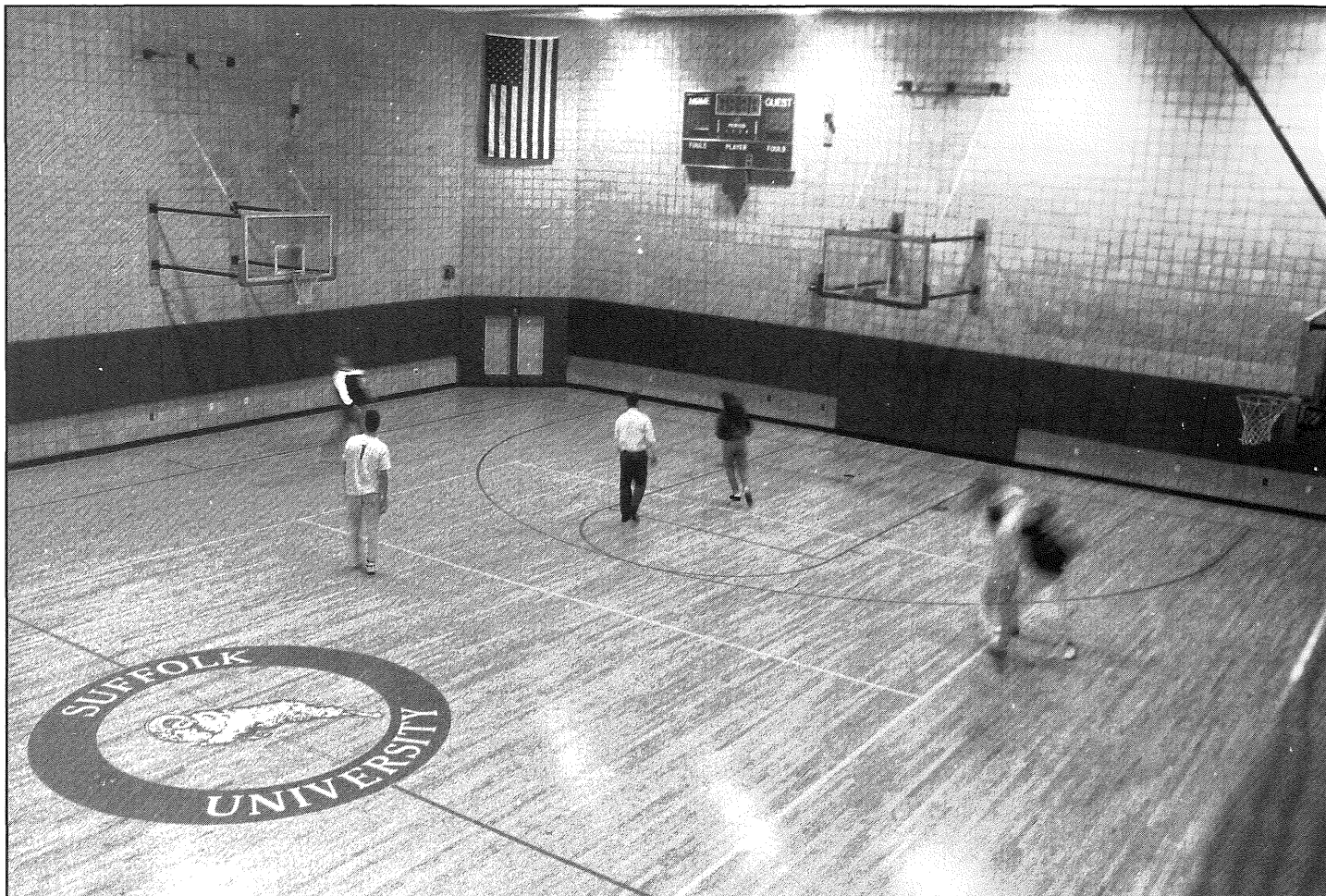
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Poems by Robert Louthan,
a student in the fourth year of the evening division at
Suffolk University Law School.

JUSTICE CARDOZO RECONSIDERING,
IN THE GRAVE,
THE MYSTERY OF PROXIMATE CAUSE

I wish my opinions were in pencil.

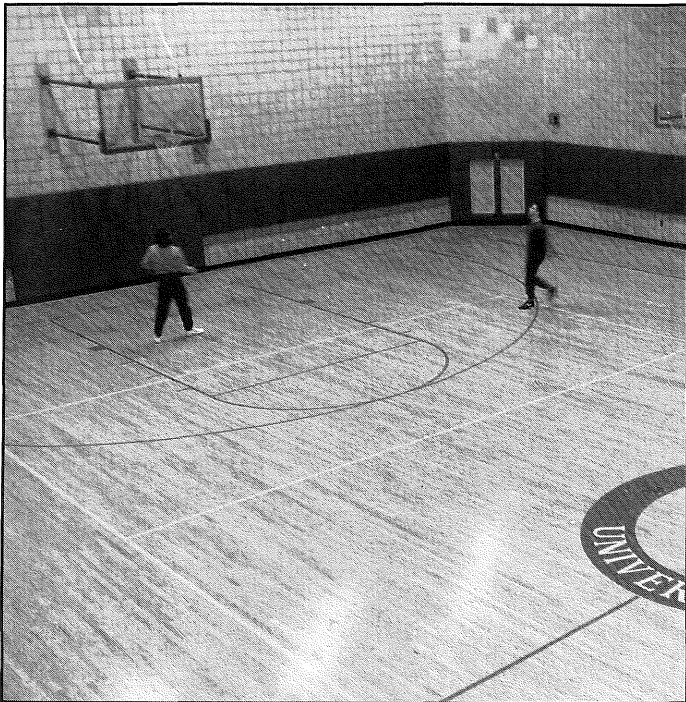
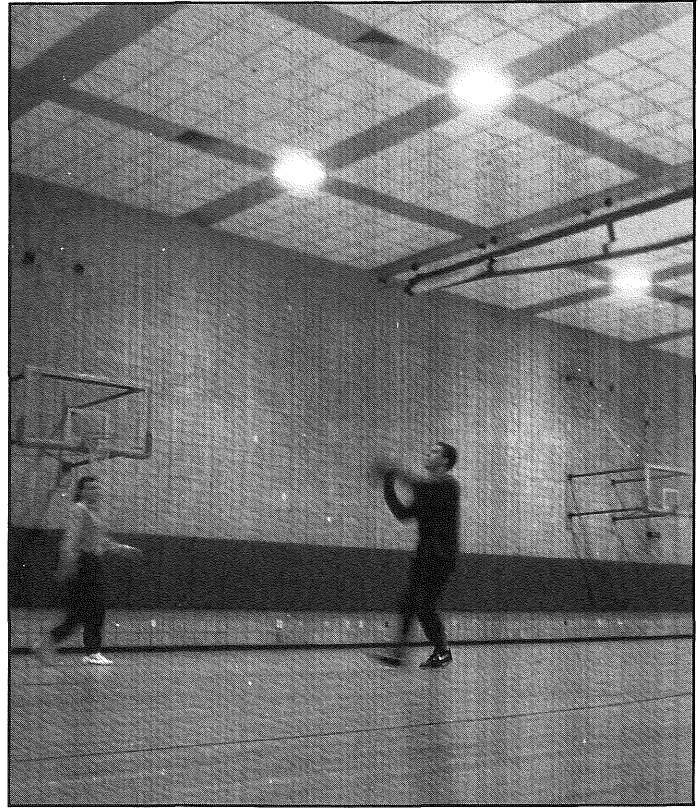
Everything that happens, from being born
without consenting and undressed
to dying before dessert,
is in the danger zone of the Big Bang.

Nothing, including the surprise package
in *Palsgraf*, supersedes that.

I want to write new law. I would not
repair to my preserve of thesauri.

I wish a case could come before me now.

In death there are no facts.
In death there is nothing but dicta.



THE COURTING OF SUPREMACY

The weather has worsened.
Deciding it's not safe to go home,
the justices stay in session all night.
When the storm knocks the power lines out,
they read the Constitution in flashes,
by lightning. The eldest scribbles a dictum:
"The more the flag waves, the more it frays.
It will not do either on a mast in a vacuum."
Then he tells the others a bedtime story:
that all of the nation except their building
is dissolving in the downpour like sugar,
like Candyland, and the framework of law
underneath, becoming exposed, is found
reinforced by our ancestors' bones.

THE ADVOCATE
Suffolk University Law School
41 Temple Street
Boston, Massachusetts 02114

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JAMES ABBOTT VAUGHN, ESQ.
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