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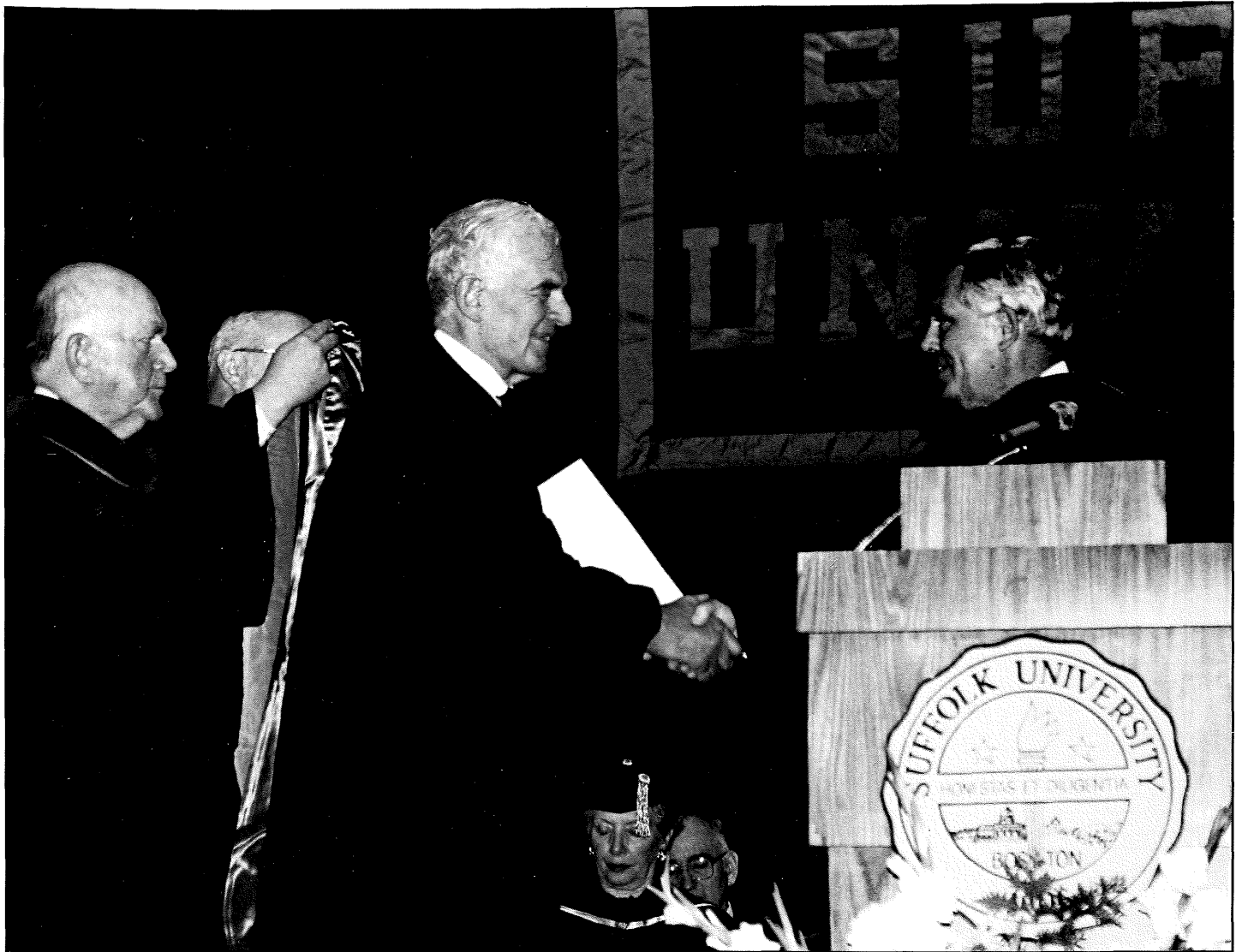
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theAdvocate



Speaker Thomas S. Foley receives his honorary degree from President David J. Sargent at the 1992 Commencement

theAdvocate

Volume 23, No. 1
Fall 1992

The Suffolk University Law School Journal

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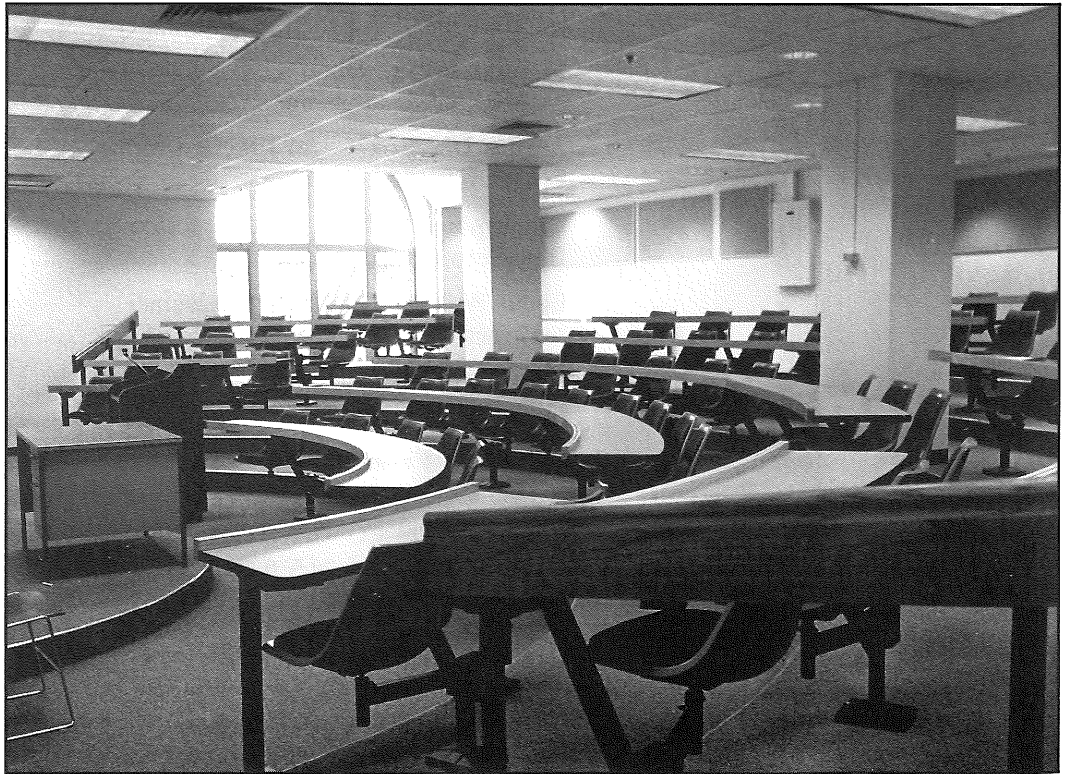
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Note From the Advocate

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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LETTERS

IOLTA

The fall 1991 issue of the Advocate contained an interview of Professor Rounds by Professor Clark on the subject of IOLTA. The spring 1992 issue contained numerous letters reacting to the interview. Further readership reaction to that interview is reproduced below. Once again we are surprised that those who have taken the time to write to the Advocate have been so generally favorable to the position espoused in the interview and thus opposed to IOLTA.

The current issue also contains an article on Mandatory Pro Bono by Michael J. Mazzone, J.D., Suffolk Law School, 1983. The article is based on a brief filed by Mr. Mazzone in litigation in Texas concerning mandatory pro bono. Mr. Mazzone argues that mandatory pro bono is unconstitutional.

IOLTA and mandatory pro bono are important and controversial subjects on which there is no doubt a variety of views. As the note from the Advocate at the bottom of the table of contents page makes clear, we at the Advocate welcome articles and ideas from our readers, especially our alumni. In particular, when we publish on controversial topics we want to emphasize our openness to a full range of views. If you read something in the Advocate that interests you, whether you agree or disagree with the conclusions set forth, we strongly urge you to consider adding your voice to the dialogue.

You may think, well, a letter is not an adequate response to an article and I don't have the time to do a response article. Create your own genre. We are interested in well written and thought out essays, even if they are relatively brief and are not festooned with citations in the manner of academic articles. We value your ideas and we are anxious to accommodate a full range of viewpoints. Let us hear from you.

To The Advocate:

Having read your latest *the Advocate*, with particular reference to IOLTA and your invitation to continue the dialogue, I wish to state at the outset that I am, and have been, opposed to the IOLTA concept from its very inception.

In addition to the reasons for opposition expressed by the writers in your Letters section, I would like to add my own feelings in the matter.

To begin with, I practice in a rural community with a population of 2000 people. My law practice seldom requires the use of escrow accounts in comparison to busier firms, but nevertheless, by the rules set down, I determined that I was required to have an IOLTA account, particularly after telephone conversations with the Committee set up to "enforce" the IOLTA regulations. I was informed that I might not be able to renew my license to practice, should I wrongfully fail to establish the account.

My resentment is deeply harbored as the result of a system that:

1. Allows the chosen few to establish and determine where my charitable donations are to go, at the expense of my privilege to practice law, if I fail to obey.
2. In the case of clients' funds in the account, gives no recognition to the clients' interest in the matter.
3. Gave such high recognition to the desires of both the Massachusetts Bar Association and the Boston Bar Association, in the initial establishment of this great "give away program."
4. Creates another bureaucratic regulatory board at whose expense?

It all reminds me of the old joke that went around at the beginning of the era of liberal causes, where a man is stopped on the street by another person, holding a cup in his hand, who says "Give to mental health, or I'll maim you!"

Thomas F. Bowes, Esq.
274 Main Street
Plympton, MA 02367

To The Advocate:

I found the discussion of the IOLTA program in the Fall 1991 and Spring 1992 issues of *the Advocate* to be most informative. I have the overall impression, however, that many of your readers would benefit from a deeper understanding of the operations and activities of the various nonprofit legal aid organizations that are funded by IOLTA. Many of these organizations are also funded by the federal Legal Services Corporation and are notorious for using the funds for partisan political purposes rather than for providing legal assistance to those who cannot afford it. To the extent this is occurring, the mandatory IOLTA programs are a form of taxation without representation that should not be countenanced.

The LSC receives funding from the federal government and then distributes much of it to over 300 nonprofit legal services organizations. Although many of them do a fine job of representing low-income clients with the money, the U.S. Senate Labor and Human Resources Committee concluded in 1983 that over half of the LSC's \$300 million annual budget was being spent on inappropriate political activities. Many – perhaps most – of these organizations are the same ones that are now being funded by the IOLTA program. For example, legal services grantees in several states sued the state governments to use tax funds for sex change operations. California Rural Legal Assistance sued the University of California to stop research on capital intensive agricultural production that would increase productivity. The Bay Area Legal Services of Tampa, Florida persuaded a federal district court to prevent statewide functional literacy tests as a prerequisite for high school graduation. LSC grantees in several states entered litigation to reclaim thousands of acres of Indian tribes. Other LSC-funded suits have sought disability payments for homosexuals, made expulsions from high schools subject to racial quotas, supported anti-nuclear lobbying groups, represented a Ku Klux Klan member in a \$1.5 million civil suit in Chattanooga, Tennessee, and sought early release of convicted felons because of alleged overcrowding of prisons.

These are just a small but representative handful of examples of how LSC funds have been diverted from providing legal services to the poor to the political causes of the activists who staff many of the legal aid "societies." Whatever one may think of these political crusades, they have nothing to do with providing legal assistance to the poor. In addition to entering into such litigation, many recipients of IOLTA funding have previously used LSC funds to hire professional lobbyists, to hold political training seminars, and to publish lobbying manuals.

Obviously, many clients whose funds are used to finance IOLTA programs would object to many of the uses of their funds but are not given a chance to do so because of the subterfuge created by state bar associations. Thomas Jefferson wrote in 1786 that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical." According to Jefferson's criteria there is a great deal of sin and more than a little tyranny being practiced in the more than twenty states which now have mandatory IOLTA programs.

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To The Advocate:

I am a plaintiff in the Federal suit against the Supreme Judicial Court and others seeking to have the Massachusetts IOLTA program, as it is presently constituted, declared unconstitutional. I would like to take this opportunity to congratulate Dean Paul Sugarman. The IOLTA debate currently being waged in *the Advocate* is evidence that under his leadership Suffolk Law School has developed into a national institution where all ideas – the politically incorrect as well as the politically correct – are given a fair hearing. My congratulations also to Editor-in-Chief Cronin who with his leadership has brought *the Advocate* to national prominence.

I regret to say however that Suffolk's spirit of tolerance for diverse views has not rubbed off on the defendants, particularly the justices of the Massachusetts Supreme Court. I was shocked to learn from our attorneys that the justices, through their counsel the Attorney General, opposed the filing of an anti-IOLTA amicus brief by an out-of-state organization. The Court has shown itself to be petty and provincial, more suited to a "banana republic" or an east block backwater, than the cradle of liberty. Massachusetts court reform should start at the top!

Karen Parker
Boston, Massachusetts

To The Advocate:

Bravo to Professor Rounds and the plaintiffs in *Washington Legal Foundation v. Massachusetts Bar Foundation* for taking on IOLTA, the "Oliver North" of the judicial branch of government. All those who were outraged at North's usurpation to the executive branch of the power of the legislative branch should be similarly outraged at IOLTA's usurpation to the judicial branch of the power of the legislative branch.

Unfortunately, there has been no such outrage. In fact, those most outspoken *against* North are the ones most outspoken *for* IOLTA.

IOLTA is really just a sophisticated "protection" racket: instead of having to pay a percent of their income for protection from "accidents", clients now instead have to turn over the interest on their trust money for "protection" against having their lawyers disbarred. Sophisticated, because IOLTA uses the "salami technique", well-known to thieves who steal from banks and their depositors by computer (taking a thin slice from other people's "salami" to avoid detection).

Let's hope that the First Circuit recognizes IOLTA's serious separation of powers problem, conflict of interest problem (courts ruling on the constitutionality of their own social investment programs), and constitutional problems (1st, 5th and 14th Amendments).

Michael J. Mazzone, Esq.
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To The Advocate:

Though based in California, I am an Adjunct Scholar at the Competitive Enterprise Institute, Washington, D.C. I have written a detailed expose of IOLTA in the Cato Institute's Summer, 1992 issue of *Regulation*. (vol. 15:3).

Professor Rounds and *the Advocate* deserve high praise for bringing into the open the constitutional and ethical issues surrounding IOLTA. That the judiciary should dispose of *private* monies without requiring attorneys to disclose to their clients the existence of the program and the purposes for which the funds are to be used travesties the traditional fiduciary relationship between attorney and client.

IOLTA requires no accounting from the recipients of its funds. All too often it serves as a smokescreen for legislative advocacy and the support of causes considered "politically correct." Nor are these abuses confined to Massachusetts. The program has spread to forty-nine states, plus the District of Columbia. The funds collected are staggering. By the third quarter of 1991 the American Bar Association reported total income since inception of over half a billion dollars, scarcely a "minimal" sum.

The need for reform becomes evident when reading the opinion of Judge Joseph Tauro of the U.S. District Court for Massachusetts in the case brought by the Washington Legal Foundation against the Supreme Judicial Court and the three foundations used as conduits for IOLTA funds. Ignoring the client, whose funds are being used, Judge Tauro focused on the attorneys. He dismissed the "takings" issue offhandedly, never coming to grips with the core of the argument, the seizure of the equitable use of the principal.

The First Amendment received equally dismissive treatment. With Orwellian logic, the judge claimed that IOLTA was, in fact, voluntary. Attorneys could decline to hold client funds or place them in individual accounts, "solutions" highly impracticable because of the numerous small accounts involved. Most surprisingly he turned *Keller* on its head, citing isolated phrases of the decision to suggest that the case *supported* the use of compulsory dues for political purposes.

The Letters to the Editor from practicing attorneys reflect their indignation and suggest the importance of reform. The appeal filed on June 24, 1992 by the Washington Legal Foundation constitutes a critical step in the continuing effort to expose this "legal theft." If any of your readers are interested in obtaining a copy of my IOLTA article, they may do so by writing to me at my California address.

Cassandra Chrones Moore, Ph.D.
3766 La Donna Avenue
Palo Alto, California 94306

THE CHIEF JUSTICE'S COMMISSION ON THE FUTURE OF THE COURTS

To The Advocate:

I read with great interest Prof. Day's excellent article, *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* in *the Advocate* (vol. 22, No.2, Spring 1992).

Computer usage, access, and education for judicial purposes are indispensable if we are to produce a justice system that works for us. It is important that judges be included among those who will work with computers in our future court system.

We should also initiate school programs so that children can learn about the judicial system. We should also make the computer available for remote access of information.

As Prof. Day has so ably pointed out in her article, the technology is here today, in fact Massachusetts is in the forefront of that technology. What we need is the will to grasp that technology and put it to work for us. In that way our judges will have the time to devote to the many sensitive cases and issues that come before them. It is not that we lack sensitive judges, what we need is to provide the proper administrative atmosphere that will allow our sensitive judges to work.

The computer will be a big step forward accomplishing that goal.

Virgil Aiello, Esq.
Boston, Massachusetts

THE NEONATAL INTENSIVE CARE UNIT— WHAT IS THE ROLE OF LAW WHEN PARENTS AND PHYSICIANS MAKE TREATMENT DECISIONS FOR SERIOUSLY ILL NEWBORNS*

By
Linda C. Fentiman**



I spent my sabbatical in the hospital. No, I wasn't sick. From June 1990 till January 1991, I spent many of my waking hours in the Neonatal Intensive Care Unit of the Massachusetts General Hospital (M.G.H.) in Boston, observing the process of making treatment decisions for seriously ill infants.

I came to this project after having written about law and ethics at the other end of life. In a 1989 article,¹ I had examined the process by which the families of incompetent and incurably ill adults sought to carry out the incompetent individual's treatment wishes. In that article, I had opposed the idea of judicial involvement in the decisionmaking process, arguing that families and physicians must be trusted to act for the patient whom they alone know best.

But in the case of children who were born with serious medical problems, I wondered if a family-centered model of decisionmaking would work. Can parents who expected a "normal," healthy baby be permitted to make decisions for one who turns out to be critically ill, with serious health problems or congenital abnormalities? Do the parents of

such child have an inherent conflict of interest with the child that renders them inappropriate as decisionmakers? And even if the parents could decide, should their decision be reviewed by someone else, either physicians, a hospital ethics committee, or the courts?

In the course of teaching my seminar in Law, Science, and Medicine, I explored these and related issues with the students. One of my students, Dr. Eileen Oullette, was also a pediatric neurologist at Massachusetts General and North Shore Children's Hospitals. Dr. Oullette put me in touch with Dr. David Todres, the head of the Neonatal Intensive Care Unit at M.G.H., who was keenly interested in ethical issues related to pediatric medicine. As a result of my conversations with Dr. Todres, I was invited to become a Consultant in Law and Ethics at M.G.H., to observe firsthand the circumstances under which seriously ill newborns come to an intensive care unit, and to explore the attitudes and behavior of nurses, parents, physicians, and social workers in making medical treatment decisions for these children.

THE N.I.C.U. SETTING

As the twentieth century draws to a close, the Neonatal Intensive Care Unit (N.I.C.U.) is a place where three complex legal, medical, and technological trends are about to collide. The first of these is the medical technology revolution, which has provided dramatic improvements in medical care and longevity but has also led to uncertainty about the medical outcome in particular cases, and the wisdom of aggressive, expensive medical treatment in general. The second phenomenon is the legal system's shift away from its historical deference to parental authority, of which the recently increased focus on child abuse, termination of

*Copyright 1992, Linda C. Fentiman

**Professor of Law, Suffolk University Law School; B.S. 1970 Cornell University, J.D. 1975, S.U.N.Y. at Buffalo Law School, L.L.M. 1983, Harvard University Law School. Professor Fentiman teaches courses in Criminal Law, Law and Psychiatry, and Law, Science, and Medicine. Her primary areas of expertise are the fields of criminal law, environmental law, and health care law.

¹Fentiman, Linda, "Privacy and Personhood Revisited: A New Framework for Substitute Decisionmaking for the Incompetent, Incurably Ill Adult," 57 *George Washington Law Review* 801 (1989).

parental rights² and medical neglect is symptomatic. The third trend is what has been decried as "the litigation explosion," leading many health care professionals to be extremely fearful of being sued and to claim that they are being forced to practice "defensive medicine."

THE TECHNOLOGICAL REVOLUTION IN NEONATAL INTENSIVE CARE

In the last twenty-five years, spectacular innovations in medical treatment have led to a significant increase in the numbers of critically ill newborns who survive. A number of these neonates are extremely premature (born at 23-26 weeks from conception) and of very low birth weight (500-1000 grams). Others are moderately premature (27-37 weeks), while others are at or near full term (38-42 weeks). Approximately 7% of all American children born each year weigh less than 2.5 kilograms, a percentage that has not changed significantly since 1980.³ Many of these children also suffer from one or more serious medical conditions, including genetic defects that lead to a greatly shortened lifespan, cardiac or circulatory anomalies, neurological impairments, a variety of respiratory problems, and impairments of other organ systems. In addition, it has been estimated that one in ten American neonates are exposed to illegal drugs in utero,⁴ and a significant number of these have major health problems at birth.⁵

In virtually every case, seriously ill newborns are transported (either from a community hospital to a major teaching hospital or within the same hospital) to a neonatal intensive care unit (a "Level III nursery") within hours of their birth. There they are cared for by a team of neonatologists, pediatric specialists, neonatology fellows, residents, interns, and intensive care nurses. They are given high quality intensive medical care, with careful monitoring of their vital signs, blood gas levels, and cardiac and respiratory activity, often accomplished through the use of invasive procedures. The children are frequently placed on a ventilator in order to receive oxygen and other respiratory support, and they often undergo multiple operations or other complex medical procedures, designed to stabilize or

cure their condition or to obtain further diagnostic information.

Almost universally, American neonatologists take as their working presumption that all seriously ill newborns merit aggressive medical intervention, in order to guarantee that each child has the maximal chances for survival.⁶ Due to the uncertainty of the medical course that will be taken by a premature or very ill infant during the first several months after birth, it is often difficult to reach a clear assessment of the prospects for a particular child. Even after a large amount of data has been gathered, different health care professionals may differ in their view of the child's diagnosis and prognosis, depending on their area of specialization, research agenda, and philosophy of treatment. Generally speaking, it is not until the baby "declares itself" as not being viable that the medical and nursing staff will consider less aggressive treatment,⁷ even though many children "graduate" from a neonatal intensive care unit to a life of severe neurological impairment, ventilator dependency, or other chronic illness.⁸

THE DECLINE OF FAMILY AUTONOMY

At the same time that physicians are able to offer more treatment options for seriously ill newborns, parents are finding that their ability to choose among them is diminishing. Historically, American parents were accorded great deference in making important decisions for their children.⁹ However, in the last twenty years parental authority to decline or discontinue medical treatment on behalf of their critically ill children has often been significantly limited, either *de jure* or *de facto*. Parents have been criminally prosecuted when their children died after they sought to treat their children's illnesses through unconventional means, such as prayer and faith healing.¹⁰ In part, these prosecutions may reflect the triumph of "science" over religion in the twentieth century, as it appears increasingly irrational for a parent to refuse what medical science is offering and rely on the power of God instead. Courts have thus frequently granted injunctive relief ordering hospitals to administer blood transfusions or chemotherapy against

²All readers will be familiar with the case of *Gregory K.*, in which a twelve-year old Florida boy was given standing in a suit to terminate his mother's parental rights because of neglect. *Boston Globe*, September 29, 1992 at 3; *Time* October 12, 1992, p. 57.

³*New York Times*, July 11, 1989, p. C3.

⁴American Academy of Pediatrics, Committee on Substance Abuse, "Drug-Exposed Infants" 86 *Pediatrics* 639 (1990).

⁵In 1990, Dr. Ira Chasnoff, President of the National Association for Perinatal Addiction Research and Education, estimated that some 375,000 American newborns annually may be affected by their mothers' use of drugs. *New York Times*, February 15, 1990, p. A14.

⁶Guillemin, J.H., and Holmstrom, L.L., *Mixed Blessings: Intensive Care for Newborns*, 119-137 (1986).

⁷*Id.* at 123-28.

⁸Many N.I.U.C. graduates also go on to lead the lives of "normal" children and adults with minimal or no health problems. Coulter, D., "Neurologic Uncertainty in Newborn Intensive Care, 316 (No. 14) *New Eng. J. Med.* 840, 842 (1987); Resnick et al., "Educational Outcome of Neonatal Intensive Care Graduates," 89 *Pediatrics* 373 (1992). Significantly, being poor and/or black was a greater predictor of later academic difficulty than being treated in a NICU versus a regular newborn nursery. *Id.*

⁹*Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹⁰*Commonwealth v. Twitchell*, Suffolk Superior Court Nos. 069517, 069757 (Massachusetts June, 1990); *State v. McKown*, 461 N.W. 2d 720 (Minn. App. 1990); *Walker v. Superior Court*, 47 Cal. 3d 112, 253 Cal. Rptr. 1, 763 P.2d 852 (1988).

the parents' wishes in order to protect the life of a desperately ill child.¹¹ In cases of seriously ill newborns, parents' decisions that their children should not be treated have sometimes not been honored.¹²

In addition, the recent rise in the reporting of cases of child abuse, particularly sexual abuse, has created great pressure on state and federal legislatures to develop expanded apparatuses for the investigation of child abuse allegations. While funding for these child protective services has not generally matched either the need or the legislative rhetoric, in Massachusetts, as in virtually every other state, physicians, nurses, teachers, and others have been required to report all cases of suspected child abuse or neglect to the state Department of Social Services.¹³ Due to their role as mandated reporters, health care providers have substantial leverage with parents who may disagree with their recommendations for treatment of their child, since merely threatening the parents with the filing of "a 51A" petition may cause them to reconsider their position.

THE LEGAL CLIMATE IN THE N.I.C.U.

Twenty years ago, difficult treatment decisions about seriously ill newborns were much rarer, both because there were many fewer treatment options for extremely premature or otherwise seriously ill children, and because parents and physicians generally made these decisions privately, away from public scrutiny. In 1973, Duff and Campbell¹⁴ launched a firestorm of controversy when they acknowledged that in some cases at the Yale-New Haven Hospital, parents and doctors decided to withhold arguably beneficial treatment from seriously ill newborns because they believed that such treatment would only prolong a life of pain and extremely limited interaction with the world.

In 1982 this controversy was reignited with the well-publicized death of "Baby Doe," a child born to an Indiana couple who suffered from Down syndrome, probable brain damage, and esophageal atresia, a surgically correctable gap between the esophagus and stomach. When the parents were given conflicting medical opinions about the desirability of surgical repair of the atresia, in light of their

baby's long-term prognosis, they chose not to treat him and he died ten days later.¹⁵ The parents' decision was upheld by the Indiana courts,¹⁶ but the case led to the U.S. Department of Health and Human Services' decision to promulgate regulations pursuant to § 504 of the Rehabilitation Act of 1973.¹⁷



These "Baby Doe" regulations¹⁸ prohibited hospitals from discriminating in the provision of medical treatment (i.e., not treating) to infants on the basis of handicap. These regulations focused primarily on the process by which potential cases of medical neglect should be handled by state child abuse authorities, but they also set up a "Handicapped Infant Hotline," and required hospitals receiving federal funds to post signs in all infant-care settings warning, "Discriminatory Failure to Feed and Care for Handicapped Infants in this Facility is Prohibited by Federal Law." In 1986, in *Bowen v. American Hospital Association*,¹⁹ the Supreme Court struck down the Baby Doe regulations, holding that they were not authorized by § 504 of the Rehabilitation Act and that there was no evidence that hospitals had in fact been discriminatorily withholding treatment from handicapped newborns.

In 1984, Congress enacted amendments to the Child Abuse Prevention and Treatment and Adoption Reform Act which were substantially similar to the Baby Doe regulations. These amendments also imposed substantive limitations on a physician's ability to withhold medical treatment from disabled infants.²⁰ New regulations implementing

¹¹In re McCauley, 409 Mass. 134 (1991); In re Custody of a Minor, 378 Mass. 732 (1978).

¹²See, e.g., Stinson, R.W., and Stinson, P., *The Long Dying of Baby Andrew* (1979, 1983).

¹³Mass. Gen. Laws. C. 119, § 51A.

¹⁴Duff, R., and Campbell, A.G.M., "Moral and Ethical Dilemmas in the Special-Care Nursery," 289 New Eng. J. Medicine 890 (1973).

¹⁵Lyon, J., *Playing God in the Nursery* 21-58.

¹⁶*Id.* at 36.

¹⁷29 U.S.C. § 794.

¹⁸45 C.F.R. §§ 84.51-55.

¹⁹476 U.S. 610 (1986).

²⁰45 C.F.R. §§ 1340.1-1340.20, particularly § 1340.15 and the Appendix to Part 1340.

these statutory changes were promulgated in 1985. These regulations prohibited "medical neglect," which was defined as the withholding of medically indicated treatment unless:

- i) The infant is chronically and irreversibly comatose;
- ii) The provision of such treatment would merely prolong dying, not be effective in ameliorating all of the infant's life-threatening conditions, or otherwise be futile in terms of the survival of the infant; or
- iii) The provision of such treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.²¹

The regulations further provided that nutrition, hydration, or medication cannot be withdrawn under any circumstances. These regulations have not been legally challenged. They have been criticized, however, because they are susceptible to a variety of interpretations in particular cases, and because of the inherent ambiguity and subjectivity of terms such as "merely prolong dying," "futile," or "inhumane."²²

Thus, in practice, the Child Abuse regulations' imprecision may make it unlikely that physicians and other health care providers will discontinue treatment of a seriously ill child, even though their medical judgment might be that treatment would be inappropriate given the child's extremely poor prognosis, and even though the parents also desire less aggressive treatment.

MY STUDY AT THE N.I.C.U.

To assess what happens when the phenomena of declining family autonomy, the "high-tech" medical revolution, and legal regulation of patient care intersect, I spent much of my time at the N.I.C.U. observing the administration of treatment as well as the interactions among parents, physicians, nurses, and social workers. I accompanied doctors on their daily "work rounds," in which the details of an infant's condition and proposed treatment are discussed by the attending physician, interns and residents, and the child's primary care nurse. I sat in on meetings with members of the medical treatment team, both in the presence and absence of the child's parents. I attended social service rounds, in which a child's family situation and plans for discharge were discussed, and I attended teaching rounds, in which cases deemed particularly interesting, medically or ethically, were discussed. Perhaps most important, I con-

ducted extensive interviews with physicians, nurses, social workers, and parents.

FREE-FLOATING LEGAL ANXIETY

What I discovered was a significant concern about legal liability on the part of health care professionals. For example, during teaching rounds, one physician invoked the spectre of "practicing legal medicine" in discussing whether one could use a particular drug when it was not specifically approved for that purpose by the Food and Drug Administration. Nurses and physicians often noted that they had been taught to document all conversations and all treatment that they participated in, as a means of protecting themselves and the hospital from lawsuits. It was noted that some lab tests were ordered not only to assess the effects of medical treatment but also to document a child's

Can parents who expected a "normal" healthy baby be permitted to make decisions for one who turns out to be critically ill?

physical condition in case of subsequent health problems. Several health care providers suggested that it was physicians' fears of being "brought to court" that made them very aggressive in their treatment approach, even though in the doctors' medical judgment such treatment would be futile. One physician observed that doctors were constantly exposed to information on legal liability and risk management, both because they knew colleagues who had been sued, or had themselves been called as witnesses in such cases, and because all physicians at Harvard University teaching hospitals received *The Forum*, a monthly publication of the Harvard risk management department. Nurses informed me that similar information, along with advertisements for nursing liability insurance, was found in nursing journals, and thus they too were understandably concerned about potential legal liability.

These observations are consistent both with those of observers of the medical profession in general, who have found a tendency to practice "defensive medicine,"²³ and with studies of N.I.C.U. physicians in particular. In *Mixed Blessings: Intensive Care for Newborns*, Jeanne Guillemin and Lynda Holmstrom concluded that the Baby Doe regulations promote overtreatment, by sending N.I.C.U. staff the message that "[t]he withholding of medical care is permissible only when an infant is unambiguously beyond medical care." Although Guillemin and Holmstrom speculated that "the closed world of . . . [the N.I.C.U.] may permit

²¹45 C.F.R. s. 1340.15 (b) (2).

²²See Lantos, J.D., Miles, S.H., Silverstein, M.D., and Stocking, C.B., "Survival After Cardiopulmonary Resuscitation in Babies of Very Low Birthweight: Is CPR Futile Therapy?" 318 (No.2) N. E. J. Med. 91, 94 (1988).

²³Zuckerman, S., "Medical Malpractice: Claims, Legal Costs, and the Practice of Defensive Medicine," *Health Affairs* 128, 131 (1984); Wood, C. *The Influence of Litigation in Medical Practice* (1978); Tancredi and Baroness, "The Problem of Defensive Medicine," 200 *Science* 879 (1978).

greater discretion than the rule allows," they also noted that the bureaucratic obligations of the N.I.C.U. and the hospital may still require substantial compliance with the Baby Doe regulations.²⁴ Pomerance *et al.* surveyed Southern California neonatologists in 1979 and 1985 concerning their attitude toward ventilator support. They found that after the "Baby Doe" regulations were promulgated, neonatologists were significantly more willing to start, and less willing to withhold, ventilator support for a wide spectrum of seriously ill infants than had previously been the case, notwithstanding parental wishes to the contrary.²⁵ The authors speculated "that fear of legal consequences [including criminal liability] or unwanted notoriety is influencing neonatologists to use ventilator support, especially in those instances when they themselves do not think they 'should' use it."²⁶

Kopelman *et al.* reached similar conclusions in a 1986 nationwide survey of neonatologists concerning the perceived impact of the 1985 "Child Abuse" regulations. These authors found that many neonatologists were uncertain as to what treatment these regulations required in particular cases. In addition, a third of the neonatologists responding indicated "that they had changed the way they practice medicine in such cases as a result of the new regulations," stating their perception that the regulations created a conflict between their "duty to act in the infant's best interest" and the duty to act in accordance with federal law.²⁷

In a 1990 lecture entitled, "The Rescue Imperative in Neonatal Care," Norman Foster, Director of the Program in Medical Ethics at the University of Wisconsin, voiced his concern that physicians practicing in neonatal intensive care units were being driven to overtreat seriously ill newborns due to a fear of civil or criminal liability, despite the fact that no American physician has ever been found liable for a patient's death due to the withholding of medical treatment.²⁸

Interestingly, in my study at M.G.H. most physicians and nurses referred to the Baby Doe and Child Abuse regulations only in passing, if at all. A few referred, in interviews, to "the old days" in which fear of "the God squads" sweeping through the N.I.C.U. was an active concern, and observed that things are not like that now. No one cited the Child Abuse regulations as mandating any particular treatment decision.

In contrast, numerous N.I.C.U. personnel mentioned the potential for the filing of "a 51A" (a report to the state Department of Social Services that a child is suspected of being abused or neglected)²⁹ as an important legal concern in treatment decisionmaking. The 51A petition is seen as primarily useful in its threatening power, as a coercive device to urge mothers to be more frequent visitors to the N.I.C.U. or to get off drugs. However, it is also viewed as a means of guaranteeing treatment for children whose parents have abandoned them and/or determined that they do not wish further invasive medical treatment, by ensuring that a "more appropriate" decisionmaker will reach a different decision than that of the parents.

In the last twenty years parental authority to decline or discontinue medical treatment on behalf of their critically ill children has often been limited.

In sum, my observations at M.G.H. lead me to conclude that physicians and other health care providers display significant fear, misperceptions, and uncertainty about the law governing treatment of seriously ill newborns. In order to determine whether this fear of legal liability, which seems largely misplaced, is a major factor influencing health care professionals to be more aggressive in treatment than the law requires or than they believe to be medically and ethically appropriate, I am currently conducting a questionnaire survey of M.G.H. professionals to assess, in a more quantitative way, the impact of federal and state law on their attitudes and behavior in the N.I.C.U. setting.

IMPACT OF THE LAW

As most readers are aware, Massachusetts' highest court has made sweeping statements in the past about the need for judicial, as opposed to medical, decisionmaking for "questions of life and death."³⁰ Over the last fifteen years, the Massachusetts Supreme Judicial Court has developed an elaborate "substituted judgment" model of judicial review, which attempts to ascertain for incompetent individuals what medical treatment choices they would make if they *were* competent. In 1980 the Court decided the case of *In re Spring*,³¹ in which it announced that prior judicial

²⁴Guillemin, J.H., and Holmstrom, L.L., *Mixed Blessings: Intensive Care for Newborns* at 281-82 (1986).

²⁵Pomerance, J. J., Yu, T. C., and Brown, S. J., "Changing Attitudes of Neonatologists Toward Ventilator Support," 8 (No. 3) *J. Perinatology* 232 (1988).

²⁶*Id.* at 237.

²⁷Kopelman, L.M., Irons, T.G., Kopelman, A.E., "Neonatologists Judge the 'Baby Doe' Regulations," 318 (No. 11) *New England J. Med.* 677, 683 (1988).

²⁸Dr. Norman Foster, "The Rescue Imperative in Neonatal Care," lecture given at Massachusetts General Hospital, December 11, 1990.

²⁹Mass. Gen. Laws C. 119, § 51A.

³⁰*Superintendent of Belchertown School v. Saikewicz*, 373 Mass. 728, 758-59 (1977).

³¹380 Mass. 629 (1980).

approval of a decision by the patient's family and physician to discontinue life-sustaining treatment was not always required. The Court enunciated a list of fourteen factors which should be considered in deciding whether prior judicial approval is necessary. Although some lawyers have suggested that *Spring's* impact has been to lessen the need to resort to the courts in cases of termination of treatment, I argue that the Court's enumeration of such a lengthy list of factors to be considered makes it highly likely that many lawyers, both for hospitals and for families, will advise their clients to seek judicial approval, "just to be on the safe side," and may also persuade some clients not to terminate treatment, because of the delays inherent in legal proceedings.

Recent cases may also have a major impact on medical decisionmaking in NICU's in the coming years. In January, 1991, the Supreme Judicial Court decided the case of *In re McCauley*.³² In *McCauley* the Court addressed the question of whether a court could order invasive diagnostic testing and life-sustaining medical treatment (a bone marrow aspiration and blood transfusions) for a child suffering from a serious illness, leukemia, over the religious objections of the parents, who were Jehovah's Witnesses. The Court declared that the state interest in saving the life of the child and maintaining the ethical integrity of the medical profession outweighed the parental and religious rights of the parents, and that therefore the medical treatment should have been ordered.³³ In March 1992, in *Care and Protection of Beth*,³⁴ the Supreme Judicial Court held that the Department of Social Services (D.S.S.), as guardian for a five year old child in an irreversible coma who was fed via a feeding tube and had significant respiratory problems, could seek, and the trial court could grant, an order requiring that a "no-code" order be entered on her hospital chart, thus preventing her from being resuscitated in the event of cardiac or respiratory failure. This order was sought by Beth's mother, herself a minor, and the D.S.S., but opposed by Beth's guardian. The Supreme Judicial Court determined first that a judicial substituted judgment for a "no-code" order, while not generally required, was appropriate in this case because Beth was a ward of the D.S.S. Further, Beth was already a subject of the court's jurisdiction since her parents had failed to exercise parental responsibility toward her, and she was incompetent, both legally and physically, to make any treatment decision herself. The

court then undertook a substituted judgment analysis using the factors articulated in *Guardianship of Roe*,³⁵ and determined that if Beth were competent, she would have chosen to have the "no code" order entered on her chart. Judge Nolan dissented, characterizing the majority's substituted judgment analysis as "a cruel charade."

The next few years will provide an ideal opportunity to observe the impact of these cases on the way that treatment decisions are made for seriously ill newborns, whose medical conditions will usually fall somewhere between those of Elisha McCauley and Beth. What will be critical to watch is whether physicians, hospitals, parents, and lawyers will decide, based on *McCauley* and *Care and Protection of Beth*, that resort to the judiciary is necessary in order to resolve disagreements about appropriate medical care for particular infants or whether physicians and families will find other, less formal and less public, means of dispute resolution.

UNANSWERED QUESTIONS

After undertaking an analysis of the impact of law on medical decisionmaking, what is left is a host of unanswered questions. Who will, and who should, pay for the costs of treating seriously ill newborns, both shortly after their birth and if they live for a long-time through the success of aggressive and innovative medicine? Currently, the federally-funded Kaleighn Mulligan program³⁶ provides for the in-home medical support of seriously ill children, who otherwise would have to be hospitalized or institutionalized, at even greater financial cost. Second, what can be done to reduce the incidence of premature births, which are such a major predictor of a child's developing physical and mental disabilities?³⁷

Finally, what are the ethical obligations of parents, physicians, and lawyers who seek to advocate for a disabled newborn? Is there only one correct solution in every case, or should parents and other decisionmakers be permitted to choose among several "reasonable" treatment alternatives, one of which is no treatment at all? How can any of us totally put aside his or her own values, needs, prejudices, and attempt to speak for that child? And how can anyone not try?

³²409 Mass. 134 (1991).

³³*Id.* at 139.

³⁴412 Mass. 188 (1992).

³⁵383 Mass. 415, 444 (1981).

³⁶42 U.S.C. § 1396a (e)(3).

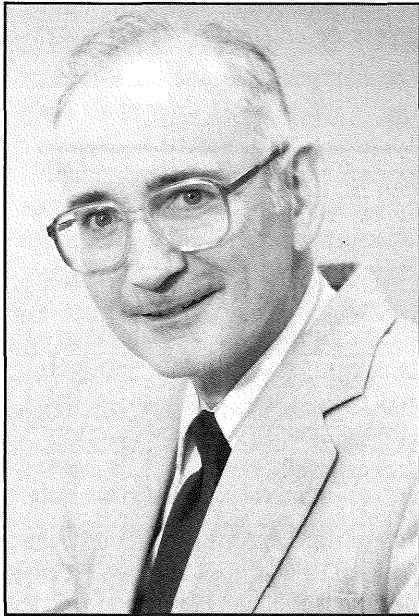
³⁷Kempe et al., "Clinical Determinants of the Racial Disparity in Very Low Birth Weight," 327 (No. 14) *New Eng. J. Med.* 969 (1992).

TURNING RIGHT THE MAKING OF THE REHNQUIST SUPREME COURT

by David G. Savage
John Wiley & Sons, Inc. 473 pages (1992)

Reviewed by Professor Joseph D. Cronin

I



When the Beatles first visited the United States a newsman asked how they found America. "Go to Iceland and turn left," a Beatle reportedly answered. Simple. The Supreme Court's change of course has been considerably more complicated and time consuming than that. In *Turning Right* David Savage chronicles that transition. It was a twenty year odyssey for several reasons.

Savage notes the familiar fact that of President Nixon's four appointees – Burger, Blackmun, Powell and Rehnquist, only Rehnquist turned out to be truly conservative. Also, after a period of remarkable stability on the Court from 1972 to 1986 during which only Justice Stevens and Justice O'Connor were appointed, there have been four appointments since – Scalia, Kennedy, Souter and Thomas. Also, of course, William Rehnquist was promoted to Chief Justice upon the retirement of Warren Burger.

Some Supreme Court Justices have disappointed the Presidents who put them on the Court. President Eisenhower's views concerning Warren and Brennan are well known. If this does not seem to be the case with the more recent appointments it is not entirely a matter of luck. Executive branch scrutiny of those appointees, although largely behind the scenes, has been intense. Computer searches of writings by and about potential nominees facilitate this. Further, since recent administrations seem more committed than Presidents in the past to promote sitting judges to the Supreme Court, these appointees have at

least something of a judicial track record. It is perhaps not unduly cynical to note that some district judges would like to be circuit judges and some circuit judges would like to be on the Supreme Court. These judges are well aware that everything they write on or off the court becomes part of that track record.

Although the remaking of the Court was a twenty year process *Turning Right* concentrates on the years since 1986 when William Rehnquist became Chief Justice and Antonin Scalia replaced him as Associate Justice. For it was then that the transformation truly began to take shape. Partly this was because of the difference between Rehnquist and his predecessor Warren Burger, who was widely believed to be an ineffective Chief Justice. It was also because as noted there have been three other conservative appointments in the years since 1986.

We should not forget that the lower federal courts have been remade during the same period. Presidents Reagan and Bush have filled a majority of federal judgeships. This has happened more quickly than one might expect because in addition to vacancies the size of the federal judiciary has undergone considerable expansion.

II

First, the mechanics of *Turning Right*. According to the dustjacket David Savage is the Supreme Court reporter for the Los Angeles Times. His academic training is in political science and journalism. Apart from the text the book contains only a standard index. There are no footnotes or lists of references, etc. The author draws on the Court's opinions, briefs submitted and transcripts of oral arguments. Also Savage had the benefit of interviews with most of the Justices as well as clerks and numerous former clerks. Sources generally are not referred to by name for obvious reasons. Apart from an occasional reference in the text to a book, such as *Order and Law* by former Solicitor General Charles Fried, these are the sources for the book.

One disconcerting aspect of the author's style is that while he tells the "story" in a very readable form it is not

always possible to determine whether he is expressing his own view or that of others. For example, on page 402 Savage writes that “[i]n his early years on the Court, Rehnquist had been considered its best writer. . . . In recent years, however, his writing had become bland . . . His writing now read as the work of a jurist who had five votes and did not need to persuade anyone that he was right.” Who says? Is this the view of David Savage? A consensus of the other Justices? This problem occurs frequently throughout the book. It might have been better if he had indicated the basis for his conclusions even if he could not disclose names. It’s not a question of whether the statement is accurate or not but whose opinion it is. Students of the Court can decide for themselves whether they agree but the general reader is left with an unsupported assertion. Also, while Savage’s emphasis on questions from the bench during oral argument is refreshing, since this is a largely neglected area in commentary about the Supreme Court, the author seems too facile in drawing conclusions about the Justices’ positions from their questions at oral argument.

A first reaction to *Turning Right* is that while it might be a good summer “read” for the generally educated public, it would not be informative to lawyers, especially those who watch the work of the Supreme Court closely. This first reaction may be reinforced by such things as Savage’s explanation of a petition for certiorari as “in essence, a plea for the Court’s attention.” Perhaps that could have been expanded upon without becoming unduly technical. Nevertheless, a full reading of the book dispels this first impression. *Turning Right* provides a dimension to the study of the Supreme Court that is absent from most academic writing. The journalist’s approach has its benefits. The author, detached from overcommitment to technicalities, finds it easier to observe the forest amid all the trees. Among the highlights of the book are biographical sketches of various of the Justices interspersed throughout the book. Inevitably these repeat some facts and anecdotes that will be familiar to many readers but they are valuable nonetheless. There are summaries of the confirmation proceedings concerning recent nominees. These are competently presented but are less valuable because those events are so recent and well known even to the general public. Savage’s descriptions of the presidential selection of recent Supreme Court nominees confirms that they are not so much affirmatively selected but are chosen after others are disqualified for one liability or another.

The author may have followed a chronological approach too slavishly. Throughout the book the discussion of major cases is divided according to the stage the case was at during a particular time. Frequently there is a discussion of certain cases that were argued together. Then after intervening material there is a discussion of the opinions in cases that were decided together. Perhaps the author concluded that an extended discussion in one place of all aspects of a major case, such as the *Webster* abortion case, would make the text too dense, but the author’s approach

can cause concern that substance is being subordinated to chronology. The reader may think that it is a bit like an episode of L.A. Law. Just when things start to get interesting we are off to something else.

Another concern is that Savage seems to have neglected the criminal side of the Court’s docket. I certainly have not counted page allocations and it may be true that the criminal part of Constitutional Law is not as much center stage as it was some terms ago but, capital punishment aside, the author appears less interested in the criminal cases. The book has a strong civil rights, First Amendment emphasis.

The image of Justice Scalia that emerges from Turning Right is that of a brilliant, bouncily exuberant judge, fearless of criticism, with fixed ideas matched with willingness to follow those ideas where they lead.

III

In a general way the approach of the author is to attempt to get a “fix” on each individual Justice, to figure out what overarching considerations reveal the mind set of the Justice. Once this is done the votes in individual cases become readily explainable and, presumably, votes in future cases predictable. First, locate the attitudinal “fix”, then all, or at least quite a lot, flows from it.

Although pertinent information, biographical and other, about the Justices is sprinkled throughout the book it may be useful to gather some of it together here on a Justice by Justice basis. Particular attention will be paid to Chief Justice Rehnquist; to Justice Brennan who led the rear-guard fight against the conservative takeover and Justice Scalia, the acknowledged intellectual leader of the conservative wing of the current Court.

1. CHIEF JUSTICE WILLIAM REHNQUIST

“He’s a great guy”

In *Turning Right* Rehnquist comes across as “a great guy,” in the words of Justice Thurgood Marshall, affable and kind. He may have been Justice Brennan’s closest friend on the Court despite their polar opposite viewpoints. Once a law clerk for Justice Robert Jackson, Rehnquist is very bright and efficient. He hates to waste time. Gets his work done quickly. He finds plenty of time to play tennis with his law clerks. Savage reports the claim (presumably not intended seriously) that Rehnquist chooses three clerks rather than four because that is all he needs to fill out a doubles game and his clerks have to be at least competitive at tennis.

Rehnquist is very conservative and his views are “flash frozen” from his youth. Savage portrays Rehnquist as more political than Scalia because he is concerned with the “right” outcome rather than scholarly opinions. His overarching principle is that the Constitution leaves most decisions to the political branches not the courts. In a legal sense, for example, he is not pro-life rather than pro-choice on abortion. Rather, the matter is for legislatures. (This is also true of Scalia.) In general he upholds claims of governmental power against claims that individual liberties are being infringed. Also Rehnquist tends to rule in favor of the states against claims of federal authority. See Derek Davis, *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations* 11 (1991).

The overall image of the Chief Justice that emerges from *Turning Right* is that he is a personally agreeable man of considerable intellectual skills, though not on the level of Scalia and Stevens in that regard. He is more concerned with results that are attuned to his ideological approach than he is with the details of reasoning.

Much that is said about Rehnquist in this book is commonplace. Much, presumably, would be controversial. In any event before we overemphasize the “government wins; individual loses; anyone for tennis?” assessment of Rehnquist, bear in mind that a few years ago he published a book on the Supreme Court and has recently published a book entitled *Grand Inquests* concerning the impeachments of Justice Samuel Chase and President Andrew Johnson. Anyone who is an effective Chief Justice of the United States, as Rehnquist admittedly is, and lectures and writes books on the side, is either a reasonably energetic worker or has a secret that he ought to share with the rest of us.

2. JUSTICE ANTONIN SCALIA

“‘I think it is quite apparent’, Powell said with a faint smile, ‘that he had been a law professor. They get to talk for the full hour.’” (Actually, only 50 minutes, Justice Powell). This quote, cruel as it may seem to legal academics, captures one side of Justice Scalia that has often been noted. He is not bashful. Savage describes him as “talkative, insistent and supremely self-confident.” A product of Xavier High School (a Jesuit military prep school in New York City), Georgetown University and Harvard Law School, Scalia is the first Italian-American to serve on the Supreme Court. He taught at the law schools of the University of Virginia and the University of Chicago.

Throughout *Turning Right* Scalia emerges as brilliant, a viewpoint that seems to be generally shared. Like Justice Stevens his opinions have an individual style, suggesting a greater independence from the work of clerks. He manages to combine an almost epic argumentative style with a surprisingly conversational manner. His opinion in the recent *Casey* (abortion) case, released after *Turning Right* was published, is a masterpiece of rhetoric, to be commended to students of persuasive writing. Persuasive, that

is to readers who are not participants in the decision making process. The uncompromising stridency of the opinion is not calculated to lead to a graceful modification of views by those on the Court who have expressed other views.

Still, if Rehnquist's views were “flash frozen” at an early age, Blackmun seems to have made an ideological journey. Whether that is in part a product of all of the uproar over abortion and Blackmun's opinion in Roe is speculative.

Scalia searches for clear, bright line rules and is not enamored of vague, subjective balancing tests. He tends to be a literalist, in some ways reminiscent of Justice Black. He has a “no exceptions” attitude. He crafts opinions that are intellectually coherent, rather than being concerned with doing justice. “While the other justices reflexively decided cases by juggling the existing precedents Scalia would gladly brush them aside to set forth a clear principle.” Once again the recent *Casey* decision comes to mind. He cares about reasoning, not merely results and is willing to follow where the reasoning leads. An example of this, although not referred to by Savage, is the 1987 case of *Arizona v. Hicks*. In *Hicks* police who were legitimately on premises moved a stereo in order to see its serial number. The Court, speaking through Justice Scalia, ruled that moving the stereo was a search, refusing to write it off as a de minimis intrusion. “A search is a search.” Justice Scalia preferred a clear line to a “conservative” result.

In regard to certain major areas before the Court Justice Scalia “despised affirmative action,” is credited with a “zealous defense of free speech” and wants to leave abortion to the states rather than make it illegal.

The image of Justice Scalia that emerges from *Turning Right* is that of a brilliant, bouncily exuberant judge, fearless of criticism, with fixed ideas matched with a willingness to follow those ideas where they lead. A reading of his opinions certainly confirms this impression. His lonely dissent in *Morrison v. Olson*, the independent counsel case, a dissent which is looking better every day, is a masterpiece that illustrates these qualities.

Morrison v. Olson also illustrates the difference between Rehnquist and Scalia. Rehnquist wrote for the Court upholding the independent counsel statute, with Scalia the only dissenter. The political perception of the case was that the two conservatives had split in a politically charged case. Arguably, however, each justice was true to his principles. Scalia sought a bright line rule based on original intent. Rehnquist, as usual, upheld the government against the constitutional claim of an individual. As Savage notes: “By this reckoning, the independent counsel case marked one of Rehnquist's finest hours as chief justice.”

3. JUSTICE STEVENS

"Yet this exceptionally bright and likeable justice usually rated as the least significant of the nine justices."

John Paul Stevens, appointed in 1975 by President Ford to replace Justice Douglas, has the reputation for being both personally agreeable and intellectually gifted. "For pure brainpower, Stevens had no match on the Court except, perhaps, for Scalia." Savage notes that after clerking for Justice Wiley Rutledge Stevens became a national expert in anti-trust law. Savage also reminds us, perhaps more often than was necessary, that Justice Stevens wears a bow-tie.

Why then does prodigious intellectual ability, combined with personal civility, not translate into influence on the Court, particularly since Stevens now has seventeen years of seniority? Presumably the bow-tie doesn't explain it. In *Turning Right* he comes across as individualistic perhaps to an extreme. He "works alone and works hard." He uses two clerks instead of the allotted four. His opinions reflect his own personal style. He even has flown his own plane.

Scalia searches for clear, bright line rules and is not enamored of vague, subjective balancing tests.

Justice Stevens is regarded as unpredictable. Savage quotes another Justice: "With each term his jurisprudence begins anew." Reportedly Chief Justice Rehnquist is reluctant to assign Stevens important cases because his opinions are so individualistic he is unlikely to satisfy other Justices in the majority. He frequently writes separate opinions. Stevens regards himself as a true conservative who adheres to precedent. He considers Rehnquist a "knee-jerk conservative" just as Brennan and Marshall were "knee-jerk liberals." Stevens, along with Justice Blackmun, are the lone firm adherents to *Roe v. Wade*. While Stevens was not on the Court when *Roe* was decided, Blackmun, of course, wrote the majority opinion.

4. JUSTICE BRENNAN

**"He is who everyone ought to have as a grandfather."
Charles Cooper, former Supreme Court clerk.**

For many years William J. Brennan was the Senior Associate Justice on the Supreme Court, which meant among other things that he would assign the opinion when he was in the majority and the Chief Justice was not. This was not uncommon during the first years of the "Rehnquist Court."

As is recounted in *Justices and Presidents* by Henry Abraham, when Justice Minton resigned just before the 1956 election President Eisenhower quickly appointed Brennan. Brennan had been a Colonel in the army in World

War II and was highly recommended by his New Jersey Supreme Court colleague, Chief Justice Arthur T. Vanderbilt. He had the support of various constituencies and it was believed that his appointment would help to solidify the support of "Eisenhower Democrats," especially Catholics, in the impending presidential election. Brennan first received a recess appointment, on October 16, 1956, a practice of doubtful wisdom that was common during that era.

It is an obvious but sometimes overlooked fact about the Justices that if you want to have an historic impact on the Supreme Court you have to have the good judgment not to die too soon. Justice Brennan exercised excellent judgment in this regard, serving on the Court for 34 years and has since enjoyed an active retirement. This longevity allowed him to be a prominent member of the Warren Court, a dominant figure during the tenure of Chief Justice Burger and a tenacious opponent of the rollback agenda of Chief Justice Rehnquist.

But Justice Brennan had more to offer than the fortuitous gift of longevity. More even than the personal warmth and "notoriously sunny disposition" for which he was famous. He regarded interpreting the Constitution as not just an abstract intellectual exercise but the practical business of forging majorities. "Each year, Brennan would ask his new batch of law clerks whether they knew the most important rule of the Supreme Court . . . After a moment, he would hold up his hand, palm open and fingers spread wide. 'It takes five votes to do anything in the Supreme court,' he told them." Brennan was still frequently "counting to five" even after it had appeared that his ideological rivals on the Court were ascendant.

One preliminary decision that the Court makes, ruling on petitions for certiorari, requires, of course, only four votes for an affirmative decision. Justice Brennan, alone among the Justices, did his own work independently of clerks in ruling on cert petitions. Most of the justices participate in a "pool" whereby the 4,000 or so petitions annually are distributed among the clerks. Justice Brennan was able to do his own cert work efficiently because he was so experienced and because the petitions are not fungible. Many are immediately recognizable as frivolous and with the others Justice Brennan knew what he was looking for. *Turning Right* discusses the certiorari process only briefly. A far more detailed assessment, also based on interviews with Justices, law clerks, etc. is contained in H.W. Perry, Jr., *Deciding To Decide: Agenda Setting in the United States Supreme Court* (1991).

Justice Brennan then was a complete package: An engaging personality, strong intellect, commitment to his work; concern that justice be done in particular cases. He had a "political" view of the process. He was not political in a crude sense but believed that constitutional interpretation was more than detached exegesis of an arcane text. Savage points out that in this regard his viewpoint was

similar to that of Chief Justice Rehnquist. Always counting to five. And he endured.

5. "Like their author, White's opinions are terse and tough."

This man may have the best resume in America. According to his biography in Congressional Quarterly's Guide to the U.S. Supreme Court he was Phi Beta Kappa, Rhodes Scholar at Oxford, magna cum laude from Yale Law School, law clerk to Chief Justice Vinson, nationally recognized college football star and later pro-football player. White came to know John F. Kennedy on various occasions, including in the South Pacific during World War II. In 1962 President Kennedy appointed White, then Deputy Attorney General, to the Supreme Court. Justice White is now the only member of the Supreme Court who was appointed by a Democrat. According to Savage, Byron White "wrote the official report on the sinking of Kennedy's PT 109."

The Byron White who emerges from the pages of *Turning Right* is not a fun guy. "His questions are gruff and intimidating, just like White himself." He doesn't say much even to his clerks because he was quoted in Woodward and Armstrong's *The Brethren*. Don't talk about his football days; he walks out of the room. Savage portrays White as anti-press. Some theorize that it could be connected with the nickname "Whizzer," which he dislikes and which was bestowed upon him involuntarily by the press. That seems like a bit of a stretch.

White's clerks describe him as "smart and exceptionally hardworking," at work by seven in the morning. Savage portrays White's opinions as "terse and conclusionary." "When law clerks draft an opinion that explains the reasons for the decision, White often edits out the reasoning, leaving simply the conclusion." While one outside the Court is in no position to say how much Justice White's final opinions differ from clerks' drafts, the quoted assertion seems to be an extraordinary oversimplification of the final product that emerges from Justice White's chambers. In the same paragraph Savage goes on to discuss White's opinion of the Court in *Bowers v. Hardwick*, the controversial sodomy case. That decision has appropriately been subjected to searching assessment by constitutional commentators because among other things it is not clear how it is to be reconciled with the privacy doctrine of *Griswold v. Conn.* and *Roe v. Wade*. Also, retired Justice Powell, who was a member of the bare five justice majority has publicly admitted that he may have been wrong in that case.

At the same time, while Justice White's opinion in *Bowers* can be legitimately criticized, it is hard to see how it was terse in any pejorative sense. It is reasonably brief but is certainly not just a statement of conclusions. Also, it should be recalled that Justice White was one of the *Roe* dissenters and Chief Justice Rehnquist, who assigned the opinion in *Bowers* was the other *Roe* dissenter. At any rate

Savage concludes that Rehnquist is more willing to assign major, controversial cases to White than, for example, Scalia or Stevens, because he is less likely to write opinions that by extreme language or eccentric reasoning will scare off majority votes.

For better or worse Justice Blackmun's opinion in Roe v. Wade is his professional footprint. In his separate opinion in Planned Parenthood v. Casey he made it clear that he knows that very well.

Like Chief Justice Rehnquist, White hates to waste time and, for example, generally does not read opinions from the bench. On substantive matters, he is strong on adherence to precedent, although obviously he does not believe that stare decisis should govern in the case of *Roe v. Wade*. He is regarded as a conservative in criminal cases and "believed firmly that Congress had broad power to shape the government." Savage gives this mind-set as the explanation for White's vote in *Morrison v. Olson*, the independent counsel case.

6. JUSTICE HARRY BLACKMUN

"[H]e said that if he had it to do all over again, he would have become a physician rather than a lawyer."

As he reminded us in his separate opinion in *Casey* at the close of the most recent term, Justice Blackmun is 83 years old. (84 as of Nov. 12, 1992). The Congressional Quarterly Guide to the U.S. Supreme Court reveals that he graduated summa cum laude in mathematics from Harvard University and then went to Harvard Law School. He was a law clerk on the Eighth Circuit and many years later succeeded the Judge for whom he clerked. Like Justice Kennedy he was a third choice for the Court, being selected only after two prior nominees, Judges Haynsworth and Carswell, were rejected by the Senate. As is well known he had been a close friend since grade school of Chief Justice Burger.

Although he decided against becoming a doctor, a defining event in Blackmun's legal career came in 1950 when he became counsel for the Mayo Clinic in Rochester, Minn. As a result of this he is regarded as in a way the medical expert on the Court. Presumably this influenced Chief Justice Burger's decision to assign the *Roe* opinion to him. In 1989, in the *Skinner* and *Von Raab* cases Blackmun joined the majority of the Court in rejecting a constitutional challenge to drug testing of certain employees. Savage relates Blackmun's vote in these cases to his medical background. "As usual, Blackmun looked at the issue through a doctor's eyes. Every patient has undergone urine tests or had a sample of blood taken. . . . The government certainly had a strong interest in detecting drug abusers, and these tests seemed at most a minimal intrusion on the employees' pri-

vacy. Blackmun cast his vote to uphold them.” It is Savage’s view that Blackmun also saw the abortion problem from a doctor’s viewpoint whereas Justice O’Connor saw abortion from the vantage point of a state legislator, which she had been, and also, of course, as a mother, which she alone among the Justices has been.

This is an important point because the real significance of *Turning Right* is in the idea that one can locate an attitudinal fix on a Justice that largely explains his views on the cases. One doesn’t read *Turning Right* for profound constitutional theorizing. Savage does not purport to be engaging in that and doesn’t have the background for it. Rather, he is reminding us that the Justices are whole persons who bring all that they are to their judicial endeavors. At times the reader may wish that Savage had developed his insights somewhat more. For example, Blackmun sees abortion from a medical vantage point. How did that dictate the trimester formula, that has now been rejected by all but two of the Justices? Is Savage suggesting that there is an agreed medical perspective on abortion? If so, what is it? So also, with Justice O’Connor. She brings the background of having been a state legislator and a mother to the Court. No other Justice now sitting has either experience. Presumably those experiences influence Justice O’Connor. But how? State (and national) legislators seem to have the same range of views on abortion that their constituents have. Neither women nor those women who are mothers present a united front on abortion. If they did that viewpoint would certainly soon predominate.

If being a mother and former legislator was important to the forming of Justice O’Connor’s abortion position why was that position adopted by Kennedy in the joint opinion in *Casey*, despite Kennedy’s quite different background. The third adherent to the *Casey* joint opinion was, of course, David Souter, who has lived an almost monastic existence as a bachelor surrounded by piles of books in the wilds of New Hampshire, deprived of the background of having been a legislator and even more conspicuously deprived of the background of having been a mother.

That having been a legislator can affect one’s work as a Supreme Court Justice is neither a profound nor novel insight. Justice Black, for example, buttressed his claim that the Fourteenth Amendment was intended to incorporate the Bill of Rights by reference to his years in the United States Senate. “My appraisal of the legislative history followed 10 years of legislative experience as a Senator of the United States, not a bad way, I suspect, to learn the value of what is said in legislative debates, committee discussions, committee reports, and various other steps taken in the course of passage of bills, resolutions and proposed constitutional amendments . . . I know from my years in the United States Senate that it is to men like Congressman Bingham, who steered the Amendment through the House, and Senator Howard, who introduced it in the Senate, that members of Congress look when they seek the real meaning of what is being offered.” *Duncan v. Louisiana*,

391 U.S. 145, 164-65 (1968) (Concurring opinion of Mr. Justice Black).

While such a classic argumentum ex umbris must be chafing to those who do not share the appealed to experiential authority, at least in the case of Justice Black and the incorporation debate there was a close fit between the experience and the dispute. The legislative history in Congress concerning the proposing of the Fourteenth Amendment was at the least relevant to whether the Bill of Rights was incorporated and made applicable against the states. Justice Black claimed, plausibly enough, that as a result of his experience in the Senate he was in a better position to assess the somewhat confusing legislative history. This is a narrow and, it seems, justifiable claim. Relating the experiences of O’Connor and Blackmun to their positions on abortion and other issues may be another matter.

On the personal level Justice Blackmun is portrayed in *Turning Right* as being more subdued than, for example, Brennan, Rehnquist or Scalia. Thoroughly dedicated to his duties on the Court, “he put in prodigiously long hours.” Originally viewed as quite conservative he, or at least his reputation, has changed. There may be a number of reasons for this. When Blackmun joined the Court in 1970 Black, Douglas and Marshall were there. Abe Fortas (whom Blackmun replaced) and Earl Warren were very recent memories. It wasn’t hard to look conservative. Thus, Blackmun and Stevens are now regarded as “liberal” but in the context of a different Court. Still, if Rehnquist’s views were “flash frozen” at an early age, Blackmun seems to have made an ideological journey. Whether that is in part a product of all of the uproar over abortion and Blackmun’s opinion in *Roe* is speculative.

But if he has not been constant in general in his years on the Court he has been constant in regard to his opinion in *Roe v. Wade*. For better or worse Justice Blackmun’s opinion in *Roe v. Wade* is his professional footprint. In his separate opinion in *Planned Parenthood v. Casey* he made it clear that he knows that very well.

7. “SHE WAS THE MOST CONSERVATIVE WOMAN WE COULD FIND.” JUSTICE DEPARTMENT OFFICIAL.

Turning Right portrays Justice Sandra Day O’Connor as fair minded rather than ideological; more concerned about justice in particular cases than the elaboration of grand legal theories. “Where law for Scalia was an intellectual exercise, O’Connor worried about the impact of a decision on real people. He sought decisions that were intellectually consistent; she tried to be fair.” She became a moderate-conservative who admired the non-ideological, ad hoc approach of Justice Powell. O’Connor is known as a relentless worker. Justice Blackmun described her as “tough” and “conservative” but “the soft spots in her armor . . . are children and women.”

On the abortion issue Justice O'Connor has attempted to stake out middle ground with her now famous "undue burden" test. Since, as applied, this test was deferential to state regulation of abortion it appeared that perhaps Justice O'Connor was biding her time while a firm majority to overrule *Roe* was being assembled. After *Planned Parenthood v. Casey*, of course, the landscape has drastically changed. While it is doubtful in the extreme that the undue burden test will do anything to lessen the Supreme Court's division over the abortion issue, or lessen the explosion of abortion related litigation, it is now apparent that Justice O'Connor is very serious in proposing it as a constitutionally appropriate middle ground. Now that Justices Kennedy and Souter have embraced this test and at least for now it controls the commanding middle ground on the abortion issue, it will be examined more critically by the other Justices and commenting scholars than in the past. As Justice Blackmun noted in *Casey* the continuing ambiguity over the status of *Roe* will probably cause Senate confirmation hearings to focus even more in the future on the abortion issue.

8. "MARSHALL HAD MUCH IN COMMON WITH HIS NEMESIS RONALD REAGAN: BOTH FOCUSED ON THE BIG PICTURE. . . LIKE RONALD REAGAN, HE ALWAYS HAD A STORY TO ILLUSTRATE HIS POINT."

It is hard to know whether Marshall or Reagan would be more appalled by this comparison.

Although Thurgood Marshall served on the Supreme Court for about twenty five years and had had a distinguished and well known career at the bar previously, he does not loom proportionately large in *Turning Right*. That may be in part because the main focus of the book coincides with Marshall's declining years on the Court both in terms of his influence and personal energy. "Marshall took a hands-off approach to the opinion writing," Savage laconically observes. "He didn't write anything my year, but I still think he could", said one clerk." Thus, Marshall was not a major force in opinion writing but was a reliable liberal vote. Despite his oft repeated claim that he would serve out his "life" appointment he retired in 1991 because of his health and also probably because of discouragement over his lack of influence on a changing Court.

IV

This is the obligatory "I found a few mistakes" section of the review. Perhaps the reason reviewers engage in this uncivil practice is to prove that they actually read the book. Anyway, the following minor items may be worthy of mention.

1. On page 379 Savage writes: "The Sixth Amendment says, 'no person shall be compelled in any criminal case to be a witness against himself.'" That language is, of course, from the Fifth Amendment.

2. On page 14 Savage quotes Justice Brennan on the subject of lobbying other Justices: "Only once did I go around and talk to everybody, and that was on the Nixon tapes case' in 1974. He sought a single, unanimous opinion, such as the Court had given in 1954, in the landmark *Brown v. Board of Education* case that outlawed official segregation. Regarding his own lobbying effort, Brennan said, 'It was a complete failure. Nobody agreed. not one.'"

The shelf life of a book about the Supreme Court and Constitutional Law is about half the time it takes the book to get to the shelf. Turning Right vividly illustrates this problem.

That discussion is at least puzzling because in the *Nixon* case the Court in fact was unanimous, (then Justice Rehnquist not participating). Chief Justice Burger wrote the opinion of the Court in which all the participating Justices joined, including Justice Brennan. *United States v. Nixon*, 418 U.S. 683 (1974).

3. My final nitpick concerns Savage's discussion on page 325 of a controversial free exercise of religion case that the Supreme Court decided in 1990, *Employment Division v. Smith*, a case that involved religious use of the drug peyote. Justice Scalia wrote the opinion of the Court, joined by four other Justices, holding generally that the state may, but is not constitutionally obliged, to provide a religious exemption from neutral criminal laws of general applicability. Also, the Court refused to apply the strict scrutiny test, i.e., whether the state's failure to accommodate was necessary to promote a compelling state interest.

In the course of his discussion of this case Savage observes: "The peyote case had provoked another sharp clash between Scalia, the professor, and O'Connor, the politician. Scalia had written a sweeping opinion that rigidly rejected religious claims. He sought an intellectual consistency in the law. O'Connor wanted the Court to be fair to both sides and to make careful, balanced judgments."

Savage goes on to discuss O'Connor's "dissent." The problem is that she didn't write a dissent. She wrote a concurring opinion. In fairness, the lineup of the Justices, as is often true these days, was a bit complicated. The case itself gives the following version: "Scalia, J., delivered the opinion of the Court, in which Rehnquist, C.J., and White, Stevens and Kennedy, JJ., joined. O'Connor, J., filed an opinion concurring in the judgment, in Parts I and II of which Brennan, Marshall, and Blackmun, JJ., joined without concurring in the judgment. Blackmun, J., filed a dissenting opinion, in which Brennan and Marshall, JJ., joined."

Fortunately, it is not as bad as it appears. The majority said: 1. the compelling interest test is not applicable; 2. The government's failure to make a religious exception is constitutionally permissible. Justice O'Connor's position was that: 1. the compelling interest test *is* applicable; 2. but the failure to accommodate religion is constitutional nonetheless. Since she agreed with the result reached by the majority, her opinion was a concurring opinion, not a dissent. The three dissenters agreed with the part of Justice O'Connor's opinion that concluded that the compelling interest test was applicable and thus joined that part of the opinion, without, of course, concurring in the result. The three dissenters concluded that the state's refusal to accommodate could not survive application of the compelling interest test. This conclusion is developed in the dissenting opinion of Justice Blackmun, joined by the other two dissenters.

Of Justice O'Connor's opinion Savage writes: "Her dissent was joined by Brennan, Marshall and Blackmun." The failure to make the distinctions noted above makes the discussion of the *Smith* case confusing for readers, to say the least.

EPILOGUE

The shelf life of a book about the Supreme Court and Constitutional Law is about half the time it takes the book to get to the shelf. *Turning Right* vividly illustrates this problem. By the end of the most recent term of the Supreme Court there were indications that a centrist bloc of three Justices – O'Connor, Kennedy and Souter – had emerged on the Court. In particular, *Planned Parenthood v. Casey*, the abortion case, and *Lee v. Weisman*, the prayer at graduation case, attracted widespread comment in this regard.

Before the decision in *Casey* it seemed fairly clear that there were four votes to overrule *Roe* – Scalia, Rehnquist, White and Kennedy; two to adhere to *Roe* – Blackmun and Stevens. Justice O'Connor was advocating the compromise "undue burden" test. Souter and Thomas, the two new Justices, were uncommitted. Therefore, if either Souter or Thomas voted to overrule *Roe*, that view would be dominant, at least if the Court were willing to overrule such a high profile case with a slender five to four majority. In *Casey*, Justice Thomas did join the anti-*Roe* coalition, although Justice Souter adopted O'Connor's "undue burden" view. Nevertheless, *Roe* was not overruled because Justice Kennedy joined O'Connor and Souter rather than Scalia, Rehnquist and White.

This was the real surprise of the *Casey* decision. For Souter and Thomas to break the way they did was no shock, although their views were to a degree unknown. Kennedy, however, seemed committed. In *Webster v. Reproductive Health Services* in 1989 Justice Scalia wrote a concurring opinion calling explicitly for the overruling

of *Roe*. The dominant opinion, however, in part an opinion of the Court, in part an opinion announcing the judgment of the Court, was the opinion of Chief Justice Rehnquist. The two Justices who joined this opinion in its entirety were White and Kennedy. (Rehnquist and White were the original *Roe* dissenters.) The Rehnquist opinion would have thoroughly demolished *Roe*, overruling it in all but name, while reserving the question of formal overruling. Although Justice O'Connor wrote a concurring opinion Justice Kennedy joined the Rehnquist opinion, not the O'Connor opinion. *Hodgson v. Minnesota* and *Ohio v. Akron Center for Reproductive Health* in 1990, having to do with parental notification in the case of minors, seemed to confirm that Justice Kennedy was in the Scalia – Rehnquist – White camp on the abortion issue.

Where are we now? There were four votes in *Casey* to overrule *Roe*; Blackmun and Stevens would adhere to *Roe*. The joint opinion by O'Connor, Kennedy, Souter, adopting a variation on O'Connor's "undue burden" test, holds the controlling middle ground.

The joint opinion had a tone of finality to it, that the Court sought to call an end to the national constitutional debate about abortion and asked that all acquiesce in *Casey*. Under the circumstances the claim was absurdly presumptuous. *Roe* at least had been a relatively straightforward opinion backed by a solid majority. Not only was *Casey* 5-4, the five were divided. The joint opinion had only three votes and as Justice Scalia detailed in his dissent the "undue burden" standard was not even the same test that O'Connor had urged in earlier cases. It is apparently less permissive of state regulation of abortions. Beyond that it is more than tolerably vague. The joint opinion states: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."

That statement is in the context of a very long opinion but nothing in the opinion appears to remove or even lessen significantly the vagueness of the "test." The opinion does not even resolve the specific kinds of abortion regulations addressed in *Casey* itself because, as Justice Scalia and Justice Blackmun note (with opposite reactions) in their opinions, the joint opinion repetitiously emphasizes that the decision is limited to the facts and record developed in the particular case. Whether any abortion regulation results in an undue burden is obviously a fact intensive matter.

The joint opinion purports to jettison the trimester regime of *Roe* while retaining crucial emphasis on the concept of viability. It never says whether *Roe* (even modified) was right in first instance but invokes *stare decisis*, not casually but with a lengthy discussion. Once again, the dissents seem on firm ground. Reliance on *stare decisis* has a hollow ring when the earlier doctrine is substantially

modified while being reaffirmed. The claim for following *Roe* as a matter of precedent is no doubt a plausible, even a strong one. But the joint opinion reaffirms *Roe* only as modified. It is true that in part the joint opinion treated intervening cases such as *Akron I* and *Thornburgh* as stricter than *Roe* and thus the joint opinion purported to be to that extent a return to the "real *Roe*." The joint opinion also explicitly modified *Roe*, however, and thus the stare decisis claim is an easy target.

Much early commentary on *Casey* suggests that while the joint opinion's approach is questionable as constitutional law, as a matter of policy it may reflect the national mood. That is, that the woman should ultimately retain the right to choose abortion but the state should have the authority to regulate and even discourage abortions in various ways. An ambivalent test to reflect an ambivalent national mood.

But is the joint opinion test wrong as a matter of constitutional law? Not provably, it seems to me, one way or the other. We may have to revisit the *Griswold* (contraceptives) case. Judge Bork cheerfully claimed that *Griswold* was wrong, there is no constitutional privacy doctrine. The contraceptives issue is quaint and was close to that even in 1965 when *Griswold* was decided. But the privacy issue is anything but quaint. If we decide to reject Judge Bork's advice and rather continue to conclude that Fourteenth Amendment liberty includes a right of privacy and personal autonomy, what are the frontiers of such a doctrine? The joint opinion, in the tradition of the second Justice Harlan, relies on "reasoned judgment." Others would stress history and tradition. If there is a right to use contraceptives is there a right to choose abortion? To engage in private consensual sodomy? Private consensual homosexual sodomy? See *Bowers v. Hardwick*. It seems that these are not provable matters. Different people are going to have very different reasoned judgments.

After *Casey*, there will be a tendency to go back to reread *Roe v. Wade*. It seems, however, that the case we should reread is not *Roe* but *Griswold v. Connecticut*. My point is not that Judge Bork was necessarily right about *Griswold* but that we must face up to the implications of believing that he was wrong.

The other case regarded as a prominent signal that a centrist bloc has emerged was in the religion area. *Lee v. Weisman*, decided a few days before *Casey*, held that prayer by clergy at public school graduation ceremonies violates the establishment clause of the First Amendment. Once again Justice Kennedy had a role that was both crucial and unexpected.

On July 3, 1989 the Supreme Court decided *Allegheny County v. Pittsburgh ACLU*. This case had to do with a creche, menorah and a Christmas tree. The Court was very fragmented in its long and complicated opinions that ran

over 100 pages in the official reports. Also, *Allegheny* was decided on the same day at the end of term that the *Webster* abortion case was decided. *Webster*, it will be recalled, attracted the same intense interest that *Casey* attracted this year. Thus, *Allegheny* was overshadowed by *Webster*.

One thing had seemed clear about *Allegheny*, however—the view of Justice Kennedy. Kennedy wrote an opinion in *Allegheny* that was a partial concurrence and a partial dissent. The opinion was joined by the Chief Justice, Justice White and Justice Scalia. One more vote and it would have been a majority opinion. In *Turning Right* Savage describes Kennedy's *Allegheny* opinion as follows:

"... he accused the majority of 'an unjustified hostility toward religion.' Kennedy also proposed a radically new approach. In his view, the government may 'aid' or show 'support for religion' so long as it does 'not coerce anyone' to give money or force them to participate in religious activities. It was not clear how far Kennedy would go, but his dissent suggested he would allow government aid to parochial schools and organized prayer in the public schools."

Savage's interpretation of Kennedy's opinion seems to be a reasonable one. Thus it appeared that just as the Court after *Webster* was one vote away from overruling *Roe*, so also after *Allegheny* it appeared to be one vote away from moving to a more accommodationist and less separatist view of the establishment clause.

Just as Thomas supplied the additional vote in *Casey* and Kennedy suddenly was unavailable to forge a new majority to overrule *Roe* so also in *Lee* Thomas joined Rehnquist, White and Scalia and once again Justice Kennedy took a walk from the position that appeared to be in line with the implications of his separate opinion in *Allegheny*.

Indeed, Justice Kennedy wrote the opinion of the Court in *Lee* concluding that the clerical invocation at public school graduation violated the establishment clause. That Justice Kennedy would write the opinion once he was in this majority was not surprising. Justice Blackmun, who was the senior Associate Justice in the majority, was no doubt gleeful to have Kennedy on board for this case and wanted to be sure that his vote was not lost during the opinion writing process. Thus, as is often the case in these situations, Kennedy was assigned to write the opinion.

It was a small miracle that any opinion of the Court at all emerged, given the divergence of views among the members of the majority. Justice Kennedy, however, managed to write an opinion that satisfied himself and that the other Justices in the majority would sign. The opinion was narrow but the other Justices in the majority had more to say in concurring opinions. Justice Blackmun and Justice Souter filed concurring opinions, each of which was joined by Justices Stevens and O'Connor.

Did Justice Kennedy fail to follow through on the principles he urged so passionately a short time earlier in *Allegheny*? Justice Scalia, in his *Lee* dissent, joined by Rehnquist, White and Thomas evidently thought so. In at least a narrow sense, however, Kennedy was consistent. The theme of coercion ran through his opinion in *Allegheny*. In *Lee* he believed that there was a subtle form of coercion on student graduates who did not wish to participate in prayer. Thus, Kennedy was faithful to his coercion test but gave it a broader meaning than readers of *Allegheny* anticipated.

Justice Kennedy mentions various points in his opinion but the essence of it is that students have no practical choice to skip graduation and they cannot sufficiently distance themselves from the invocation by refusing to participate. Thus, there is at least a degree of compulsion and the Kennedy test is satisfied.

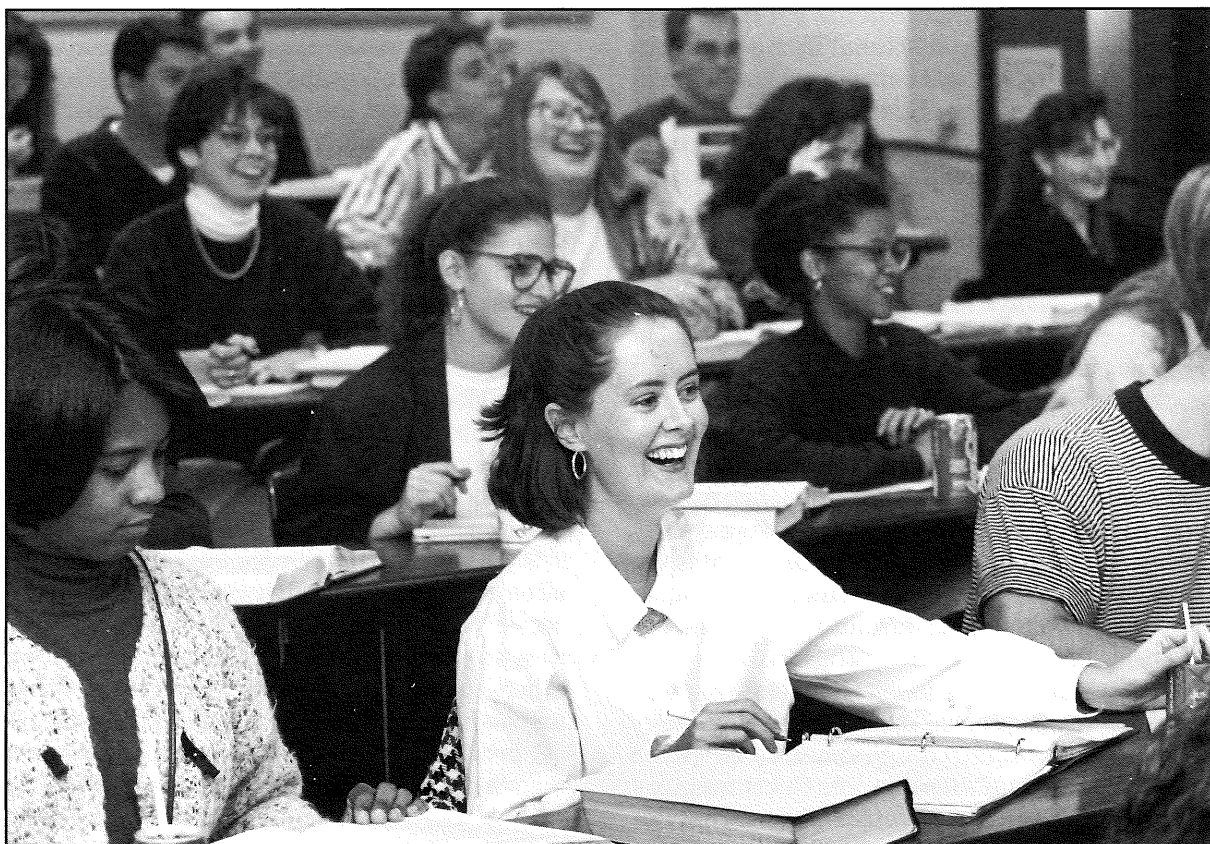
Perhaps critics of Justice Kennedy should not be too quick to despair over this one. Kennedy pointedly finessed the continuing vitality of the famous *Lemon* three-part test and he emphasized that *Lee* involved children rather

than mature adults. Although the concurring opinions addressed whether a finding of coercion is necessary for an establishment clause violation and whether practices that favor religion in general but do not prefer one sect over another violate the establishment clause, Kennedy's opinion was narrower. *Lee* may end up being a comparatively minor case. Prayer in the schools has been a "hot button" issue for conservatives, however, and *Lee* plainly reaffirms the *Engel-Schempp* ban on prayer in the public schools.

CONCLUSION

David Savage has made a signal contribution to the literature about the Supreme Court with the publication of *Turning Right*. The book is simultaneously readable, vivid and serious. It emphasizes materials that are often neglected in writings about the workings of the Court. Savage relies heavily on interviews but the book is free of the aura of gossipy expose.

Turning Right will reward both general and professional students of the Supreme Court. As *Casey* and *Lee* exemplify, however, the Supreme Court never takes its final turn.



Little, Brown & Company has commissioned Professor Charles E. Rounds, Jr. and Eric P. Hayes, Esq. to write the Seventh Edition of Loring, *A Trustee's Handbook*. Professor Rounds teaches Trusts here at Suffolk. Both Professor Rounds and Mr. Hayes are graduates of Suffolk Law School. Mr. Hayes is an officer of The First National Bank of Boston as was Professor Rounds from 1976 to 1983. Publication is scheduled for sometime in 1994. *The Advocate* has asked Professor Rounds to comment on the project. As Suffolk's curriculum currently is under intense review and re-examination by the Curriculum Committee, the Advocate is also taking this opportunity to solicit Professor Rounds's thoughts on the teaching of Trusts.

IN THE MATTER OF TRUSTS

For the time is coming when people will not endure sound teaching, but having itching ears they will accumulate for themselves teachers to suit their own likings, and will turn away from listening to the truth and wander into myths.

II Timothy 4:3, 4:4



The first edition of *A Trustee's Handbook*, by Augustus Peabody Loring, appeared in 1898. Mr. Loring was a practicing lawyer and a Boston trustee. In the forty years which passed before the death of Mr. Loring, the Handbook played a significant part in the dramatic growth of trust administration in this country.

It performed the very useful office of rendering practical assistance in the everyday problems that arise in the management of the property of others.

In 1940 Prof. Scott wrote that for more than thirty years he had had the Handbook on his desk or near at hand. Mayo Adams Shattuck, Esq., who quite coincidentally was my grandfather's lawyer, prepared the Handbook's fifth revision. The renowned James F. Farr, Esq., whose name will forever be associated with the concept of the common trust fund, prepared the Handbook's sixth revision.

A trustee holds title to property for the benefit of someone else. To the person who does not know this, the trust is a vague, elusive, somewhat mysterious concept. Title is the key to unlocking the secret of the trust. Title is what makes it work. Title is what gives the trust its utility. Take,

for example, the matter of probate avoidance. As title is not in the beneficiary per se, the beneficiary's death or incapacity usually will not interrupt the continuity of the trust's administration. Thus a trust simultaneously can perform the functions of a property guardianship, a will, a durable power of attorney and much more.

To the lawyer, the trust is a "fiduciary relationship with respect to property, subjecting the person by whom title to the property is held to equitable duties to deal with property for the benefit of another, which arises as a result of a manifestation of an intention to create it."¹ The client tends to think of the trust in quite different terms, as some kind of basket or receptacle. How property gets into the basket and what role the trustee is supposed to play in the matter he never fully understands.

Thus a trust simultaneously can perform the functions of a property guardianship, a will, a durable power of attorney and much more.

The Handbook is about the rights, duties, and obligations of the parties once the trustee takes title to the trust property, once the property ends up in the basket. The primary focus is on "personal" trusts, that is to say trusts created by human beings for human beings. Some attention is paid as well to trusts for charitable purposes and trusts created by corporations for their employees.

The trust is a complex legal organism that survives on private property. Its earlier forms pre-date even the Norman conquest. The trust as we know it today is the product of centuries of evolution. According to Prof. Maitland, "[o]f all the exploits of Equity the largest and the most important is the invention of and development of the Trust."²

The trust "is an 'institute' of great elasticity and generality; as elastic, as general as contract."³ The trust provides enlightened property owners and their lawyers with a

¹I Fratcher, *Scott on Trusts* §2.3 (1987).

²Id. at §1.

³Id.

mechanism for seeing to the needs of the young, the disabled, and the elderly. And it can do this far more efficiently, far more cost-effectively, far more creatively, far more flexibly, far more expeditiously – and with far more dignity – than the state can. In this regard, even a charitable trust is no match for the private personal trust. Only one's imagination limits the purposes for which such trusts may be created. To be sure, the institution of the private personal trust can never accommodate the needs of everyone, but each person who is properly cared for pursuant to its terms is one less person who has to deal with – and be a burden to – the welfare bureaucracy.

Only one's imagination limits the purposes for which such trusts may be created.

Alas, however, this private welfare system exists more in theory than in practice. For it to work, the country needs more than enlightened settlors. It needs a bench and bar that understand the concept of the trust and its myriad possibilities. It also needs a corps of uncorruptible and conscientious trustees.

History will show that sometime in the 1960s the center of gravity in this country began to move from the private individual to the state. It was about that time that law schools set about the process of marginalizing the teaching of the law of trusts. While most institutions now require courses on state regulation, few institutions now require a course dedicated to the law of trusts. Often the law of trusts is an afterthought buried somewhere in an elective course on estate planning.

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This cleansing process is about complete, with Suffolk being one of only a few hold-outs in the entire country. It is expected that sooner rather than later Suffolk will go the way of the other law schools, downgrading the teaching of trusts to elective status – or to an elective offering on a required menu. The sentiment for downgrading trusts will inevitably intensify as Suffolk brings more and more lawyers onto its faculty who were never formally trained in this substantive common law discipline and as the older common law lawyers depart.

It is my best guess, based upon years of informal discussions with students, based upon the unsigned returns of my 1992 poll of students finishing up the trust component of Wills and Trusts, and based upon the experience of other courses that have been downgraded from required to elective status that the percentage of Suffolk students in any given class who would elect to take trusts would soon settle at about 50%, with the percentage rising somewhat in inverse proportion to the perceived rigor of the instruction.

The poll revealed that approximately 60 out of 200 students would have passed up trusts were it not required – and this is with full knowledge that trusts is a subject tested by the bar examiners. Fifty of the 60 did admit that a decision not to elect trusts would have been a mistake – although some of my friends have discounted these anonymous admissions as the “I went through hell, and you can do the same” reaction of the basic training graduate or as the natural inclination of students indiscriminately to bond with whatever course they happen to be taking.

The national marginalization of the teaching of the law of trusts, of course, has done enormous injury to the institution of the trust itself. It has worked to the disadvantage of the client whose attorney is unable to recognize when the pleading of a trust – or the creating of a trust – could provide the solution to his problem. All too often, the attorney now turns to state regulators when the assertion of a trust relationship would have been the more appropriate and effective strategy. All too often conveyancers advise the creation of legal life estates when their clients would be better served by the creation of trusts.

This marginalization also has caused those attorneys who have been introduced to the trust in the estate planning context to see it only as a tax avoidance device. As has been suggested, the trust's major social utility lies elsewhere.

This marginalization also has caused those attorneys who have been introduced to the trust in the estate planning context to see it only as a tax avoidance device. As has been suggested, the trust's major social utility lies elsewhere.

By setting about to cleanse the bench and bar of its traditional collective understanding of the trust, law schools do the common law as well an enormous disservice. In the past, the law schools required their students to take Torts, Agency, Property, Contracts, and Trusts so that they might master the substantive common law. While these disciplines were probably seen as “components” of the common law, they are actually “perspectives” of the common law. They are different facets of the same gem. The trust,

for example, can be looked upon as an evolution in the concept of agency. On the other hand it could just as well be looked upon as one side of the legal-equitable property coin. Contractual rights are often held in trust. Breaches of fiduciary duty are essentially torts. And so it goes. The trust is not merely an estate planning device, it is marbled throughout the common law. Moreover, as statutes in derogation of the common law are strictly construed, it lurks as well in the most unlikely of places; environmental law, labor law, family law, international law, intellectual property law, the law of non-profit corporations, the law of taxation to name just a few.

The trust is not merely an estate planning device, it is marbled throughout the common law.

In this country, approximately 3 trillion dollars worth of property is now held in trusts, with much of it being held in trusts of the employee benefit and charitable variety. As more and more of the nation's wealth concentrates in the hands of trustees, the number of crimes involving the theft and embezzlement of equitable or beneficial interests inevitably will rise. Thus even the criminal prosecutor and the criminal defense lawyer cannot be assured of practicing in a trust-free environment.

The Handbook was last updated in 1962. Like Rip van Winkle it awakens into a very different world where the

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state dispenses many more entitlements and regulates commercial activity far more intensely than it did then. Not only the nation's center of gravity but also the focus of its consciousness is shifting to the state. Whether, in light of these realities, the trust as Mr. Loring understood it survives the next century remains to be seen.

It is said that in the early part of the thirteenth century the precursor of the trust facilitated conveyances for the benefit of the Franciscan friars. According to Prof. Maitland the greatest achievement of English jurisprudence is "the development from century to century of the trust idea."⁴ Whether this noble legal structure, which took so long to build, falls into abandonment and disrepair in the next millenium will depend in large part on the fate of private property rights. After all, the private right to dictate how property is used is one incident of ownership.

Should the day ever come when wealth, as a practical matter, flows to and from the state, the age of the trust will be at an end. Whether that day will ever come about and, if it does, whether the law school curriculum of the 90's will have been a cause or an effect, or something of both, are matters left for the reader to contemplate.

⁴Id.

BOOK REVIEW

REFLECTIONS OF AN AFFIRMATIVE ACTION BABY

by Stephen Carter

Reviewed by Gerard J. Clark, Professor of Law



After law school and a year clerking for a trial judge, my first job as a lawyer was with a legal services law reform project in Newark, New Jersey. The office had no in-take of clients, but was supposed to seek out links to the community to do group representation and impact litigation.

The city was badly polarized by the gun-toting Mayor Anthony Imperiale and by the fact that just three years before, in 1967, a large section of the city burned in the infamous Newark riots. The acres of charred buildings were symbolic of the feelings of the large and impoverished black community. The poet Imamu Amiri Baraka (Leroy Jones) was the para-military leader of a large black-separatist organization.

The State of New Jersey, under the leadership of Governor Hughes, had chosen the central ward of Newark as the site for the construction of the New Jersey College of Medicine and Dentistry, a project that would cost close to one billion dollars and last for over five years. The construction trade union locals that represented the Newark area were essentially all white.

One of my first assignments was to attend the meetings of a group of minority journeymen tradesmen who had done non-union work in Newark for years. This group was determined not to allow the medical school to be built by the extant white unions. The Philadelphia Plan was one of the first attempts to integrate white unions through the use of federal Executive Order 11246, which required affirmative action plans on construction projects that included federal monies. Through a series of endless meetings with the U.S. Department of Health, Education and Welfare and the State of New Jersey an acceptable plan was established which would require that all bidders guar-

antee that one-third of all journeyman hours and one-half of all apprentice hours be worked by minorities. In addition and most important, the contractors and their subs had to accept and employ trainees referred from a skills training school that the State agreed to fund at a rate of in excess of one million dollars per year.

The unions and contractors challenged the plan in federal court, but with the backing of the state and federal government the plan prevailed. Armed with this legal victory and the backing of the newly-elected black mayor, Kenneth Gibson, the minority construction workers succeeded in convincing the sponsors of other large construction projects, including, for instance, the Port of New York Authority in the construction of Newark airport, to adopt the plan. The plan operated for eight years under the Republican Governor Cahill's administration until the election of Democrat Governor Byrne who discontinued the funding for the training school and for the personnel who monitored compliance with the plan on a daily basis on the job sites.

In eight short years, however, the plan had indeed achieved its goals. Newark's construction unions were integrated. The trainees proved their worth on the job and gained sufficient knowledge of union operations to gain entry into membership under the watchful eye of litigious legal services lawyers like myself. Once inside the union structure the minorities were able to monitor their own hiring halls and admission procedures to assure fairness.

Thus the Newark Plan is a prototypically liberal solution to a social problem. Good societies must strive to achieve greater parity. When faced with inequality, simply organize a legal framework and a system of subsidies to combat social inequality. This was the basic premise of Johnson's Great Society, Roosevelt's New Deal, the graduated income tax, welfare, medicaid and medicare, unemployment compensation, housing subsidies and social security. The nation's commitment to these programs was based upon a consensus that equalization is a worthy goal.

Discrimination against minorities obviously undermined these goals and thus the Civil Rights statutes of

1957, 1964, 1965, 1968 were enacted. The nation became sensitized to the plight of the victims of inequality through the activism of the sixties, the leadership of Martin Luther King, Malcolm X and the Black Panther Party and the riots in Watts and Newark. Student demonstrations at Berkeley, Columbia and Kent State heightened an awareness that the nation confronted some serious issues around race and equality. Indeed it was these sensibilities that gave rise to the women's liberation movement.

But laws against discrimination were only marginally effective because the assertion of these rights required litigation and litigation required lawyers and lawyers required money. Litigation at best addressed the rare and extreme cases. Means were sought to mainstream blacks more effectively in order to make them true participants in the economic machine that had worked so well for waves upon waves of immigrants. This gave rise to the concept of affirmative action first embodied in Executive Order 11246, signed by Lyndon Johnson in 1967. The idea spread quickly. Schools adopted it in their admissions procedures, state and local government followed suit. It looked like a quick fix to four hundred years of injustice. Ah, such naivete.

But laws against discrimination were only marginally effective because the assertion of these rights required litigation and litigation required lawyers and lawyers required money.

As the idealism of the sixties and the early seventies ebbed and the political power that went with it, the focus on affirmative action moved away from the unfortunate victim of centuries of discrimination and turned instead to the displaced applicant for positions given to minorities, the Allan Bakkes of the world. The courts legitimated this focus and placed the legality of affirmative action in considerable doubt. As the Reagan years proceeded and the constitutional philosophy of the Supreme Court moved to the right, the validity of affirmative action has been placed in doubt.

In *Croson*, 488 U.S. 469 (1989), it will be recalled the Supreme Court invalidated an affirmative action plan promulgated by the city of Richmond which required that general contractors that bid on city-funded construction projects sub-contract at least thirty per cent of work to minority sub-contractors. In Justice O'Connor's dense and difficult opinion the Court found insufficient factual predicates for the program. The City Council had found that minorities were awarded less than one per cent of city-funded construction contracts although they constituted fifty per cent of the city's population and that contractor associations were dominated by whites. There was also testimony

that the conduct of the construction industry in the area was dominated by "discrimination and exclusion on the basis of race." The Court stated that "an amorphous claim that there has been past discrimination in a particular industry" cannot justify affirmative action of the sort that Richmond had promulgated. Likewise the use of statistics to prove underutilization was inapposite. The opinion suggests that only specific findings of discrimination against specific defendants will be sufficiently "narrowly tailored" to justify the remedial steps of affirmative action. These appear to be the same type of findings required by the court in Title VII actions where statistics of underutilization are insufficient to establish the rigid intent requirements of *Wards Cove*, 490 U.S.642 (1989), which were somewhat softened by Congress in the 1991 Civil Rights Act. Such findings will be impossible for the builders of large government projects to make. One would assume that hearings would have to be held and targeted employers would certainly fight and perhaps litigate findings that they had previously engaged in discrimination making the imposition of affirmative action necessary against them. One can expect similar prohibitions against private sector affirmative action plans in the future through civil rights act interpretations.

Affirmative action has been a staple in admissions to educational institutions since the early 1970's and has produced a large group of educated minorities. Application of Croson's requirement of specific findings and narrow tailoring to affirmative action plans promulgated by educational institutions is difficult. It may require a university to make applicant-specific findings before relaxing standards applied to the larger applicant population.

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However, an end to educational affirmative action is advocated by Professor Stephen Carter of Yale Law School in his book *Reflections of an Affirmative Action Baby*. Carter states that "racial preferences are founded on the proposition that the achievements of their beneficiaries would be fewer if the preferences did not exist." All of the arguments in its favor, including institutional racism, inferior education, overt prejudice, the lingering effects of slavery, cultural bias "entail the assumption that people of color cannot at present compete on the same playing field with people who are white." This is a bit surprising because in the first sentence of Chapter One he confesses that "I got into law school because I am black." The book goes on to "chronicle the ambivalence and frustration of the role of beneficiary (or suspected beneficiary)." That

ambivalence is felt by everyone and Carter's willingness to discuss it honestly is a contribution to an area where honest inquiry seems rare indeed. To the question of whether affirmative action is really preferential treatment, he responds with an honest: Of course! What is affirmative action but preferential treatment for a fixed group of beneficiaries? Denial or obfuscation of this essential element of affirmative action by those of uncertain ego can only obscure the question. A more relevant question he claims is what the beneficiary of the program has done with the boost afforded. But the creation of specific slots for blacks results in the "best black" syndrome which creates a separate set of evaluative criteria for black achievement which serve only to isolate blacks even further.

The Office of Civil Rights of the United States Department of Education recently forced Boalt Hall Law School of the University of California at Berkeley to cease its practice of using different criteria in the evaluation of minority applicants than those used for other applicants to the law school.

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In the late eighties, affirmative action began to be justified on the basis of diversity: the country is made up of a broad range of cultures and learning centers and work places will be enriched by a multi-cultural environment. Carter rejects this argument as well. He attacks a recent Supreme Court case, *Metro Broadcasting, Inc.*, 110 S.Ct. 2997 (1990), where the Court approved racial preferences in the distribution of broadcast licenses by the FCC to promote "programming diversity." This, he claims, "supposes that biology implies ideology" by ignoring the interwoven diversity of subcultures and aesthetic visions represented by America's black nation, thirty million strong. Further, it pressures black artists to conform to some supposed group-think instead of expressing their own artistic impulses. This would appear to place Carter with Harvard Law's Randall Kennedy in his critique of Derrick Bell and other black legal scholars who claim that "academic scholars of color produce a racially distinctive brand of valuable scholarship," which grants them some advanced standing in the debate about racial relations and concomitantly places special responsibilities on scholars of color. See Kennedy, *Racial Critiques of Legal Academia*, 102 Harv. L. Rev. 1745 (1989). Kennedy claims that there is a single set of standards by which all scholarship must be judged.

A recent example of a claim of special responsibility was articulated in Third Circuit Judge A. Leon Higgenbotham,

Jr.'s *An Open Letter to Justice Clarence Thomas from a Federal Judicial Colleague*, 140 U. Pa. L. Rev. 1005 (1992), exhorting Thomas "to recognize that both your public life and private life reflect this country's history in the areas of racial discrimination and civil rights." He excoriates Thomas for past criticisms of the Warren Court and Justice Marshall wondering if they were motivated by a perceived "political duty to the Reagan and Bush administrations." He reminds Thomas that but for the efforts of those he criticizes, he "might still be in Pin Point, Georgia working as a laborer as some of [his] relatives did for decades." He wonders about Thomas's self description as a black conservative when "at every turn, the conservatives, either by tacit approbation or by active complicity, tried to derail the struggle for equal rights in this country."

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Carter dedicates a chapter to refuting the notion that there is something antagonistic between black voters and conservatives. Indeed he quotes a Heritage Foundation speech by Clarence Thomas himself complaining about the fact that black conservatives constantly have to prove the sincerity of their beliefs. Carter goes on to suggest that conservative positions on crime, religion and education are more in harmony with the opinions in the black community than is appreciated by whites.

He rejects the argument, however, that affirmative action is unfair to whites: affirmative action as a distributive justice program is no different than taxing people for benefits they may not receive like disaster relief. Further, many Ivy League admittees receive a boost based on family, connections or money.

Instrumentally, affirmative action fails the test as well to Carter. Using himself as an example and claiming not to have "suffered serious disadvantage because of systematic racism," as the product of educated parents and middle class upbringing, he claims that affirmative action touches only the top twenty per cent of blacks who are less victimized by the system than the eighty per cent whom it ignores. To this extent it is "racial justice on the cheap" because it diverts attention from the real needs of the black community for better schools, housing and health care.

Viewing affirmative action now in retrospect, perhaps we should say good riddance. For one it seems to have gotten perverted almost from the start, at least in the employment field. Most governmental agencies responded to the call for affirmative action by the creation of offices for civil rights enforcement. This bureaucratized the problem. Re-

ports were filed; forms developed; ads were monitored. These offices were often staffed by minorities and thus isolating them from the agency personnel. Sanctions for failure to comply with affirmative action regulations became politicized and rare. Thus while there was a lot of talk about affirmative action there was very little compliance and the enforcement offices became ineffectual bureaucratic appendages. In the world of employment the truly effective affirmative action plan was the rare exception.

In university admissions, affirmative action continues, usually under the rubric of cultural diversity. Legal challenges are rarer here because rejected applicants find it difficult to prove that but for such programs they would have been admitted. Also *Bakke* made it clear that the Fourteenth Amendment did not require strictly meritocratic admissions.

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Constitutional color-blindness is a laudable goal. Race ought to be irrelevant to access to opportunity. Historically the use of race has been an evil. Somehow to create a remedy for racism that utilizes race as a basis for access to a benefit creates a dissonance that is not easily explained away. Further once race becomes relevant it must be defined with precision. Reading the statutes of Nazi Germany defining who was a Jew or the statutes of South Africa regulating access into white areas is offensive to our sensibilities. Defining who is black enough to gain a preference is difficult, but the problem is exacerbated when we extend the preferences to "Asians" or to those with "Spanish surnames." Further extending affirmative action to other minority groups, recent immigrants and women raises a whole set of issues not really addressed by Carter nor herein.

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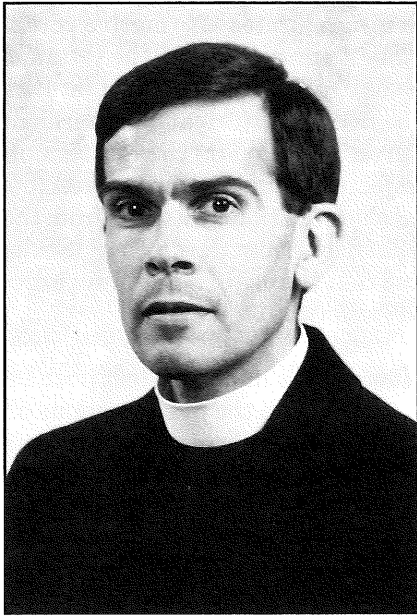
As a matter of constitutional law, the use of race as a statutory classification differentiates affirmative action from other channeled benefits programs like the veterans preference, subsidies for the aged or blind or wheat farmers or tax benefits for the owners of historical landmarks or for small businesses, Carter's opinion on the matter notwithstanding. *Croson* rejects the distinction between benign and invidious racial classifications. Justices from the far left (Douglas in *DeFunis*) and from the far right (Scalia in *Croson*) have suggested that the use of race always introduces a "capricious and irrelevant factor."

Few subjects have generated as much interest both inside and outside of the academy. In the past, opinions on affirmative action were viewed as a litmus test on one's commitment to coming to the aid of the nation's minorities. But the Reagan revolution changed all of that. Government programs are viewed with a much more critical eye. The nation's commitment to the less fortunate has weakened. There appears to be a backlash in the white community. Leadership from the minority community appears weaker and less unified. Maybe Machiavelli was right: might makes right. When the nation's cities are aflame and the black panther party advocates that blacks arm themselves, affirmative action looks like part of a just and reasonable solution; when the nation worries about how to pay for the excesses of the eighties, the problems of poor people seems to fall off the political agenda.

This is unfortunate. Justice Marshall in *Bakke* labeled the position of the Negro in America as "tragic." He went on to catalogue familiar comparative statistics on life expectancy, child mortality, median income, which have deteriorated further since he wrote in 1978. Programs that were discretely focused upon those who have been denied the opportunities for education and employment, like the Newark Plan, have enhanced opportunity and achieved some modest successes. Given Justice Marshall's tragic reality, Carter's level playing field just does not cut it.

Legislative Intent: *Fact or Fiction?*

Robert J. Araujo, S.J.¹



Frequently, lawyers and law students who wrestle with the meaning of a statute – be that legislative text written by a local or county body, a state legislature, or Congress – will ask, “What is the legislative intent underlying this text?” Just as frequently, the interpreter thinks that if s/he can ascertain the intent of the institution which enacted the statute, most – if

not all – questions concerning its meaning in general – as well as specific – contexts will be answered.

In addressing the issue of legislative intent, many interpreters will turn to legislative history. Like the relationship in which the presence of smoke leads to fire, legislative history is often examined by interpreters to identify legislative intent. While he acknowledged that the legislative intent underlying a statute may be difficult to discover, Max Radin considered legislative history as “the richest kind of evidence” that can reveal something about both the intent of the legislature and the meaning of the legal text it enacted.² Joseph Chamberlain once concluded that the intent of Congress in passing legislation is often contained in the work of the committee which was initially responsible for the bill and most of the amendments that become law. In his estimation, the legislature often adopts the

work of the committee as its own – particularly when few, if any, amendments are added once the bill leaves the committee.³ Judge Abner Mikva of the District of Columbia Circuit Court of Appeals (who served several terms in the Illinois legislature and Congress before his appointment to the bench) attaches special significance to committee reports in assessing legislative intent. In his view, committee reports generally possess a reliability and importance absent from other elements of legislative history because the committee report often represents the last meaningful discussion and debate on the bill before it is passed by the legislature.⁴

These are some facts about legislative intent. One fiction accompanying the fact is that by ascertaining the legislative intent of any statute, the meaning it has – and therefore, the outcome of the case – are, if not foregone conclusions, then at least relatively simple goals to achieve.

Recently, an interesting and unusual case arose under a Kentucky State statute which once again raised the question: “What did the legislature intend by enacting this statute?” The question of interpretation involved a criminal statute making the operation of a motor vehicle – while the driver was under the influence of alcohol – a punishable offense.⁵ The defendant in the case was a paraplegic who operated his motorized wheelchair on a public way after he had consumed several beers.⁶ The paraplegic was forced to drive his wheelchair onto the road because the sidewalk on which he had been traveling was blocked. The wheelchair operator was subsequently cited for violating the state’s drunk driver law. A principal issue in the case was whether the paraplegic was a “driver” who “operated a motor vehicle.” The judge assigned to the case was interested in the legislature’s intent on these points. She consequently ordered counsel to advise her on whether the legislature intended to consider motorized wheelchairs as vehicles and

¹A.B., J.D. Georgetown University; M.Div., S.T.L. (cand.) Weston School of Theology; LL.M., J.S.D. Columbia University. Lecturer in Law, Boston College Law School. The author has recently written a more comprehensive work on the use of legislative history in statutory interpretation. See, *The Use of Legislative History In Statutory Interpretation: A Look At Regents v. Bakke*, 16 Seton Hall Legis. J. 57 (1992) and *The Use of Legislative History In Statutory Interpretation: A Recurring Question – Clarification or Confusion?*, 16 Seton Hall Legis. J. 551 (1992).

²Max Radin, *Statutory Interpretation*, 43 Harv. L. Rev. 863 (1930) [hereinafter cited as Radin, *Statutory Interpretation*], at 888-9.

³Joseph Chamberlain, *The Courts and Committee Reports*, 1 U. Chi. L. Rev. 81, 82 (1933).

⁴Abner Mikva, *A Reply To Judge Starr's Observations*, 1987 Duke L. J. 380, 385 (1987) [hereinafter cited as Mikva, *Reply*].

⁵See “Wheelchair Tests a Drunken-Driving Law,” *New York Times*, June 21, 1992, A16.

⁶*Id.*

whether their operators, if drunk while operating the wheelchairs, would be considered "operators" subject to the provisions of this statute.⁷

A co-sponsor of the bill which ultimately became the drunk-driving statute argued that the bill was never intended to encompass wheelchair users. As he said, "It was not something we [the legislature] contemplated. This is the first time I ever heard of something like this happening."⁸ Nonetheless, the court found that the statute applied to the wheelchair operator.⁹

The never-ending quest for discovering the "intent of the legislature" remains a challenge that has been and continues to be a major interpretive issue over which legal commentators have debated for a better part of this century. Views concerning the importance of determining legislative intent can be supportive of the quest.¹⁰ While he recognizes that legislative texts can reflect "diffuse and ambiguous meanings," Judge Mikva concludes that there exists beneath legislative ambiguity a "discernible legislative intent."¹¹ A middle ground acknowledges that, while legislative intent is a fiction, it remains a useful tool in the interpretation of legislation.¹² For example, Justice Frankfurter once noted that while "a loose statement" offered by a key legislator during the enactment of a statute "will hardly be accorded the weight of an encyclical . . . , a painstaking, detailed report by a . . . committee bearing directly on the immediate question may settle the matter."¹³ Justice Scalia holds a skeptical view about legislative intent and the interpreter's ability to determine what it is.¹⁴ As he has succinctly stated, ". . . to tell the truth, the quest for 'genuine' legislative intent is probably a wild-goose chase anyway . . . If I am correct in that, then any rule adopted in this field represents merely a fictional presumed intent, and operates principally as a background rule of law against which Congress can legislate."¹⁵

A useful guideline for today's lawyers and law students who deal with questions about the meaning of statutes and legislative intent is that we ask the right question. Rather than wrestling with the issue: "What did the legislature think about this issue and what meaning would they give the statute in this case"; we might be better off thinking of the question: "How might the drafters of the statute apply its guidelines to the case before us today?" As the case from Kentucky suggests, legislators (as individuals, as members of a legislative committee, and as members of the entire legislature) can neither think of nor identify all factual contexts in which the legislative text may be applied in the future. As the case of the drunken wheelchair operator illustrates, the legislature simply never thought about this type of case when it enacted the statute.

The scholarly controversy surrounding the issue of "legislative intent" may have begun with the exchange between Profs. Max Radin and James Landis. Prof. Radin, a member of the so-called realist school of the 1930's, argued that "legislative intent" is a fiction which has little, if any, bearing on the meaning of statutory law.¹⁶ For him, it was the purest-of-fictions to suggest that the members of a legislature (consisting of many people who hold different, sometimes conflicting views of legislative policy) share a common intent in passing a statute. Concerning the act of statutory interpretation, he stated,

It has frequently been declared that the most approved method is to discover the intent of the legislator. Did the legislator in establishing this determinable have a series of pictures in mind, one of which was this particular determinate? On this transparent and absurd fiction it ought not to be necessary to dwell . . . A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected, and in regard to which

⁷*Id.*

⁸*Id.*

⁹*No Drunk-Driving Trial For Wheelchair User*, New York Times, June 29, 1992, A14.

¹⁰See Gerald MacCallum, *Legislative Intent*, 75 Yale L. J. 754, 756 (1966) [hereinafter cited as MacCallum, *Legislative Intent*]; Earl Maltz, *Statutory Interpretation And Legislative Power: The Case For A Modified Intentionalist Approach*, 63 Tul. L. Rev. 1 (1988) [hereinafter cited as Maltz, *Statutory Interpretation*]; David Farber & Philip Frickey, *Legislative Intent And Public Choice*, 74 Va. L. Rev. 423 (1988) [hereinafter cited as Farber & Frickey, *Legislative Intent*].

¹¹See *supra* note 4, Mikva, *Reply* at 385.

¹²See Frank Horack, *The Disintegration Of Statutory Construction*, 24 Ind. L. J., 335, 340-1 (1949); Richard Nunez, *The Nature Of Legislative Intent And The Use Of Legislative Documents As Extrinsic Aids To Statutory Interpretation: A Reexamination*, 9 Cal. W. L. Rev. 128 (1972); Charles Nutting, *The Relevance Of Legislative Intention Established By Extrinsic Evidence*, 20 B.U.L. Rev. 601, (1940). See also Felix Frankfurter, *Some Reflections On The Reading Of Statutes*, 47 Colum. L. Rev. 527, 538 (1947) [hereinafter cited as Frankfurter, *Reflections*].

¹³See *supra* note 12, Frankfurter, *Reflections* at 543.

¹⁴See Antonin Scalia, *Judicial Deference To Administrative Interpretation Of Law*, 1989 Duke L. J. 511, 521 (1989); see also L. LaRue, *Statutory Revision: Lord Coke Revisited*, 48 U. Pitt. L. Rev. 733, 752 (1987) (statutes may have many "intents").

¹⁵Scalia, *Judicial Deference*, *supra* note 14, at 517.

¹⁶See *supra* note Radin, *Statutory Interpretation*, 863.

many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.¹⁷

Radin modified his initial position some dozen years later when he clarified several of his earlier views. While he did not retract his previous opinion that legislative intent is a fiction, he suggested that his earlier statements about an interpreter's inability to discern the purpose underlying a particular statute may have been too broad.¹⁸ While remaining skeptical about the fiction of "legislative intent," Radin subsequently concluded that the words of the statute could reveal to the interpreter some evidence about the purpose for which the statute was enacted as well as the means by which it could be implemented.¹⁹

But Radin's revised theory casts a shadow on the concept of representative democracy as we practice and experience it in the United States. So many of our political, economic, and social institutions operate only because there is a delegation from the whole to a smaller group. With this delegation comes authority (rarely *carte blanche* authority) that is still subject to the oversight and review of the whole. Thus, citizens (the whole) oversee the activities of Congress (the smaller group to whom power is delegated by the Constitution and by the vote). In turn, Congress (the whole) oversees the activities of committees (the smaller group to whom authority is delegated by internal rules that can be changed by Congress).

A Radin contemporary, James Landis, departed from the Radin position and argued in favor of pursuing the search for legislative intent in the interpretive enterprise.²⁰ The distance between the views of Radin and Landis may not, however, have been as great as was originally thought.²¹ Prof. Landis acknowledged that,

The real difficulty is not that the intent is irrelevant but that the intent is often undiscoverable, especially when the passer of statutes is, in most cases, a representative assembly. Intent is unfortunately a confusing word, carrying within it both

the teleological concept of purpose and the more immediate concept of meaning—the assumption that one or more determinates are embraced within a given determinable. . . .²²

Upon additional reflection, it seems to me that much of the energy still spent on prolonging the Radin/Landis disagreement would be better used to understand the social, political, or economic issues underlying the statute and how legislatures try to address them. In an American context, the relationship between legislative intent and the history surrounding the enactment of the statutes is illustrated by the civil rights laws enacted by Congress after the Civil War. The Congressional debates accompanying the enactment of this legislation reveal something about what Congress as an institution was facing and attempting to address. Donald Zeigler has examined the intent of the Reconstruction Congress which considered how federal courts might be the principal enforcers of the rights given by Congress to the former slaves. Prof. Zeigler asserts that the legislative discussion and debates from the reconstruction era are vital for our present understanding of the "evils that Congress sought to redress."²³ It would follow, then, that our consciousness of the general intent underlying the post-Civil War legislation, as revealed by the Reconstruction debates, could well guide the interpreters and courts today in dealing with the current legislation designed to deal with racial and other forms of discrimination. Even though the members of the legislature may be at odds over the precise meaning of statutes and how they are to be implemented, there is often considerably less dispute over the issues facing legislatures which prompt them to act. Whether they should respond and how they should respond are separate issues for us who attempt to interpret the work of legislatures.

With the fundamental questions that emerge from the Radin/Landis debate in mind, let me turn to a hypothetical municipal ordinance. The story begins in a quiet town where the citizens of a community use the municipal park for different forms of recreation, e.g., jogging, bicycling, walking, and picnicking. A convention has developed over

¹⁷*Id.* at 869-70. (Citations omitted)

¹⁸In responding to his earlier exchange with Landis, Radin submitted that,

My statements were undoubtedly somewhat too sweeping. They suggested approval of the English method of dealing with debates, reports and the like, a method that regards these matters as incompetent as well as irrelevant. I intended then—and I certainly should like to take the position now—that they are neither irrelevant nor incompetent, but that they are in no sense controlling. Max Radin, *A Short Way With Statutes*, 56 Harv. L. Rev. 388, 410-11 (1942) [hereinafter cited as Radin, *A Short Way*].

¹⁹*Id.* at 409.

²⁰James Landis, *A Note on "Statutory Interpretation,"* 43 Harv. L. Rev. 886, 888 (1930) [hereinafter cited as Landis, *Statutory Interpretation*].

²¹ Sometimes the myth about a dispute lives a longer, more glorious life than the reality of any differences that may have originally caused the disagreement. See *supra* note MacCallum, *Legislative Intent*, at 754. However, Prof. Radin modified his criticism of the notion of legislative intent when he suggested that use of legislative history may have some competence and relevance in statutory interpretation; but, these materials are not controlling and do not demonstrate one fixed mind. See *supra* note Radin, *A Short Way*, at 410-11.

²²See *supra* note 20, Landis, "Statutory Interpretation," at 888.

²³Donald Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 Duke L. J. 987, 992 (1983).

the years under which the town's citizens do not drive their automobiles on the gravel and asphalt paths which crisscross the park.²⁴ However, one day a teen-age boy who recently obtained his driver's license drives his family's car through the park "for kicks," as he later tells the police. The police were contacted by a number of citizens who complained that the boy never should have driven the car through the park. Although no one was physically endangered by the boy's stunt, many townsfolk who were accustomed to the absence of automobiles in the park envisioned how someone could have been injured. After all, the long-standing convention excluding motor vehicles from the park had been violated when the boy drove through the park. However, there was no official rule (either town ordinance or state statute) addressing the issue or prohibiting motor vehicles from the park.

In response to this incident, a number of townsfolk petitioned the municipal government to take action ensuring that this action will never be repeated. After going through the necessary procedure, the town council enacted an ordinance "... prohibiting all motor vehicles from the park." Thus, official notice was given by this legislative text warning one and all that motor vehicles were now prohibited from the park.

It seems that the town council intended to regulate the kind of incident – joyriding – perpetrated by the novice motorist. But what happens when a new incident unlike the boy's joyriding occurs in which another motor vehicle makes its way into the park? This time, I shall examine the case of an emergency vehicle entering the park to render life saving assistance. What intent, *if any*, did the enacting legislature have toward the case of the ambulance entering the park to assist a person needing emergency medical assistance?

Can we, as an interpretive audience *and* community, say that the legislators who promulgated the ordinance had any intent regarding the prospective interpretation and application of this statute? While there may be subtleties which could muddy the discussion, I think it both reasonable and fair to suggest that the legislative body *did* have some intent, both collectively as a unit and individually as specific members, regarding the regulation and prohibition of motor vehicles in the park. I further suggest that if the legislative authority were comprised of a group of individuals, a minority of whom did not want to exclude motor vehicles from the park, there was still some general

agreement (i.e., intent) about the ordinance they deliberated. During enactment, the members of the town council, who served as the legislators, intended to address the presence of motor vehicles in the park.

It would also be fair to state that there was probably no unanimity of opinion about the extent to which the presence of motor vehicles should be regulated. However, it is evident that the legislative body was examining a statute controlling the presence of motor vehicles in the park and that each member of the legislative authority knew s/he was debating a proposed ordinance bearing on the presence/exclusion of motor vehicles in the park.

The appropriate state legislative authority had previously defined the term *motor vehicle* "as any self-propelled rubber-tired equipment using four or more wheels to convey human beings; or, using two wheels and a self-contained power plant generating at least two horsepower to convey human beings." But, did any member of the municipal legislature intend to regulate the presence of emergency vehicles, such as ambulances, in the park? Did any member of this legislature intend to exclude emergency vehicles from the proposed ordinance's coverage? Did any legislator intend to include emergency vehicles in the prohibition? Did the majority (anywhere from fifty percent-plus of the legislature to its entire membership) share any intent concerning the status of emergency vehicles under the proposed regulation?

Assuming that most reasonable people (who subscribe to common disciplining rules and who are members of the same interpretive community²⁵) would agree that emergency assistance vehicles, such as ambulances, do not share the same status with commercial or privately owned vehicles,²⁶ can we as interpreters agree that the town council which enacted the motor vehicle ordinance *intended anything at all* regarding emergency vehicles like ambulances? Probably not if neither this statute nor any other statute enacted by the legislative body has addressed emergency vehicles and conferred upon them any special status that would exclude them from coverage of regulatory statutes like the one in my hypothetical.

It would seem at one level that an emergency vehicle is covered by the prohibition. After all, most contemporary ambulances would fit the state's general definition of a motor vehicle, i.e., "... any self-propelled rubber-tired equipment using four or more wheels to convey human beings

²⁴The basis for this hypothetical comes from a synthesis of examples used by Kent Greenawalt, *Objectivity and Law*, The Julius Rosenthal Lectures, Northwestern University Law School, (March 13-15, 1989), forthcoming publication by Oxford University Press; H.L.A. Hart, *The Concept Of Law*, Oxford, 1961, at 121; and, Paul Brest, *The Misconceived Quest For The Original Understanding*, 60 B.U.L. Rev. 204, 209-13 (1980).

²⁵See Owen Fiss, *Objectivity And Interpretation*, 34 Stan. L. Rev. 739, 744 (1982).

²⁶Prof. Greenawalt has adopted a basic standard of the reasonable interpreter. It is patterned after the standard of the reasonable lawyer-interpreter. The basic standard covers the person who is not a member of the legal profession; otherwise the standard is the same. See *supra* note 24, Greenawalt, *Objectivity*.

...²⁷ But does this mean that the town council had any particular intention regarding this class of vehicles which could surely have an important and substantive reason for being in the park while most other motor vehicles would not?

While there may be skepticism about the existence of specific legislative intent(s),²⁸ we can acknowledge and appreciate that in many cases of statutory interpretation, the interpreter subscribes to the notion that the language of the statute does reflect some institutional intention of the members of the legislature. After all, most interpreters begin with an examination of the text and ask the question, "What did the legislature, as a *single* institution, have in mind when its members considered and passed this statute?"²⁹

Even if the legislature did not have any intent (either shared by its general membership or held by individual members) concerning the exclusion or inclusion of emergency vehicles, it could be useful to determine if this statute has a teleological dimension, i. e., a goal for which it was generally *intended* to reach.³⁰

I would like to suggest a caveat about intentionalism and the corresponding search of the interpreter for legislative intent. Unlike the Holy Grail, which is real (at least for some of us) but elusive, legislative intent is a fiction, albeit a useful one, of the law. We interpreters of statutes must use this fiction carefully when we deal with statutes (which are *not* fiction). Congress and other legislatures enact statutes which provide a general policy framework. Even the most detailed of programmatic statutes³¹ cannot anticipate every potential circumstance which the statute may some day address. By necessity, then, statutes, in order to remain operational and effective, must be general and must retain flexibility in their language so they can deal, through the interpreter, with these unforeseen circumstances. It is up to us as advocates, administrators, and judges (for we are all interpreters) to appreciate the limits of any "intent" that was in the mind(s) of the legislature (either institution-

ally or individually; either objectively or subjectively³²) when the statute was enacted.

It is better to let the facts – the context – of the application help shape the meaning of the statute rather than to rely exclusively on an exhaustive (and exhausting) search for the intent of the enacting legislature. After all, since legislative intent is a fiction, what was in the individual minds of the legislators as well as in the institutional "mind" of the legislature may have been nothing more than this: *enact a statute dealing with some identifiable, general issue.*

In the famous *Bakke* reverse-discrimination and affirmative action case, Justice Powell addressed Congress's "... intent to halt federal funding of entities that violate a prohibition of racial discrimination."³³ An examination of the *Bakke* case illustrates that it is often much easier to discern something about legislative intent the closer in time the interpretation is to the enactment of the statute. As time passes, the ability to identify something about the legislature's intent becomes increasingly difficult.

It is worth noting that agencies which administer programmatic statutes are often better equipped than many other interpreters to discern legislative intent. The agencies ordinarily participate in the enactment of legislation by supplying information as well as witnesses who testify before the legislative committees which consider, debate, and amend the bills that become law. At the Federal level, agencies, moreover, stay in touch with Congress regarding the legislation they interpret and implement via the appropriations and oversight powers reserved by Congress. These agencies are generally sensitive to and mindful of Congressional attitudes and intent about the meaning of statutes. This all gives the agency a good opportunity to keep track of the institutional pulse of Congress along with the "vital signs" of its committees and of individual members who are interested in the programs generated by the statutes and administered by the agencies. In short, agencies are often better-suited than the courts to identify, ap-

²⁷See *supra* for the complete definition of "motor vehicle."

²⁸See William Bishin, *The Law Finders: An Essay In Statutory Interpretation*, 38 S. Cal. L. Rev. 1, 2 (1965).

²⁹See Farber & Frickey, *Legislative Intent*, *supra* note at 468-9.

³⁰See Maltz, *Statutory Interpretation*, *supra* note .

³¹See Frank Grad, *The Ascendancy of Legislation: Legal Problem Solving In Our Time*, 9 Dalhousie L. J. 223, 251-252 (1985) where Prof. Grad introduces the notion of "programmatic statutes," i.e., legislation that is broadly defined and creates government programs for which administrative agencies are responsible for developing the details of the program.

³²There are different levels or facets of intent. For example, within Congress there is a multitude of "intents" which may be identified by the Committee, a political party, regional composition of members who generally share views on specific issues, alliances formed by a desire to protect an industry and its labor force, as well as those that may reflect well-organized special interests. There is also subjective intent and objective intent. There is collective and institutional intent. In ascertaining what sorts of intents are to be explored, the interpreter may ask if the authors of the statute intended the words to mean something according to its plain language or according to some special sense about words?

³³*Regents of the University of California v. Bakke*, 438 U.S. 265, 284 (1978). (Italics supplied)

preciate, and understand Congress's general intent (or as Peter Strauss calls them, "views"³⁴) about particular legislation.

The late Reed Dickerson offered some helpful advice for those of us who address statutes in search of their underlying legislative intent – particularly when we appreciate the diversity of a single legislature's membership and the need for political compromise that is essential to the enactment of legislation. While acknowledging that conflicting and contrasting opinions exist in legislatures about issues and the meaning of the laws enacted, Dickerson properly noted that the fiction of an institutional legislative intent is often helpful and sometimes necessary and without which "the legislative process makes no sense."³⁵

Still, we interpreters of today ought to learn from the example of the Kentucky case I discussed earlier that legislatures – as institutions and as a collection of elected individuals – may not have had any intent whatsoever about some

issues and the application of the statutes they have enacted to them. After all, examination of even the most carefully prepared and comprehensive histories that accompany the passage of major legislation will reveal that legislatures never envisioned and therefore never considered many of the factual contexts in which their statutes are now being or will be applied.

One practical way of dealing with the difficult matter of legislative intent could well be this: instead of focusing so much energy on discovering what legislators were thinking about during the period of enactment, it might be better to ascertain in a logical way the broad goals and general purposes of the statutes we apply to specific contexts. The statute's meaning consequently becomes more a function of factual context than of the fiction of imagined intent. In the final analysis, the quest for determinate meaning may be better served by considering the statute in the context of factual application rather than solely in the fiction of legislative intent.

³⁴See Peter Strauss, *Legislative Theory And The Rule Of Law: Some Comments On Rubin*, 89 Colum. L. Rev. 427, 438 (1989).

³⁵Reed Dickerson, *Statutory Interpretation: Dipping Into Legislative History*, 11 Hofstra L. Rev. 1125, 1126 (1983).

ALTERNATIVE DISPUTE RESOLUTION

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Among the most prominent developments of American law of the past decade has been the growth of the Alternative Dispute Resolution ("A.D.R.") movement. A field rapidly growing, yet widely misunderstood, A.D.R. has begun to make its presence felt in court rooms, law schools and law firms throughout the country. References to "Multi-Door Courthouses," mediation, arbitration, summary jury trials and mini-trials are now common, yet the meanings of these terms are mysteries to many lawyers. How A.D.R. got its start, an overview of some of its component elements, and some common, practical applications in law practice are the subjects of this article.

A LOOK AT A.D.R.'s HISTORY

As a nation the United States has historically looked to its courts for the resolution of disputes far more frequently than is the case in other countries. With the apparent decline of other critical agents of social guidance and control, particularly the extended family, the church, and the neighborhood, Americans now look with ever increasing frequency to the courts for decisions and guidance during times of conflict.

While this has been occurring, the number of attorneys in the U.S. has grown dramatically. As pointed out by Derek Bok, Esq., former President of Harvard University, Japan (with a population about half that of the U.S.) has a total of around 15,000 lawyers, while American law schools produce 35,000 new graduates *annually*.² With fewer alternative social structures available for informal dispute resolution, and with plenty of lawyers available for consultation, it cannot be surprising that the number of suits filed has risen dramatically in the modern era.

Unfortunately, the level of resources available to the judicial system has in no way kept pace with the number of cases filed. Consequently, the ability of that system to respond by the method traditionally anticipated by the general public, the overseeing of periods of litigation culminating in trial (and, commonly, appeal), has diminished sharply over the past thirty years.

DEREK BOK ON ACCESS OF MIDDLE AND LOWER INCOME GROUPS

Beginning in the early 1980's, serious consideration of the public policy implications inherent in these matters began. Harvard's President Bok spoke out repeatedly, calling attention, *inter alia*, to the maldistribution of resources that results in most lawyers spending most of their time attending to the legal needs of "affluent individuals and large institutions",³ while the average person's access to the legal system is effectively stymied by the high costs and long delays inherent in the present system. The natural result is frustration and anger on the part of the millions of non-wealthy individuals who perceive themselves as excluded from any practical access to the legal system, except perhaps in personal injury cases where contingency fee arrangements are possible. Said Bok:

"This state of affairs has become so familiar that it evokes little concern from most of those who spend their lives in the (legal) profession. As I travel around the country, however, and talk to laymen in other walks of life, these problems loom so large as virtually to blot out every other feature of the legal system. The blunt, inexcusable fact is that this nation, which prides itself on efficiency and justice, has developed a legal system that is the most expensive in the world yet cannot manage to protect the rights of most of its citizens."⁴

And while certain factual claims can be debated, it cannot be doubted that we face a real problem with providing swift and comprehensive access to the courts. For example, the by now common reference to the supposedly non-litigious nature of the Japanese is contradicted by such as Professor Marc Galanter, who points out (citing Professor John Haley) that the small number of Japanese lawyers results from a deliberate and long standing Japanese government policy to limit access to the courts of that country by severely limiting the number of lawyers admitted to practice each year,⁵ and not necessarily from any lesser proclivity towards litigation on the part of the Jap-

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² 38 The Record, Assn. of the Bar of the City of New York 12-13, Jan.—Feb., 1983.

³ Id.

⁴ Id.

⁵ Professor Marc Galanter—Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society. 31 U.C.L.A. L. Rev. 4 (1983)

anese. And yet, we have a real problem to deal with in this country, regardless of the litigiousness, or lack thereof, of our Japanese friend.

WARREN BURGER SEEKS BETTER WAY

Former Chief Justice Warren Burger was another proponent of change. Writing in *"Isn't There A Better Way? Annual Report On The State Of The Judiciary"* (January, 1982) he argued that the primary obligation of lawyers is "to serve as healers of human conflicts," and that exclusive reliance by them upon the traditional litigation model will not and cannot discharge this obligation.

To fulfill our traditional obligation means that we should provide mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about.

The law is a tool, not an end in itself. Like any tool, particular judicial mechanisms, procedures or rules can become obsolete. Just as the carpenter's handsaw was replaced by the power saw and his hammer was replaced by the stapler, we should be alert to the need for better tools to serve our purpose.⁶

In that same report, the Chief Justice went on to decry the stress, lost time and expense associated with litigation. He called upon American lawyers to fashion new ways to approach their clients' problems, and specifically endorsed the use of mediation, conciliation and arbitration as problem solving mechanisms to address "our litigation explosion."

THE N.I.D.R. REPORT

Finally, in October 1983, a comprehensive report was issued by the National Institute for Dispute Resolution's Ad Hoc Panel On Dispute Resolution And Public Policy. Entitled "Paths to Justice: Major Public Policy Issues Of Dispute Resolution" the report is a comprehensive review of the need for, and the options available within, ADR. A significant contribution of the report was to provide a lexicon of common terms within the ADR field, along with suggested definitions of those terms. Adoption of this lexicon, with its accompanying definitions, should help reduce the currently widespread uncertainty as to the precise meaning of terms as they apply to ADR.

The collective impact of these works, together with others (notably Fisher & Ury's landmark *Getting To Yes: Negotiating Agreement—Without Giving In* (1981), served to give substance and longevity to the ADR move-

ment. Now widely accepted philosophically, and necessitated by the fiscal conditions of government which essentially preclude substantial funding for the courts in the foreseeable future, ADR is being increasingly embraced by judicial systems nationwide, and by the federal courts as well, primarily to address civil disputes pending in the courts.

MANY NON-JUDICIAL APPLICATIONS

To believe or assume that ADR's principles apply only to controversies before the courts is to miss important opportunities to be of service to one's clients and potential clients. As Riskin and Westbrook express it: "... we view lawyers as more than advocates. We see problem solving as the overriding function of the lawyer. In our view, advocacy—inside or outside of litigation—is simply one approach to dealing with a problem."⁷

The lawyer consequently can play an important role in a wide variety of contexts in fashioning methods of resolving disputes that meet the particular needs of a given client in a given circumstance. And while lawyers have commonly done just that informally for centuries, the ADR movement recognizes such efforts "formally" for the first time in our jurisprudential history as important and vitally necessary services which attorneys can render their clients. Indeed, an attorney who can, by careful analysis of the true needs of a client, work with that client and help the parties to fashion a remedy to an ongoing problem that is acceptable and fair to all the parties, and which avoids the expense, delay and frustration inherent in protracted litigation, has rendered valuable professional service.

HERE TO HELP, AND TO STAY

As a permanent part of the legal practice, lawyers and law students will increase their professional potential by making a conscious decision to add a working knowledge of ADR to their professional expertise.

In the first place, ADR is not some sort of all-encompassing mechanism to be invoked in every circumstance to the exclusion of more traditional forms of litigation. Indeed, there are certain cases where ADR will be of no practical use whatever, particularly those where important public policy issues are at stake which would have widespread social and legal consequences, affecting people and events beyond simply the parties to the immediate dispute. *Brown v. Board of Education* comes quickly to mind.

ADR, is a body of mechanisms, some old (e.g., mediation and arbitration), some newly devised (e.g., mini-trials), which provide a variety of options available to counsel in

⁶W. Burger—"Isn't There A Better Way? Annual Report On The State Of The Judiciary (Jan. 1982).

⁷Riskin & Westbrook "*Dispute Resolution And Lawyers*" 52-53 West (1987).

attempting to advise the client what available options are most likely to bring about the realization of the client's goals. In medical school physicians learn to examine a patient carefully to determine overall health, and to prescribe surgery – with its pain, mess, high costs and hidden risks – only as a last resort. So must attorneys learn the options to litigation – with *its* pain, mess, high cost and hidden risks – and learn how best to use these options, in order to provide best for the legal health of our clients.

THE FIRST STEP – A THOROUGH CLIENT INTERVIEW

In order to understand fully the totality of a client's circumstances, it is necessary initially to conduct a thorough interview. In this way the lawyer begins to gather the facts necessary to allow fully informed decision making as to appropriate and necessary next steps. Good interviewing skills are critical to the success of many endeavors of attorneys. Not only is the proper litigation path dependent upon information governed in this way. Attorneys who act as mediators, fact finders and arbitrators must have these skills as well.

It is not sufficient to provide the client with an opportunity to speak without interruption at the initial client conference, although this often provides much valuable information. The attorney/interviewer can obtain considerably more information in many cases by the simple device of being an "active listener." By listening closely and from time to time restating to the client the information just conveyed along with the feelings the client is experiencing, the lawyer accomplishes several goals. *First*, the client is gratified to find the attorney is actually paying attention and appears to be taking the problem seriously. *Second*, this in turn often causes the client to relax and be more willing to reveal additional information, both of a personal nature and as it relates to the problem at hand. The more complete the information available, the easier it is for the attorney to see the whole picture. *Third*, armed with complete information, the lawyer is then in a position to provide a comprehensive analysis of the client's legal circumstances, enabling the lawyer to advise the client of the full range of options available, and to determine with greater certainty how many causes of action might apply. To refer again to the medical parallel: the thorough and smart physician listens to the patient carefully, exhibiting empathy, smiling when appropriate and nodding affirmatively, and then conducts an objective head-to-foot examination of the patient. In this way not only is the patient's orally expressed complaint recognized and evaluated, but also those maladies and abnormalities of which the patient might not even be aware, but which nevertheless exist. Such physicians are generally successful practitioners of

the medical arts, are liked by their patients, and find their practices more satisfying than their more brusque, less empathetic colleagues. Interestingly, it appears that friendly, thorough and empathic M.D.'s, since they are genuinely liked by their patients, are sued for malpractice less often than their counterparts who may be equally thorough and proficient from a clinical point of view, but who appear to be cold, overly distant and apparently less personally concerned about the patients' lives. (Even if, in fact, they do not feel that way in reality the patient's *perception*, regardless of objective reality, may be the controlling force in this circumstance).

The same holds true for the attorney. Those who are not only professionally competent, and whose competence is acknowledged by their clients, but who are also empathetic (but not judgmental) are more likely to succeed in addressing their client's needs fully and completely, thus discharging their real and ethical obligations to the client. They will also find their work personally more rewarding and their clients more satisfied, and thus more prone to be forgiving when things go wrong.

In sum, as expressed by Riskin and Westbrook, the interviewer has two primary objectives: 1) to elicit information so as to enhance an understanding of the problem, and 2) to establish a relationship which includes trust and rapport.⁸

EVALUATING THE CLIENTS NEEDS

Having conducted a thorough interview, the lawyer must evaluate all the information gathered, together with information from such outside sources as is necessary and prudent in the circumstances. The next questions must be:

- 1) What is the real problem, and
- 2) What is the client's actual interest, i.e., what does the client really want?

Lawyers sometimes speak too quickly in suggesting their own opinions in these areas. In particular, visions of law suits seeking money damages spring, sometimes too quickly, to their minds. At times, of course, this option is the only viable one. And, whenever it is a possibility, the lawyer is duty bound to explain it to the client at the appropriate time. But it is often better to hold off, opting first to see if some other, simpler and less taxing approach might satisfy the client's needs and interests.

A simple example illustrates the point. A client informs you he wishes to sue his next door neighbor for assault and battery. Your interview, along with a police report the client

⁸Id. at 87.

has brought along, indicates that the neighbor did indeed shove your client without legal justification or excuse; further, you learn the neighbor is fairly well-to-do, and has the ability to pay any reasonable judgment. Your client's *position* is that he wants to sue. If the analysis ended here, any competent attorney could simply go through the mechanics of initiating the suit, prosecuting it, obtaining a favorable judgment, and perhaps even collecting the full amount of damages awarded. This would vindicate the client's stated position. But it may well do nothing to address the client's real *interest*. Further conversation with the client reveals that the shoving incident followed months of wrangling over use of a common driveway, took place in full view of many neighbors gathered for a cook-out in your client's backyard, and was precipitated by your client's daughter's loud and unkind references to the neighbor's obvious obesity. The neighborhood, once peaceful, is now on edge and is factionalized.

When you then ask the client what he would like to accomplish by a law suit, he replies that what he really wants is an apology for being shoved, especially in front of the whole neighborhood, which he plainly feels has caused him to "lose face." He also wants free and unobstructed use of the common driveway again and a pledge from his corpulent neighbor to avoid further trouble. He says nothing about money. In short, he wants peace, and his dignity, restored.

By looking past the client's stated (and legally correct) *position*, and helping him to verbalize what he actually wants out of the transaction, the lawyer has identified the client's *underlying or motivating interest*. Having identified that interest, you as the lawyer can now help your client solve "the real problem," which makes for a happier client and a problem that is less likely to repeat itself if approached with care.

WHICH PROCESS TO INVOKE

Once having interviewed the client and gathered the necessary information, thus determining both the client's stated position and the client's real interest, the question becomes how best to achieve that interest. It is the obligation of the attorney to be aware of all reasonable options available, and to explain those options, listing the pros and cons, along with an explanation of how each process works in practice. In this way, the attorney enables the client to make an informed choice of options.

Among the available options, litigation is the most commonly invoked, and of course it must be explored as one avenue of approach with the client. But other avenues exist as well, which should also be carefully examined for their

suitability in the attempt to realize the client's interest. The most common of these are: conciliation, mediation, arbitration, the "mini-trial," and the "summary jury trial." While no attempt will be made here to exhaustively examine these individual processes, what follows is a thumbnail sketch of each, in the hope of at least clarifying the terminology.

One common thread exists in each; neutral third parties are engaged, to a greater or lesser degree, depending upon the type of process chosen, to assist the parties in resolving their differences via mechanisms other than the traditional judicial trial.

CONCILIATION AND MEDIATION

Although often used interchangeably, these concepts are not identical. *Conciliation* generally involves a somewhat informal process in which a neutral third party attempts to resolve differences between and among disputing parties through a combination of the easing of tensions, the interpretation and reinterpretation of outstanding issues, facilitating the exchange of information and the understanding of the differing beliefs of the respective parties and the discussion of possible solutions. Although some definitions differ, in general it is accepted that the conciliator is vested with the right to offer potential resolutions based upon his own analysis of the circumstances of the case and the needs (i.e., the interests) of the parties.

Two common examples of conciliation exist in the Massachusetts courts. The first is the Civil Pre-Trial Conference, traditionally presided over by judges,⁹ but now increasingly conducted by magistrates,¹⁰ and by experienced trial attorneys under grants of authority from the courts. The second, and perhaps better known example, is the "District Court Magistrate's Hearing," thousands of which are conducted annually involving misdemeanor (and some felony) cases where no arrest has been made but where a crime has allegedly occurred. In both the conferences and the hearings, experienced officials listen to all sides, and are free to make suggestions as to possible ways to resolve the underlying dispute. Due to the skill and perseverance of these officials (and, of course, to the fact that they have the authority, in a practical sense, to send controversies forward to trial), the rate of case settlement resulting from these proceedings is consistently high throughout the Commonwealth.

Mediation, on the other hand, is a more formalized, structured process than is usually the case with conciliation. With the neutral third party acting as a go-between, the parties are assisted in themselves identifying the precise issue or issues involved, in recognizing their underlying

⁹See M.R.C.P., Rule 16; Dist./Munic. Ct. R.C.P., Rule 16.

¹⁰See M.G.L., Ch. 221, §62C, and Uniform Magistrate Rules, Rule 13 (Trial Court Rules).

ing interests (and in verbalizing them where necessary) and in crafting their own agreements. The mediator, who increasingly has undergone specialized professional training is not free to offer his or her own suggestions as to how to resolve the case, even when requested to do so by the parties themselves. In its pure form, mediation is a process in which the conflicting parties themselves arrive at their own jointly accepted agreements. The agreement is then reduced to writing, and signed by the parties. The mediator signs, indicating his/her capacity as that of mediator. The written agreement sets forth the agreed upon manner and means of resolving the problem, but does not attempt to define or delineate the problem itself.

By its nature, especially the prohibition against the mediator's suggesting possible resolutions, successful mediation can be long and tedious. Mediators themselves must by nature be patient in the extreme and willing to keep their own thoughts unrevealed, either explicitly, by word, or implicitly, by deeds or actions that might cause the parties to believe the mediator personally favors one interpretation of the dispute, or one possible method of resolving the dispute, over another. The great hallmark of true mediation, therefore, is the resolution of conflict by the parties themselves, assisted and facilitated by the mediator, but always arriving at agreements purely their own.

ARBITRATION

Not every case is a good candidate for conciliation or mediation. There may be bad faith on one side which precludes the sort of open and honest exchange of views that generally denote those processes. One side may simply not be willing to bargain in good faith. Yet it might be a case more suited to arbitration than litigation because of the need for speed, efficiency and/or privacy in its resolution. Or there may be contractual agreements in place which require arbitration in the event of disputes. In any event, the use of arbitration is increasing as a preferred method of dispute resolution.

In arbitration, a single arbitrator, sitting alone, or a panel of three arbitrators, sitting together, hear evidence from both (or all) sides of a dispute, and subsequently render a judgment that is binding upon the parties. The two largest providers of arbitrators in the United States are the American Arbitration Association (AAA), and the Federal Mediation and Conciliation Service (FMCS). The FMCS specializes in providing mediators and arbitrators for labor-management disputes. The AAA provides mediators and arbitrators in many fields, particularly in automobile insurance, commercial, industrial and international dispute matters. While these are two of the best known sources, the parties are free to designate any person (or persons) in whom they repose mutual faith to act as an arbitrator.

There are several advantages to arbitration. It is speedy; it can be as formal or as informal as the parties in advance agree for it to be; it is private; and the decisions of the arbitrator is binding. On multi-arbitrator panels, the vote of the majority is controlling.

The decisions of arbitrators are enforceable both in the federal courts, by operation of the Federal Arbitration Act (9 U.S.C. §1 et seq), and in the state courts, by operation of the Uniform Arbitration Act of 1955, which has been adopted by most of the states. Grounds for setting aside an arbitrator's award are quite narrow, reflecting legislative intent to encourage the submission of disputes to arbitration.

MED-ARB

Contrary to its sound this process has nothing to do with medical malpractice. In fact, it is a hybrid process, starting out as mediation, but where the neutral third party can, in the event of an impasse, and with the consent of the parties, switch roles and become an arbitrator, rendering a decision that is binding upon the parties.

THE MINI-TRIAL

Not really a trial at all, this process is a flexible but structured settlement process found often in commercial disputes. A neutral presides over a "hearing" at which are present senior management officers of the disputing companies, who must have full settlement authority. Counsel for each side is given a short period of time (commonly one hour or less) to provide their "best case" by any means they see fit. After hearing both sides, the managers meet together, often without their lawyers, to attempt to reach settlement. The "mini-trial" concept can be modified to suit the needs of other types of disputes among other kinds of disputants.

THE SUMMARY JURY TRIAL

A nonbinding procedure, generally conducted at and in conjunction with a court (although not necessarily so), in which attorneys for each side of a dispute present their "best case" within a limited time frame (commonly an hour or less) to a jury sitting for advisory purposes. The jury, by rendering its nonbinding, advisory opinion as to liability and damages, gives the parties some guidance as to what a "real" trial jury might reasonably be expected to do in that case.

THE MULTI-DOOR COURTHOUSE

First proposed by Professor Frank Sander of Harvard Law School in 1976, the concept aims at providing courthouses where most, if not all, processes for dispute resolution would be readily available at all times on a standing

basis for the most efficient resolution of any dispute that might arise in the civil context. In his view, a "Screening Clerk" would review all new matters, and refer them to the most appropriate process: mediation, arbitration, formal litigation, etc. Variations on the "Multi-Door Courthouse" concept are appearing across the country, with one of the earliest examples being the Middlesex County Superior Court in Cambridge.

CONCLUSION

With the crush of litigation now clogging the courts, with fiscal constraints limiting the ability of the judiciary to respond, and with widespread public dissatisfaction with the expense, frustration and delay inherent in the modern American court system, the Alternative Dispute Resolution movement is here to stay. ADR's proponents point out that, just as there is a wide variety of types of problems which cause people to consult attorneys, so too should there be a wide variety of potential avenues available to address those problems. Attorneys practicing in the

modern era must be sensitive both to current realities, and to the real needs of their clients. A working grasp of the kinds of client assistance available through ADR can only serve to meet better both the needs of the clients and the demands of a busy practice.

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COUNTRY TORT

T.B. Downes

He stood upon the witness stand
The figure tall and spare
Complaint of petty theft he made
With most majestic air.
From his car had disappeared
A camera in a slicker
While out upon the town one day
In argyle socks and knicker.

No one took sight or saw the thief
Who worked the dast'ly deed
Or really knows who did in truth
Photography impede.
The car'd been parked just for a while
In downtown for a fee
Two dollars had the hero paid
And then gone out for tea.

On his return with wife in tow
They stopped and got the car
From thence they drove out to a burg
From city very far.
Delightful folks they found out there
Who'd never ever take
The property of someone else
Or ownership claim fake.

They left the car and made the rounds
'Neath spreading leafy oak
For hours did they stroll around
Those honest gentlefolk.
And when at least they made their way
Back to the open car
They then discovered it purloined
The camera au revoir.

Quick to a lawyer did they fly
As some are wont to do
And fast as lightning did they file
Law suit 'gainst city crew.
Country folks are honest souls
With them your life is safe
But not so when on city streets
They steal there from a waif.

So on the stand he did assert
With voice most confident
The city slickers did the deed
And took without consent.
How could there be the slightest doubt
He told them there in court
Who took the camera on that day
Who did commit the tort.

SUFFOLK UNIVERSITY LAW LIBRARY

RECENT PRACTICE ORIENTED ACQUISITIONS

by Susan D. Sweetgall, Assistant Director for Public Services
and Elizabeth Gemellaro, Reference Librarian

The titles listed below are a selection of the practice oriented materials recently acquired by the Suffolk University Law Library. The titles are arranged alphabetically by subject, with the call number, which indicates the location of the material within the Library, underlined at the end of each entry. With the exception of the titles which contain the letters "BIB", "Reference", "L-Leaf" or are kept on Reserve, the materials listed below may be taken out of the library by individuals who present their up to date Suffolk University Law School I.D. card at the Reserve Desk. Most books may be checked out for a period of one month.

These are only a selection of the practice oriented mate-

rials in the Law Library's collection. For the complete holdings of the Law Library, please consult our card catalog. The Law Library is open from 8:00am to 11:00pm Mondays through Fridays, and from 9:00am to 11:00pm Saturdays and Sundays. Changes in Library hours are posted at the entrance doors.

If you need assistance, The Reference Librarians are available to help you from 9:00am to 10:00pm Mondays through Thursdays, from 9:00am to 6:00pm Fridays, and from 9:00am to 5:00pm on Saturdays and Sundays, and most holidays. You may reach the Reference Department at 573-8516 (Reference Desk) or 573-8199 (Reference Office).

PRACTICE ORIENTED ACQUISITIONS

ARBITRATION AND AWARD

COMMERCIAL ARBITRATION FOR THE 1990's. Richard J. Medalie, editor. Chicago, Ill: Section of Litigation, American Bar Association, c 1991. 391 p: forms. NOTES: Includes bibliographical references and index. KF 9085 .C64 1991

ARBITRATION, INDUSTRIAL

DISPUTE RESOLUTION AND THE TRANSFORMATION OF U.S. INDUSTRIAL RELATIONS: A NEGOTIATIONS PERSPECTIVE. Joel Cutler-Gershenfeld [sic], Robert McKersie, and Richard Walton. Cambridge, Mass: Harvard Law School, 1989. 15 p. (Working paper series. Program on Negotiation at Harvard Law School) Includes bibliographical references. HD 6971.5 .C88 1989

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THE HIGH LEGAL ROAD: A NEW APPROACH TO LEGAL PROBLEMS. By Sloan Bashinsky. Birmingham, Ala: Essential Publications, c1990. 229 p. KF 300 .Z9 B38 1990

KEEPING HAPPIER CLIENTS: HOW TO BUILD AND IMPROVE CLIENT RELATIONS. Robert W. Denney, Carole Jordan, Sandra Yost. Chicago, Ill: American Bar Association, Section of Law Practice Management, c1991. 52 p. RESERVE KF 311 .Z9 D46 1991

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ABA MEMBER'S GUIDE: PROGRAMS, SERVICES, BENEFITS.

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KF 1040 .C54 1991

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LAW FIRMS YELLOW BOOK: WHO'S WHO IN THE MANAGEMENT OF THE LEADING U.S. LAW FIRMS. New York, NY: Monitor Pub. Co. RUN: Semiannual. REFERENCE KF 190 L38

MARKETING THE LAW FIRM: BUSINESS DEVELOPMENT TECHNIQUES. Sally J. Schmidt. New York, N.Y: Law Journal Seminars-Press, 1991-1 v. (loose-leaf): forms; 26 cm. (Law office management series) RESERVE KF 316.5 .S355 1991

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POLICE MISCONDUCT: LAW AND LITIGATION. By Michael Avery and David Rudovsky, under the auspices of the National Lawyers Guild. 2d ed. New York, N.Y.: C. Boardman, 1980. 1v. (looseleaf). (Civil rights litigation series) NOTES: Includes index.

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KF 300.P73 1992

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DEVELOPING EFFECTIVE PROCEDURES FOR PRO SE MODIFICATION OF CHILD SUPPORT AWARDS. By Eleanor Landstreet, Marianne Takas; Child Support Enforcement Project, Center on Children and the Law, American Bar Association. Washington, D.C.: U.S. Dept. of Health and Human Services, Administration for Children and Families Office of Child Support Enforcement 1991. 1 v. (various pagings): forms.

KF 549 .L36 1991

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REFERENCE JK 2445 .P82 K55 1992

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KF 645 .W3 1991

SECURITY

SECURED TRANSACTIONS GUIDE. Chicago, Ill: Commerce Clearing House, 1969-. 5 v. (loose leaf): forms. (Typical law reports) NOTES: Material of permanent value is removed periodically and bound in separate volumes. Includes index.

L-LEAF KF 1048.S43 1969

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FEDERAL SENTENCING GUIDELINES MANUAL. United States Sentencing Commission. St. Paul, Minn: West Pub. Co. RUN: Annual. Began with: 1987 ed. NOTES: Some vols. issued in revised editions.

KF 9685 .A329 U55

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CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983. Sheldon H. Nahmod. 3rd ed. Colorado Springs, Colo: Shepard's McGraw-Hill, 1991. 2 v. (Individual rights series) NOTES: Includes bibliographical references and index. Kept-up-to-

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KF 1325 .C58 N34 1991

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REFERENCE KF 6285 .B458

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KF 3176 A32 T7

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RD 27.42 E94 1991

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KF 8915 .Z9 M25 1987

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FEDERAL TORT CLAIMS ACT LITIGATION SEMINAR. Office for U.S. Attorneys, 1990.

PALLOT LIB. J31.2: T63

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KF 6443 Z9 153 1990

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L-LEAF HG 5131.B7 A5

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MASSACHUSETTS COLLECTION LAW: DEBTOR/CREDITOR PRACTICE, PROCEDURE, REMEDIES. By Jordan L. Shapiro, Marc G. Perlin and John M. Connors. 2nd ed. Rochester, N.Y.: Lawyers Co-operative Pub. Co., 1992. 915 p: forms. (Massachusetts practice library) NOTES: Includes bibliographical references and index. Kept up-to-date by pocket parts.

RESERVE KFM 2567 .C6 5529 1992

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RESERVE KFM 2939 .E8 R47 1991

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FLASCHNER JUDICIAL INSTITUTE JUDICIAL FORUM-1992: TOPICS OF CURRENT INTEREST TO JUDGES OF THE FAMILY AND PROBATE COURT. By Charles P. Kindregan. Boston, Mass.: Commonwealth of Massachusetts, Probate and Family Court Dept., c1992. Continuing legal education program materials.

KFM 2494 .K56 1992

ENVIRONMENTAL LAW

ENVIRONMENTAL COMPLIANCE IN MASSACHUSETTS. Madison, CT: Business and Legal Reports, Inc., 1990-. 2 v. (loose-leaf). NOTES: Includes two newsletters: Environmental compliance. National news update, and Environmental compliance in Massachusetts. Massachusetts news briefs; 1st Issue of newsletter called Environmental compliance. Massachusetts edition.

KFM 2754 E58 1990

EVICTIION

RESIDENTIAL SUMMARY PROCESS BENCH BOOK. Flaschner Judicial Institute. Rev. June 1991. Boston, MA: The Institute, 1991. 527 p: forms. Includes bibliographical references.

RESERVE KFM 2877 N37 1992

GUARDIAN AND WARD

GUARDIANSHIP AND CONSERVATORSHIP IN MASSACHUSETTS. John H. Cross, Robert D. Fleischer. Salem, NH: Butterworth Legal Publishers, c1991-. 1 v. (loose-leaf): forms.

RESERVE KFM 2506 .C76 1991

LABOR LAWS AND LEGISLATION

A JUDICIAL GUIDE TO LABOR AND EMPLOYMENT LAW. Maria C. Walsh, editor-in-chief; Bench Bar Coordinating Committee, William H. Carey . . . et al. Boston, MA: Lawyers Weekly Pub., 1990. 588p. NOTES: Includes bibliographical references and indexes. Sponsored by Flaschner Judicial Institute.

RESERVE KF 3319 J83 1990

LANDLORD AND TENANT

MASSACHUSETTS LANDLORD-TENANT LAW. By George Warshaw. Rochester, N.Y: Lawyers Co-operative Pub. Co., 1987. 544 p: forms. (Massachusetts practice library) NOTES: Kept up to date by pocketparts. Includes bibliographical references and index.

RESERVE KFM 2517 .W37 1987

PHYSICIANS

FOLIO'S MEDICAL DIRECTORY OF MASSACHUSETTS. Boston: Folio Associates. RUN: Annual. NOTES: At head of title: MDMA.

RESERVE R 712 AZ M39

TORT LIABILITY OF MUNICIPAL CORPORATIONS

MUNICIPAL LAW UPDATE. Jointly sponsored by MCLE and the City Solicitors and Town Counsel Association; Joseph P J. Vrabel . . . [et al. Boston, MA: Massachusetts Continuing Legal Education, Inc c1991. 2v., 850 p.

RESERVE KFM 2831 M86 1991

TORTS

MASSACHUSETTS JURISPRUDENCE. PERSONAL INJURY AND TORTS. Rochester, N.Y: Lawyers Coop. Pub. Co., 1992. 3 v. NOTES: Includes bibliographical references and index. Kept up-to-date by pocket parts.

RESERVE KFM 2480 .M37 P47

TRIAL PRACTICE

THE US. DISTRICT COURT SPEAKS. District of Massachusetts, 1992; Joseph L. Tauro . . . et al. Boston, MA (20 West St., Boston 02111-1219): Massachusetts Continuing Legal Education, c1992. xii, 479 p: forms. NOTES: Includes standing orders of judges of the US. District Court, Massachusetts District.

KFM 2915 .Z9 U7 1992

NEW HAMPSHIRE

INSTRUCTIONS TO JURIES

NEW HAMPSHIRE CIVIL JURY INSTRUCTIONS. Rev. ed. edited by Walter L. Murphy, Daniel C. Pope. Orford, N.H: Equity Pub. Co., 1992-. 1 v. (loose-leaf): forms. NOTES: Includes index.

RESERVE KFN 1742.6 A65 M87 1992

PROBATE LAW AND PRACTICE

PROBATE LAW AND PROCEDURE. By Charles A. DeGrandpre, Kathleen M. Robinson; with a foreword by William W. Treat. Orford, NH: Equity Pub., c1990. 3 v: forms. (New Hampshire practice; v. 10-12) NOTES: Includes bibliographical references and indexes. Kept up-to-date by pocket parts.

RESERVE KFN 1280 .N49 v. 10-12 1990

RHODE ISLAND

CIVIL PROCEDURE

CIVIL PRACTICE: THE KEYS TO EFFECTIVE REPRESENTATION. Providence, RI. (115 Cedar St Providence 02903): Rhode Island Bar Association, c1990. 79 p: forms. NOTES: Prepared to accompany a continuing legal education seminar held November 15, 1990. Program moderator, R. Kelly Sheridan; panelists Robert Corrente, William F. Hague, Jr.

RESERVE KFR 528 29 C58 1990

CONVEYANCING

RESIDENTIAL CLOSINGS. Providence, RI.: Rhode Island Bar Association, c1992. 195 p: forms. NOTES: A compilation of four volumes written by Daniel Donovan, Richard N. Morneau, Toni Ann Motta.

RESERVE KFR 127 R47 1992

CORPORATION LAW

ORGANIZING A RHODE ISLAND BUSINESS.: Rhode Island Bar Association, Continuing Legal Education, c1991. 1 v.: forms. NOTES: Faculty: Barbara L. Bennett, Constance A. Howes, Victor I. Orsinger. This volume is intended as an aid to the practice of law in Rhode Island. It was prepared by the authors as a supplement to a seminar lecture and provides a starting point for independent research by an attorney.—Preface.

RESERVE KFR 205 .Z9 O74 1991

CRIMINAL PROCEDURE

CRIMINAL LAW PRACTICE IN RHODE ISLAND. Providence, RI.: Rhode Island Bar Association, Continuing Legal Education, c1990. 1 v: forms. NOTES: Prepared to accompany a continuing legal education seminar held October 18, 1990. Program moderator: Stephen R. Famiglietti; panelists Gerald I. Coyne, Peter A. DiBiase, John A. MacFadyen.

RESERVE KFR 575 .Z9 C75 1990

DISCOVERY

CIVIL DISCOVERY: TECHNIQUES AND STRATEGIES. Providence, RI.: Rhode Island Bar Association, c1990. 154 p. NOTES: Prepared to accompany a continuing legal education seminar held April 5, 1989. Program moderator: C. Russell Bengston; panelists: Berndt W. Anderson, Thomas C. Angelone, Paul V. Reynolds.

RESERVE KFR 537 .Z9 C58 1990

DOMESTIC RELATIONS COURTS

RHODE ISLAND FAMILY COURT BENCHBOOK. Prepared by National Center for State Courts, Northeastern Regional Office, CLE ed. Providence, RI: Rhode Island Bar Association Continuing Legal Education, 1990? 3 v- NOTES: This benchbook was initially prepared for the Family Court in 1983-1984 . . . Reprinted with the permission of the Rhode Island Family Court. Includes index. CONTENTS: v. 1. Domestic relations matters.—v. 2. Juvenile matters.—v. 3. Adult criminal, jury & miscellaneous.

RESERVE KFR 515 .R46 1990

EQUITABLE DISTRIBUTION OF MARITAL PROPERTY

DIVORCE FROM PETITION THROUGH FINAL DECREE. Providence, RI.: Rhode Island Bar Association Continuing Legal Education, c1990. 1 v: forms. NOTES: Program moderator Richard A. Boren; panelists Pamela M. Macktaz, John E. McCann III Robert C. Iuliano.

RESERVE KFR 100 .Z9 D58 1990

EVIDENCE

RHODE ISLAND RULES OF EVIDENCE: EFFECTIVE OCTOBER 1, 1987: WITH ADVISORY COMMITTEE'S NOTES, CASE DEVELOPMENTS, AND INTRODUCTION. Edited by Eric D. Green. Salem, NH: Butterworth Legal Publishers, c1990. 1 v. (loose-leaf). RESERVE KFR 540 .A44 G74 1990

HAZARDOUS WASTES

PROTECTING YOUR CLIENT AND THE ENVIRONMENT. Providence, R. I.: Rhode Island Bar Association Continuing Legal Education, c1991-171 p: ill. NOTES: Prepared as a supplement to a seminar lecture; moderator, Dennis H. Esposito; panelists Dean H. Albro . . . et al. RESERVE KFR 354 .Z9 P76 1991

PERSONAL INJURIES

PERSONAL INJURY CASES: EVALUATION, NEGOTIATION, AND ARBITRATION. Providence, RI.: Rhode Island Bar Association, c1991.: forms. NOTES: Materials prepared to accompany a continuing legal education seminar held May 7, 1991. Faculty: Sandra A. Blanding, Charles A. Hirsch, Philip M. Weinstein; program moderator Mark S. Mandell. RESERVE KFR 539 JP4 P47 1991

PROBATE LAW AND PRACTICE

HANDBOOK OF RI. PROBATE FORMS. 3rd ed. Providence, RI: Rhode Island Bar Association Continuing Legal Education, c1985. 1 v. : chiefly forms. NOTES: Contains complete set of statewide probate

forms. 1st ed. published 1978. CONTENTS: Statewide printed probate forms. - Sample letters & documents. - Probate system forms. RESERVE KFR 144 .A65 H36 1985

TITLE EXAMINATIONS

RHODE ISLAND TITLE STANDARDS HANDBOOK. Providence, RI.: Rhode Island Bar Association, Continuing Legal Education, c1992. 1 v. NOTES: Cover title: RI title standards. Supplemented through 1992. RESERVE KFR 127 .R49 1992

TRUSTS AND TRUSTEES

DRAFTING TRUST AGREEMENTS. Speaker, David T. Riedel. Providence, RI: Rhode Island Bar Association Continuing Legal Education, c1988. 121 p: forms. NOTES: Materials to accompany a seminar at the Rhode Island Law Institute, May 23,1988. RESERVE KFR 137 .Z9 R54 1988

WORKERS' COMPENSATION

WORKERS COMPENSATION PRACTICE IN RHODE ISLAND. Providence, RI.: Rhode Island Bar Association, Continuing Legal Education c1990. 1 v.: forms. NOTES: Prepared to accompany a continuing legal education seminar held October 4, 1990. Program moderator Mark P. McKenney; panelists Robert F. Artigan, George E. Healy, Armand E. Sabitoni. RESERVE KFR 342 .Z9 W67 1990

PLACEMENT

The Placement Office is working to expand services designed to assist students and alumni in their career choices and employment searches. In this effort, we are enlisting your help in providing information on opportunities in your geographic area, both regionally and throughout the United States. We have established a "Job Posting Hotline" to quickly notify the Placement Office of employment opportunities. The Hotline covers summer and permanent postings for students or graduates. The toll free number is 1-800-841-4LAW. This number is to be used exclusively for *employment listings*.

You can greatly assist us by completing the attached form and returning it to the Placement Office. Your valuable contribution is very much appreciated.

ALUMNI RESOURCE FILE 1992

Name: _____ Year of Grad.: _____

Title: _____

Organization: _____

Business Address: _____

Business Telephone: () _____

My organization is a:

law firm

government agency

corporation

other

public interest organization

My organization would be interested in reviewing resumes from Suffolk University Law School students/alums (circle)

for full-time attorney positions.

Resumes should be directed to my attention.

for summer law clerk positions.

Resumes should be directed to:

Name: _____

Address: _____

Phone: _____

I am willing to make contacts on a Suffolk University Law School student's/alum's behalf to other legal employers.

I am willing to advise students/alums on conducting a job search in my city/state.

PLEASE RETURN THIS SURVEY TO:

**Kathleen Barber, Placement Director
Suffolk University Law School
41 Temple Street
Boston, MA 02114
TEL 617-573-8148
FAX 617-573-8706**

THE PLACEMENT OFFICE

Kathleen N. Barber, Director

1991 EMPLOYMENT SURVEY

(Statistics compiled 4/92)

STATUS OF 1991 CLASS

Total Number of Graduates. 519
 Employment Status Known. 478 (92%)

	DAY DIVISION	EVENING DIVISION	TOTAL	%
1. Number of Graduates	302	176	478	
2. Number Employed				
a. Full-time Legal Positions	184	88	272	57%
b. Part-time Legal Positions	28	10	38	8%
c. Full-time Non-Legal Positions	18	59	77	16%
d. Part-time Non-Legal Positions	5	2	7	1%
3. Number Seeking Employment	39	8	47	10%
4. Not Actively Seeking Employment	6	3	9	2%
5. Unemployed/Unknown Status	16	5	21	4%
6. Number Enrolled in Full-time Degree Program	6	1	7	2%

CATEGORY	%	DAY DIVISION		EVENING DIVISION	
		Men	Women	Men	Women
A. Private Practice	48%	70	64	28	28
B. Business	20%	12	11	29	25
C. Government	16%	16	14	20	12
D. Clerkship	10%	17	18	4	2
E. Military (JAG)	2%	3	2	2	0
F. Academic	1%	0	2	1	2
G. Public Interest	1%	1	0	0	1
H. Unknown	2%	1	4	3	2

DATE OF EMPLOYMENT

Held position prior to beginning law school (1988 and prior) 12%
 By beginning of third year (January 1991) 29%
 By graduation (February 1991 – June 1991) 19%
 By publication of bar results (July 1991 – December 1991) 34%
 After publication of bar results (after December 1991) 6%

GEOGRAPHIC DISTRIBUTIONS

Massachusetts	407	Colorado	2
Rhode Island	40	Ohio	2
New Hampshire	12	Vermont	2
California	12	Foreign	2
New York	11	Alabama	1
Connecticut	6	District of Columbia	1
New Jersey	5	Florida	1
Virginia	5	Illinois	1
Delaware	3	Maine	1
Michigan	3	Maryland	1
		Texas	1

**SUFFOLK UNIVERSITY LAW SCHOOL
STATUS OF 1991 CLASS**

<i>A. Private Practice</i>	<i>Salary Distribution</i>	<i># Grads</i>
Very Small Law Firms (2-10 attys.)	\$10,000 – \$46,000	62
Small Law Firms (11-25 attys.)	\$25,000 – \$55,000	14
Medium Law Firms (26-50 attys.)	\$30,000 – \$60,000	4
Large Law Firms (51-100 attys.)	\$40,000 – \$60,000	8
Very Large Law Firms (100+ attys.)	\$50,000 – \$85,000	13
 <i>B. Business/Industry</i>	 <i>Salary Distribution</i>	 <i># Grads</i>
Insurance Companies	\$24,000 – \$50,000	9
Corporations	\$31,000 – \$72,000	12
Accounting Firms	\$36,000 – \$45,000	6
Bank/Financial Institutions	\$26,000 – \$60,000	4
Other Business/Industry	\$18,000 – \$64,000	11
 <i>C. Clerkships</i>	 <i>Salary Distribution</i>	 <i># Grads</i>
Judicial Clerkships	\$23,000 – \$34,000	28
 <i>D. Military</i>	 <i>Salary Distribution</i>	 <i># Grads</i>
JAG/Other	\$24,000 – \$35,000	4
 <i>E. Government</i>	 <i>Salary Distribution</i>	 <i># Grads</i>
Federal	\$16,000 – \$40,000	9
State	\$20,000 – \$41,000	11
Local	\$15,000 – \$31,500	13
 <i>F. Private Sector</i>	 <i>Salary Distribution</i>	 <i># Grads</i>
Legal Service/Public Interest	\$22,500 – \$26,500	2
 <i>G. Academic</i>	 <i>Salary Distribution</i>	 <i># Grads</i>
Higher Education	\$45,000 – \$45,000	2

* Reported salaries only

COMMERCIAL VENDOR AND SOCIAL HOST LIABILITY: FAILURE TO SERVE ALCOHOL RESPONSIBLY¹

Michelle I. Schaffer

INTRODUCTION



The attention of the courts and the Legislature in Massachusetts in recent years increasingly has been directed to the serious personal injuries likely to result from drunken-driving or other activities undertaken by persons whose behavior is impaired by alcohol consumption. The result has been a judicial mandate that those who are engaged in the service of alcohol, either in a business

capacity or as a social host, be held liable for failing to serve alcohol responsibly. The responsiveness of the courts and Legislature stems from the understanding that the continued service of alcohol to an intoxicated person, whether such service takes place on the premises of a business establishment or at a host's private function, puts travelers on public highways or other so-called innocent bystanders in grave danger and increases the likelihood of harm to the intoxicated patron or guest.

This article will discuss the theories of liability presently recognized in Massachusetts in actions brought against

commercial vendors and social hosts. It will address the plaintiff's burden of proof in such cases, the nature of the evidence that likely would be sufficient to establish liability and the evidentiary problems that plaintiffs may encounter.

I. LIABILITY OF THE COMMERCIAL VENDOR FOR NEGLIGENT PROVISION OF ALCOHOL TO INTOXICATED PATRONS

A licensed commercial vendor of alcoholic beverages in Massachusetts has a statutory duty under G.L. c. 138, §69² not to sell or deliver alcohol to an intoxicated person. A vendor who violates this statute by providing alcohol to one who is impaired may be held civilly liable for injuries that proximately flow from such service.³ Civil liability for the service of alcohol to an intoxicated patron is grounded on common law negligence principles:⁴ the vendor's liability is not imposed directly by the statute; however, its violation of the statute may be considered by the fact finder as evidence of negligence and may subject the vendor to liability for all personal injuries that are found to be causally related to the service of the alcohol.⁵ Having determined that the legislative purpose of G.L. c. 138, §69 was "to safeguard, not only the intoxicated person himself, but members of the general public as well,"⁶ the Supreme Judicial Court has extended vendor liability to encompass both injuries sustained by the intoxicated patron and those which the patron inflicts upon third persons.

A. THE DUTY OWED BY THE COMMERCIAL VENDOR TO THIRD PARTIES

¹ Copyright 1992 Michelle I. Schaffer. This article is adapted from materials presented at the January 1991 Seminar of the Massachusetts Defense Lawyers Association, in Boston, Massachusetts.

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² General Laws c. 138, §69 provides "No alcoholic beverage shall be sold or delivered on any premises licensed under this chapter to an intoxicated person." Criminal penalties for violation of this statute are imposed by G.L. c. 138, §62.

³ *Cimino v. Milford Keg, Inc.*, 385 Mass. 323, 327 (1982); *Adamian v. Three Sons, Inc.*, 353 Mass. 498, 499 (1968).

⁴ *Three Sons, Inc. v. Phoenix Ins. Co.*, 357 Mass. 271, 275 (1970).

⁵ *Wiska v. St. Stanislaus Social Club, Inc.*, 7 Mass. App. Ct. 813, 816 (1979).

⁶ *Adamian*, 353 Mass. at 500. See also *O'Hanley v. Ninety-Nine, Inc.*, 12 Mass. App. Ct. 64, 66 (1981).

The commercial vendor's duty to the general public is to refuse to serve alcohol under circumstances when it knows or reasonably should know that its patron is intoxicated.⁷ The continued service of alcohol to a patron despite signs of the patron's impairment has been deemed actionable because the potential injury to such persons is within "the scope of the foreseeable risk" created by the service of alcohol under those circumstances.⁸

The standard of care to which the commercial vendor is held is based upon ordinary negligence principles. The vendor's conduct is compared to that of a vendor of ordinary prudence;⁹ the ultimate question that the fact finder must consider is "whether the service of liquor by the [vendor] to the intoxicated patron was a failure to exercise that degree of care for the safety of [third parties] that ought to be exercised by a [vendor] of ordinary prudence in the same or similar circumstances."¹⁰

Since liability is grounded upon the vendor's failure to discontinue service of alcohol when it knows or should know of its patron's intoxication, a critical issue is the nature of the conduct which constitutes sufficient notice of intoxication to the vendor. The case law indicates that the plaintiff's burden to establish that the vendor knew or reasonably should have known that its patron was intoxicated may be satisfied by the introduction of evidence, for example, of the customer's loud and vulgar conduct to show that the customer "was visibly intoxicated when served."¹¹ The plaintiff may be able to establish such notice with evidence of the vendor's service to the customer of several beverages which it knew to have a high concentration of alcohol.¹² In general, the court will look to the totality of the surrounding circumstances to determine whether the vendor knew or should have known that its patron was intoxicated.¹³

The Supreme Judicial Court has broadly drawn the scope of the foreseeable risk stemming from the service of alcoholic beverages to an intoxicated customer. Third parties may recover, for example, for injuries resulting from the customer's negligent operation of a motor vehicle while intoxicated,¹⁴ or from the intoxicated customer's generally unreasonably aggressive and unruly behavior.¹⁵

B. THE DUTY OWED BY THE COMMERCIAL VENDOR TO THE INTOXICATED CUSTOMER

In recent years, the Legislature and the courts have sought to limit the remedies available to intoxicated customers for their own injuries which result from a commercial vendor's service of alcohol by requiring the plaintiff customer in such a case to sustain a higher burden of proof. The newly enacted G.L. c. 231, §85T¹⁶ requires the customer to show that the vendor's conduct was wilful, wanton or reckless in order to recover for personal injuries sustained as a result of intoxication. Section §85T provides:

In any action for personal injuries, property damage or consequential damages caused by or arising out of the negligent serving of alcohol to an intoxicated person by a licensee . . . or by a person or entity serving alcohol as an incident of its business . . . no such intoxicated person who causes injuries to himself, may maintain an action against the said licensee or person or entity in the absence of wilful, wanton, or reckless conduct on the part of the licensee or such person or entity.¹⁷

Although §85T provides a remedy to intoxicated patrons, it provides protection to commercial vendors in suits alleg-

⁷ *Cimino*, 385 Mass. at 327.

⁸ *Adamian*, 353 Mass. at 501.

⁹ *Cimino*, 385 Mass. at 331.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ The Court's opinion in *Wood v. Ray-Al Cafe, Inc.*, 349 Mass. 760, 766 (1965) is instructive on this point. In upholding the trial court's denial of the defendant's motion for a directed verdict the Court stated:

The testimony tended to show that a bartender, employed by the defendant in its cafe, served the plaintiff's assailant with liquor for some time after he was obviously intoxicated and in a period when he was moving about the cafe imposing himself on patrons, cadging drinks from them, and in the course of this action using abusive or insulting language. There was also testimony that the assault on the plaintiff, a patron, came after the plaintiff had asked the bartender to eject the offender. Such conduct by a drunken person carried with it the menace of violence. Failure to protect the plaintiff from this menace could be found to be a breach of the duty owed to him.

Typically the plaintiff's evidence will consist of testimony from other patrons who had direct contact with or an opportunity to observe the patron exhibiting signs of impairment such as inappropriately loud and unruly behavior, speech that is slurred or deliberate, bloodshot eyes, or unusually poor dexterity and mobility. The commercial vendor may successfully rebut this evidence with testimony that at the time of the service of the alcohol, the patron did not exhibit any such signs of impairment.

¹⁴ *Cimino*, 385 Mass. at 330.

¹⁵ *Sweenor v. 162 State Street, Inc.*, 361 Mass. 524, 527 (1972).

¹⁶ G.L. c. 231, §85T (ed. 1990).

¹⁷ G.L. c. 231, §85T (ed. 1990).

ing ordinary negligence by customers who cause injury to themselves as a result of their own intoxication.¹⁸

The Supreme Judicial Court's first (and only) opportunity to interpret the scope of §85T was in the case of *Manning v. Nobile*.¹⁹ In *Manning*, the plaintiff John Manning brought suit against the Long Wharf Marriott Hotel and others seeking recovery for injuries which he sustained in a motor vehicle accident after attending a private party in a suite at the hotel.²⁰ Marriott had provided both snacks and alcoholic beverages for the party. Although it had offered to provide bartenders for the evening, the host declined to use them.²¹ There was evidence that Manning had consumed a substantial amount of alcohol at the Marriott and that he was intoxicated when he left the hotel.²² Manning alleged that Marriott negligently provided him with alcohol when it knew or should have known that he was intoxicated, that it negligently failed to supervise the party and that it acted wilfully, wantonly or recklessly in its provision of alcohol at the party.²³

The trial court concluded that the facts of the case placed it under G.L. c. 231, §85T; consequently, Manning could recover only if he could establish that Marriott's actions were wilful, wanton and reckless.²⁴ The court held that there was insufficient evidence, as a matter of law, which could permit Manning to meet this burden and it granted summary judgment in favor of the Marriott.²⁵

Manning argued on appeal that the language of §85T limited the statute's scope to the "negligent serving of alcohol to an intoxicated person by a licensee," and that since Marriott had not served Manning, the statute was inapplicable to the facts in the case.²⁶ In essence, Manning asserted that the Legislature's intent in enacting the

statute was to extend protection only to those businesses that "directly served" alcoholic beverages to its customers.²⁷

The Supreme Judicial Court, however, disagreed with the plaintiff's limited reading of the statute.

We do not believe that by using the word "serve," the Legislature intended to restrict the statute's scope to cases in which a defendant or its employee physically dispenses alcohol to the plaintiff. The word "serve" is a broad one. It may mean "[t]o help persons to food," but it can also mean "[t]o furnish [or] supply." . . . Because the statute clearly expresses a legislative intent to protect commercial vendors from suits alleging negligence by patrons who injure themselves as a result of intoxication, we reject the plaintiff's cramped view of the statute's scope.²⁸

The Court held that §85T protected Marriott both against Manning's negligent service and negligent supervision claims,²⁹ and hence, concluded that Marriott could only be liable to Manning if its conduct was wilful, wanton and reckless.³⁰

The Court restated its definition of "wilful, wanton or reckless" as "intentional conduct, by way either of commission or of omission where there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another."³¹ In addition, it identified two characteristics of wilful and wanton conduct which distinguished such conduct from mere negligence: first, that the defendant "knowingly or intentionally disregard an unreasonable risk," and second, that the risk, when viewed prospectively, involve "a high degree of probability that substantial harm would result."³² In *Manning*, the Court

¹⁸ *Manning v. Nobile*, 411 Mass. 382, 387 (1991). Prior to the enactment of G.L. c. 231, §85T, the Appeals Court in *O'Hanley v. Ninety-Nine, Inc.*, 12 Mass. App. Ct. 64 (1981) found that there could be recovery under G.L. c. 138, §69 for injuries sustained by a customer as a result of the negligence of the vendor in continuing to serve alcohol to the customer after he has become intoxicated. The enactment of §85T has precluded recovery by the intoxicated customer for the vendor's ordinary negligence.

¹⁹ 411 Mass. 382 (1991).

²⁰ *Id.* at 383.

²¹ *Id.* at 384.

²² *Id.* at 383 n.3.

²³ *Id.* at 383.

²⁴ *Id.* at 385-386.

²⁵ *Id.* at 386.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 386-387.

²⁹ *Id.* at 387. An interesting issue that was not addressed by the Supreme Judicial Court is the Legislature's intent in limiting the statute's scope to a licensee, person or entity which serves alcohol "as an incident of its business".

³⁰ *Id.*

³¹ *Id.* (quoting *Commonwealth v. Catalina*, 407 Mass. 779, 789 (1990)).

³² *Id.* at 388.

found that there was no evidence that Marriott should have been aware of any risk involving a " 'high degree of probability' that Manning, or any other guest would injure himself,"³³ and affirmed the entry of summary judgment.

C. LIMITATIONS ON LIABILITY: NO DUTY RISES ABSENT EVIDENCE OF THE PROVISION OF ALCOHOL

The courts in Massachusetts consistently have held that absent evidence of the actual furnishment or supply of alcohol, no duty arises on the part of the commercial vendor. Therefore, even under circumstances in which a vendor permits alcoholic beverages to be consumed on its premises or in cases in which the vendor has actual knowledge of the intoxication of a patron, liability will not be imposed on the vendor for injuries resulting from that patron's intoxication.

In *Yakubowicz v. Paramount Pictures Corp.*,³⁴ the Supreme Judicial Court addressed the issue of whether a theater operator owes a duty to protect members of the general public from activities resulting from a patron's intoxication from alcohol that the patron had smuggled into the theater and consumed on the premises. A patron of the Saxon Theater Corporation, Michael Barrett, consumed excessive amounts of alcohol on the premises of the theater while watching a movie.³⁵ The Saxon Theater did not have a license to sell or distribute alcohol and none of its employees had provided any alcohol to Barrett.³⁶ After he left the theater in an intoxicated state, Barrett became involved in an altercation some distance away from the theater, during which Barrett fatally stabbed the decedent.³⁷ The decedent's estate brought a claim against the Saxon Theater for failing to exercise proper supervision and control over its patron. In upholding the trial court's entry of summary judgment, the Court stated: "[w]e have never imposed tort

liability on a defendant whose premises are simply used for the consumption of alcoholic beverages, even with the defendant's knowledge, where the defendant did not serve or supply the intoxicants."³⁸

In *Dhimos v. Cormier*,³⁹ the Court held that there is no actionable negligence by a lessor or lessee of a convenience store and its adjoining parking lot for permitting an eighteen year old youth to consume beer and take drugs in the parking lot when that youth, as a result of his intoxication, thereafter negligently operates a motor vehicle which injures a third party. "[N]either [the lessor] nor [the lessee] had a relationship with the plaintiff. Absent a relationship, we cannot say that there was a duty of care owed by the defendants to the plaintiff and absent a duty of care there can be no actionable negligence."⁴⁰

In *O'Gorman v. Rubinaccio & Sons, Inc.*,⁴¹ the Court considered whether a licensed bar could be held liable for the fatal injuries caused to a third party by the negligent operation of a motor vehicle by an intoxicated person under circumstances in which the bar "had not served the intoxicated person any liquor but had taken his car keys, attempted to sober him up, and then, upon the person's request, returned the keys, allowing him to drive while still intoxicated."⁴² In *O'Gorman*, there was evidence that when patron Grover Greenleaf entered the defendant's bar, he was obviously drunk and was refused an alcoholic beverage by the bartender.⁴³ The owner of the bar, defendant Antonio Rubinaccio took Greenleaf's car keys and attempted to sober him up. When Greenleaf indicated his desire to leave, Rubinaccio offered him a ride.⁴⁴ The Supreme Judicial Court affirmed the trial court's entry of summary judgment in favor of Rubinaccio since he "had nothing to do with Greenleaf's intoxication, assumed no duty with respect to Greenleaf, and had no right to control Greenleaf's conduct or the use of his motor vehicle."⁴⁵ Hence, Rubinaccio, owed no duty to intervene "because he did not create or contribute to the danger".⁴⁶

³³ *Id.* at 389.

³⁴ 404 Mass. 624 (1989).

³⁵ *Id.* at 627-628.

³⁶ *Id.* at 628.

³⁷ *Id.*

³⁸ *Id.* at 632-633.

³⁹ 400 Mass. 504 (1987).

⁴⁰ *Id.* at 507.

⁴¹ 408 Mass. 758 (1990).

⁴² *Id.* at 759.

⁴³ *Id.*

⁴⁴ *Id.* at 760.

⁴⁵ *Id.* at 762.

⁴⁶ *Id.*

II. LIABILITY OF THE COMMERCIAL VENDOR TO ITS PATRONS FOR THE NEGLIGENT FAILURE TO MONITOR THE CONSUMPTION OF ALCOHOL

In cases in which there is no evidence that the commercial vendor actually served alcohol to a patron whom it knew or reasonably should have known to be intoxicated, an alternative theory of recovery may be available for those injured by the conduct of an intoxicated patron. A vendor may be found negligent for failing to monitor the consumption of alcohol by its patron or for failing to take reasonable steps to prevent the foreseeable harmful conduct related to the consumption of alcohol.

This theory of liability stems from the general duty of a proprietor of a business establishment to use reasonable care to prevent injury to paying patrons by the accidental, negligent, or intentional acts of third parties.⁴⁷ If the nature or character of the establishment or any past occurrences on the premises should lead the vendor reasonably to anticipate negligent or criminal conduct on the part of patrons, the vendor has a duty to take precautions against such conduct.⁴⁸ For example, bars that have a history of altercations and other forms of aggressive conduct on the premises or of drawing rowdy or unruly crowds may have a duty to employ additional security or to adopt other measures to protect patrons. Similarly, those vendors who routinely use special alcohol promotions to draw patrons to the premises may have a duty to take additional precautions at those times to prevent risk of injury to patrons. The argument can be made that under the case law in Massachusetts, a vendor may be held liable for failing to protect third persons from the violent acts of its customers related to the consumption of alcohol regardless of how unpredictable in hindsight the acts may appear.⁴⁹

In *Carey v. New Yorker of Worcester, Inc.*,⁵⁰ suit was

brought against the defendant owner of a bar and restaurant by a patron who had been shot by another patron on the defendant's premises.⁵¹ There was evidence that the assailant was "absolutely drunk", had been observed to be "staggering up and down the aisle," and "was loud and very noisy."⁵² Further, there was evidence that on prior occasions he had been asked to leave the bar or had been refused service and that he was generally known by the defendant's employees to be a troublemaker.⁵³ On the day in question, the assailant had been drinking before he arrived at the defendant's premises and consumed some additional alcohol on the premises.⁵⁴ There was evidence that the defendant's employees were too busy to observe the patron's conduct.⁵⁵

After a plaintiff's verdict, the defendant argued on appeal that it had no notice of any signs of trouble. The Supreme Judicial Court rejected this argument and held as follows:

It was open to the jury to find that the defendant's employees had general knowledge of [the assailant's] previous experience as a patron and should have realized on the occasion here considered the need for repressing him. The jury could have found that the defendant's agents should have tried to stop his drunken staggerings the length of the aisle, and if they did not attempt completely to remove him from the scene, at least should have provided some safeguard for the defendant's patrons. The defendant is in error in claiming that there were no warnings of trouble. There had been commotion and boisterous behavior and continued drinking. That there had been no express threat to any patron is not conclusive.⁵⁶

Importantly, the court found that it was not necessary for the plaintiff to prove that the method of assault was foreseeable to the defendant.⁵⁷

⁴⁷*Sweenor v. 162 State Street, Inc.*, 361 Mass. 524, 526 (1972); *Carey v. New Yorker of Worcester, Inc.*, 355 Mass. 450, 452 (1969). See also Restatement (Second) of Torts, § 344 (1965).

⁴⁸Restatement (Second) of Torts, §344, comment f (1965).

⁴⁹See *Sweenor*, 361 Mass. at 527; *Carey*, 355 Mass. at 454; *Wood v. Ray-Al Cafe, Inc.*, 349 Mass. 760 (1965); *White v. Thursday Afternoon*, Superior Court Civil Action No. 79-1512 (1986)(McHugh, J.), discussed *infra*.

⁵⁰355 Mass. 450 (1969).

⁵¹*Id.* at 451.

⁵²*Id.*

⁵³*Id.*

⁵⁴*Id.* at 451.

⁵⁵*Id.* at 452.

⁵⁶*Id.*

⁵⁷*Id.* at. 453.

Similarly, in *Sweenor v. 162 State Street, Inc.*,⁵⁸ the Court upheld the jury's finding of negligence on the part of a commercial vendor for the injuries sustained by the plaintiff patron while attempting to prevent an intoxicated patron from falling off of a barstool. In its discussion of the foreseeability of the injury to the plaintiff, the Court stated: "The jury would have been warranted in finding that the patron's falling from the barstool was predictable, and that the instinctive reaction of one in a nearby position would be to try to catch the falling patron. . . . We decline to characterize the consequential harm as a 'remote possibility.'" ⁵⁹

Finally, in *White v. Thursday Afternoon*,⁶⁰ the trial judge refused to disturb a jury's finding of negligence on the part of a vendor for injuries sustained by police officers who were attacked while attempting to quell a brawl between intoxicated patrons just outside of the premises. In *White*, there was evidence that the vendor had promoted the sale of alcoholic beverages through specials it had on most nights of the week at which alcoholic beverages were sold at reduced prices.⁶¹ Although the vendor employed several bartenders and door men, none of these individuals were required to monitor the amount of alcohol being consumed by any patron.⁶² Furthermore, the patrons who became involved in altercations inside of the bar were ejected to the sidewalk outside. In upholding the jury verdict of negligence based upon the vendor's failure to use reasonable care to monitor or supervise the amount of alcohol consumed by the patrons, the court noted:

No extraordinary foresight is required to anticipate that service of substantial quantities of alcohol, particularly to a large group of young people, carries with it the potential for harmful conduct. Indeed, it is well known that consumption of alcohol tends to make some individuals aggressive and tends to create an environment in which almost any irrational act is foreseeable.⁶³

The fact that the action involved injuries caused to non-patrons on property adjacent to the defendant's bar was held to be irrelevant.

In an urban age, it is surely foreseeable that the manner in which a bar is operated may have an impact on persons outside the bar itself. [citations omitted]. More generally, under well-established common-law principles, the operator of a business

has an obligation to use reasonable care to prevent foreseeable risks of harm to patrons and non-patrons alike. [citations omitted]. That obligation simply does not, and by its nature cannot, end at the proprietor's front door.⁶⁴

This theory of liability, based upon common law negligence principles, may provide recovery where the plaintiff lacks evidence of the defendant's knowledge of the patron's intoxicated condition and would therefore be denied recovery under a traditional theory of liquor liability. Absent a demonstrable action by the defendant to monitor the consumption of alcohol and to prevent harmful conduct by intoxicated patrons to third persons, the vendor may be held liable under this theory.

III. LIABILITY OF THE SOCIAL HOST FOR NEGLIGENT SERVICE OF ALCOHOL TO AN INTOXICATED GUEST

Until recently, the courts in Massachusetts, like those in other jurisdictions, were more reluctant to impose liability on social hosts for the service of alcohol to an intoxicated guest than they had been to impose liability on commercial vendors. This reluctance was to some degree based upon the recognition of the "differences" between the sale of alcoholic beverages for consumption on the premises of a licensed vendor as part of the operation of a commercial establishment and the furnishing of alcohol by the social host to guests in a social setting. In *McGuiggan v. New England Telephone and Telegraph Co.*,⁶⁵ the Supreme Judicial Court identified those differences to include the following:

The threat of tort liability may serve the public purpose of offsetting the commercial operator's financial incentive to encourage drinking. The means of serving beverages in a bar, tavern, or restaurant normally permits closer control and monitoring of customers and their consumption than is typically possible in private gatherings. The commercial vendor may generally (but certainly not always) have more experience in identifying intoxicated drinkers than would social hosts and would be better able to "shut off" consumption without the embarrassment that a social host would suffer. It has also been suggested that li-

⁵⁸361 Mass. 524, 527 (1972).

⁵⁹*Id.* at 527.

⁶⁰Superior Court Civil Action No. 79-1512 (1986)(McHugh, J.).

⁶¹*Id.* at 4.

⁶²*Id.* at 4-5.

⁶³*Id.* at 10.

⁶⁴*Id.* at 13.

⁶⁵398 Mass. 152 (1986).

censed operators can be expected to have insurance against loss whereas a private individual would not.⁶⁶

Furthermore, courts took into consideration the detrimental effect that the imposition of liability on the social host might have on personal relationships in various social settings.⁶⁷ Finally, they recognized that the imposition of liability on the social host to some extent appears to excuse the intoxicated driver from the consequences of his own choice to drink to excess.⁶⁸

Balancing these considerations against the social harms of drunken driving, in *McGuiggan v. New England Telephone and Telegraph Co.*⁶⁹ the Supreme Judicial Court held that in an appropriate case it would recognize a social host's liability to an individual injured by an intoxicated guest's negligent operation of a motor vehicle if the social host knew or should have known that the guest was intoxicated, yet nevertheless furnished an alcoholic beverage to the guest, who thereafter, because of intoxication, negligently operates a motor vehicle causing the injury to the individual.⁷⁰ Liability will be imposed if the host knew that the guest was intoxicated or if the evidence shows that the guest was "obviously intoxicated".⁷¹ In determining if the social host exercised ordinary prudence under the circumstances, the trier of fact may consider whether the host knew or reasonably should have known that the intoxicated guest might presently operate a motor vehicle.⁷²

These principles are to be applied on a case by case basis. In *McGuiggan*, the defendant parents of Daniel McGuiggan supervised a high school graduation party for their son, at which alcoholic beverages were provided.⁷³ Daniel

McGuiggan left the party in a vehicle driven by James McGee, an adult guest who had become intoxicated at the party. McGuiggan received fatal injuries as a result of McGee's negligent driving.⁷⁴ The Court refused to find the McGuiggans liable as social hosts since there was no evidence that they knew that McGee was intoxicated while at their home nor was there evidence that McGee was obviously intoxicated at any time during the night.⁷⁵

In *Langemann v. Davis*,⁷⁶ the plaintiff Ruth Langemann was injured in a motor vehicle accident caused by the negligent driving of Darren Hathaway, who was a minor. Prior to the accident, Hathaway had been drinking beer at a party given by the defendant Margaret Davis' daughter. Although the defendant was not home that evening, she had given her daughter permission to have the party.⁷⁷ Hathaway had obtained the beer from another guest.⁷⁸ There was no evidence that the defendant kept alcoholic beverages at her home, permitted her daughter to drink alcoholic beverages or that there were alcoholic beverages on the premises when she left that evening prior to the party.⁷⁹ Based upon these facts, the Supreme Judicial Court held that liability could not be imposed on the defendant since she had not served or made available the alcoholic beverages, but merely had provided the premises on which the minor drank the alcohol supplied by another.⁸⁰

Most recently, in *Ulwick v. DeChristopher*,⁸¹ the Supreme Judicial Court again had the opportunity to determine whether a social host could be held liable for injuries caused to a third person by an intoxicated guest under circumstances in which the host did not serve or provide alcohol to the guest.⁸² Jeffrey Salvatore and some of his friends attended a party at the home of defendant Matthew De-

⁶⁶*Id.* at 157.

⁶⁷*Id.* at 160.

⁶⁸*Id.* at 164 (Lynch, J. concurring).

⁶⁹398 Mass. 152 (1986).

⁷⁰*McGuiggan*, 398 Mass. at 162.

⁷¹*Id.* at 161-162.

⁷²*Id.* at 162.

⁷³*Id.* at 153.

⁷⁴*Id.* at 154.

⁷⁵*Id.* at 161.

⁷⁶398 Mass. 166 (1986).

⁷⁷*Id.*

⁷⁸*Id.* at 167.

⁷⁹*Id.* at 166-167.

⁸⁰*Id.* at 168.

⁸¹411 Mass. 401 (1991).

⁸²*Id.* at 401-402.

Christopher.⁸³ At the party, Salvatore consumed alcohol which was brought by himself or the individuals that accompanied him to the DeChristopher home; he was not served or provided alcohol by DeChristopher.⁸⁴ During the party DeChristopher conversed with Salvatore, who apparently was unsteady on his feet and visibly intoxicated, but DeChristopher said nothing to Salvatore about his alcohol consumption or his ability to operate a motor vehicle.⁸⁵ After staying at the party for an hour and a half, Salvatore departed in his automobile and, as a result of negligent operation, collided with and caused severe and permanent physical injuries to the plaintiff, an off-duty police officer who was operating a police motorcycle.⁸⁶ Based upon these facts in the record, the trial court granted DeChristopher's motion for summary judgment concluding that as a matter of law there was no social host liability.⁸⁷

On appeal, the Supreme Judicial Court agreed with the trial court's determination that this case did not fall within the parameters of social host liability set forth in *McGuigan*,⁸⁸ which the Court found to be limited to situations in which social hosts serve or provide alcohol to an intoxicated guest.⁸⁹ The Court held that the factor of "control over the liquor supply" should be the dominant consideration:

Policy considerations support the imposition of a duty only in cases where the host can control and therefore regulate the supply of liquor. A host who furnishes liquor at a social gathering can deter a guest from becoming intoxicated. Because the alcohol being consumed belongs to the host, the host is like a bartender at a commercial establishment who can "shut off" a patron who is showing signs of excessive drinking. Society may fairly expect that in such circumstances, a host will deny additional liquor to an intoxicated guest.

The ability effectively to control a guest's excessive drinking is not present when the liquor belongs to the guest. Therefore, to impose a supervisory duty on social hosts to police the conduct of guests who drink their own liquor presents a number of practical difficulties. Hosts in these circum-

stances might be left with little alternative than to resort to physical force in order to discourage further drinking or to try to eject the guest, a solution that in many cases will aggravate the situation and put the drunk driver where he should not be behind the wheel of a car. For such reasons, liability thus far has been found only in cases where drinks are made available by a host.⁹⁰

Thus, the social host's duty of care stems from the ability to control the distribution of alcohol, and under circumstances in which there is no ability to exercise authority over the dissemination of the alcohol, the Court, to date, has refused to impose liability.⁹¹

CONCLUSION

If commercial vendors and social hosts hope to avoid liability, they must recognize that they have a duty to serve alcohol responsibly, and further, that the duty extends to those served the alcohol as well as to those innocent persons who may be injured by their conduct. To meet that duty of care, commercial vendors and social hosts must be willing to adopt precautionary measures in an effort to prevent the injuries from occurring. Commercial vendors may consider instituting clear policies and guidelines for employees to follow which require them to refuse alcohol to intoxicated patrons. Further, employees should learn to recognize the manifestations of alcohol impairment and proper intervention methods to prevent excessive consumption of alcohol by their patrons.

Social hosts must also undertake appropriate steps to avoid liability. Those who provide alcohol in a social setting should become educated as to the signs of intoxication in guests. In addition, social hosts must take an active role in controlling the alcohol supply and in learning methods to shut off consumption. Finally, prior to the commencement of the function hosts should designate drivers or make arrangements for transportation for those incapable of safely operating a motor vehicle. In the event that injuries do, in fact, occur the prior institution and use of precautionary measures of this type may make such actions defensible at trial.

⁸³*Id.* at 402.

⁸⁴*Id.* at 403.

⁸⁵*Id.* at 403-404.

⁸⁶*Id.* at 404.

⁸⁷*Id.* at 402.

⁸⁸*Supra*, note 68.

⁸⁹*Id.* at 405-406.

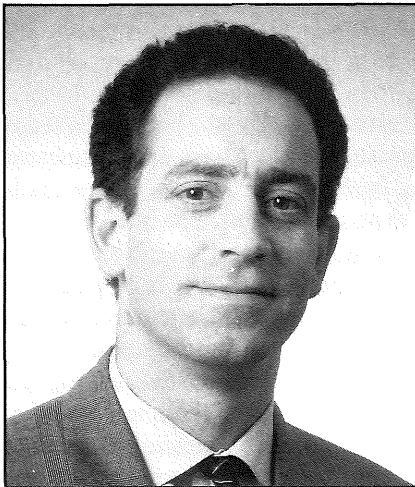
⁹⁰*Id.* at 406.

⁹¹*Id.* at 407.

MANDATORY PRO BONO IS UNCONSTITUTIONAL

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I. INTRODUCTION



In the debate about “mandatory pro bono” (a euphemism for the forced labor of lawyers), one issue is being ignored, consciously avoided, or dismissed. That issue is whether “mandatory pro bono” is constitutional. For example, a recent story in the *Texas Lawyer*, January 6, 1992, at 1, covering

the pro bono debate devoted three short paragraphs (of the three-page story) to the constitutionality of mandatory pro bono, and those few lines simply referred to a report of the Bar’s legal services to the poor committee, which purported to cover all of the constitutional issues raised by mandatory pro bono in a five-page appendix to the 63-page report. The appendix did not discuss – or even cite – any of the many cases (see below) which have held mandatory pro bono to be unconstitutional. The quality of that appendix is one of the reasons why I intervened as a defendant in *Gomez, et al. v. State Bar of Texas*. This article is a shortened version of the brief that I filed in that case in support of my motion for a summary judgment declaring mandatory pro bono to be unconstitutional. (Ultimately, the Court dismissed the *Gomez* case on jurisdictional grounds without reaching the constitutional questions).

Neither the Texas Supreme Court nor the United States Supreme Court has decided the constitutionality of mandatory pro bono.¹ However, a number of other courts have directly addressed the issue, and many courts have held that mandatory pro bono is unconstitutional; many others have held that it is not.

II. AN UNCONSTITUTIONAL TAKING

A. INTRODUCTION

In *Armstrong v. United States*,² the United States Supreme Court held that:

The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.³

Any program of unpaid forced labor of lawyers seeks to do exactly that which the Fifth Amendment of the U. S. Constitution and Article I, § 17 of the Texas Constitution prohibits: forcing some people alone (namely, lawyers) to bear public burdens (guaranteeing access to the courts, etc.) which, in all fairness and justice, should be borne by the public as a whole.⁴

B. FORCED LABOR OF LAWYERS WITHOUT PAY VIOLATES THE FIFTH AMENDMENT AND ARTICLE I, SECTION 17

In pertinent part, the Fifth Amendment says: “Nor shall private property be taken for public use, without just compensation.”⁵ In pertinent part, Article I, § 17 of the Texas

¹However, the Texas Supreme Court has said in a case involving attorney’s fees of an attorney ad litem, “Forcing attorneys to accept court appointment for a contingent representation would surely frustrate the effective representation of unknown parties”. *Rhodes v. Cahill*, 802 S.W.2d 643, 647 (Tex. 1990). Moreover, Justice Doggett recently wrote: “Generally I prefer to leave the development of moral codes to individuals and families as well as to religious and other institutions. The unnatural injection of natural law into today’s decision can only serve to encourage those who are insistent in demanding that this Court force the moral values of a few upon the rest of society.” *Williams v. Patton*, 821 S.W.2d 141 (Tex. 1991) (concurring opinion). This statement is particularly applicable in Texas to mandatory pro bono because its proponents argue that Texas lawyers have a moral obligation to serve the poor, and that courts should simply enforce that moral obligation.

²364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed. 2d 1554 (1960).

³364 U.S. at 49, 4 L.Ed. 2d at 1561.

⁴I am not suggesting that anyone has a “right” to legal services. But whatever one is entitled to, if anything, it is not the responsibility of lawyers to provide it; it is the responsibility of the “public as a whole”.

⁵U.S. CONST. amend. V.

Constitution says: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."⁶ Forced labor of lawyers without pay is unconstitutional because it is a taking of private property for public use without just compensation.⁷

There is no question that a lawyer's labor and/or services are "property" within the meaning of the takings clause of the Fifth Amendment and Article I, § 17.⁸ "A lawyer's services are as much his property as a grocer's stock, an electrician's tools, or an individual's home."⁹ It has long been recognized that "labor is property."¹⁰ To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock.¹¹

The United States Supreme Court has held that when a prisoner's property is wrongfully destroyed, the courts must ensure that the prisoner, no less than any other person, receives just compensation.¹² Unfortunately, some courts have not granted to lawyers the Fifth Amendment protections granted to prisoners. Various justifications have been used by these courts to take lawyers' property without just compensation.

C. THE GUISES THAT SOME COURTS USE TO JUSTIFY UNCONSTITUTIONAL TAKINGS

Those courts that have upheld taking lawyers' property without compensation have done so under the guise of one or more of the following alleged justifications:

(1) that lawyers are "officers of the court", and as a result, they are accorded certain privileges not bestowed upon

others; (2) that lawyers have a professional obligation to serve indigents on court order without compensation because such obligation is an "ancient and established tradition"; (3) that the obligation to serve is a "condition under which lawyers are licensed to practice"; (4) that lawyers have a "monopoly" on the practice of law; and (5) that the practice of law is a "privilege" not a right, and can thus be burdened at the whim of the state.

None of these claimed justifications can withstand serious examination; each is without merit.

Lawyers Are Not Officers of the Court

Unfortunately, the off-repeated doctrine that lawyers are officers of the court and as such may have conditions imposed by the court on their privilege to practice law has been "used as an incantation with little or no analysis of what the title means or why a particular result should flow from it".¹³

The United States Supreme Court has said:

Unlike [marshals, bailiffs, court clerks, or judges] a lawyer is engaged in a private profession, important though it be to our system of justice. In general he makes his own decisions, follows his own best judgment, collects his own fees and runs his own business.¹⁴

English "attorneys" and serjeants-at-law were treated as officers of the court; serjeants-at-law were virtually public officials.¹⁵ However, the roles of the English "attorney" and the serjeant-at-law are unmatched in American practice and have no counterpart in this country.¹⁶ The role of the

⁶TEX. CONST. art. I, § 17.

⁷E.g., *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 442 (Alaska 1987); *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. 1985) (en banc); *McNabb v. Osmundson*, 315 N.W.2d 9, 16 (Iowa 1982); *Bedford v. Salt Lake County*, 447 P.2d 193, 195 (Utah 1968); *Knox County Council v. State ex rel. McCormick*, 29 N.E.2d 405 (Ind. 1940); See Shapiro, *The Enigma of the Lawyer's Duty to Serve*, 55 NYU L.Rev. 735, 756 (1980) ("In all, relevant precedents have been found in a total of thirty-five American jurisdictions, including the federal. Of these, I believe that in only eighteen of thirty-four states—a bare majority—and in the federal courts can the law presently be stated in terms approximating an unqualified, enforceable duty to represent an indigent for little or no compensation when ordered to do so. . . . In . . . eight members of the majority, substantial signs of judicial discontent have surfaced.") (hereinafter Shapiro).

⁸*DeLisio*, 740 P.2d at 440-41; *Roper*, 688 S.W.2d at 764; *Bedford*, 447 P.2d at 195; *Knox County Council*, 29 N.E.2d at 412; *Cunningham v. Superior Ct.*, 177 Cal.App.3d 336, 348, 222 Cal.Rptr. 854, 862; See *United States v. Berdan Firearms Mfg. Co.*, 156 U.S. 552, 15 S.Ct. 420, 39 L.Ed. 530 (1895); *City of Cincinnati v. Louisville & N.R. Co.*, 223 U.S. 390, 56 L.Ed. 481 (1912); *Greene v. McElroy*, 360 U.S. 474, 3 L.Ed. 2d 1377, 79 S.Ct. 400 (1959); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed. 2d 424 (1972); *In re: Marshal*, 102 F. 323, 324 (1900) ("Labor is property"); and J. Locke, *Two Treatises of Government* (P. Laslett, Student Edition 1988) ("For this Labour being the unquestionable Property of the Labourer . . .").

⁹*Roper*, 688 S.W.2d at 764.

¹⁰*DeLisio*, 740 P.2d at 440 (Alaska's takings clause says "Private property shall not be taken or damaged for public use without just compensation").

¹¹*Webb v. Baird*, 6 Ind. 13, 17 (1854).

¹²*Hudson v. Palmer*, 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed. 2d 393 (1984).

¹³*Roper*, 688 S.W.2d at 766-67 (quoting Martineau, *The Attorney as an Officer of the Court: Time to Take the Gown Off the Bar*, 35 SC. L.Rev. 541 (1980) (hereinafter Martineau)).

¹⁴*Cammer v. United States*, 350 U.S. 399, 405, 76 S.Ct. 456, 459, 100 L.Ed. 474, 478 (1956).

¹⁵*Roper*, 688 S.W.2d at 765-66 (citing Shapiro and Martineau).

¹⁶*Id.*; *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 441 (Alaska 1987).

“attorney” resembled the role performed by staff members in the court engaged in ministerial duties.¹⁷ “Attorneys were regarded as technically part of the clerical staff of the courts.”¹⁸

These “attorneys” were accorded the same privileges provided to the courts – exemption from suit in another court, exemption from service in the militia, and exemption from other public duties.¹⁹ These privileges were the basis of the title and status of officers of the court.²⁰ “It soon became common place to refer to all professional attorneys as officers of the court whether or not they held any other official court position.”²¹ These “attorneys” and sergeants-at-law have no counterpart in American practice.²²

Courts can take judicial notice that Texas lawyers have none of the privileges, exemptions, or immunities that real officers of the court once had. Texas lawyers are not court or public officials; they are not exempt from suit; they are not exempt from military service; and they are not relieved of any public duties by virtue of being lawyers. At best, Texas lawyers are “officers of the court” in name only.

It follows that this nominal status does not and cannot justify the taking of property without compensation, and this was recognized in this country over 100 years ago:

The practitioner, therefore, owes no honorary services to any other citizen, or the public. . . . The idea of one calling enjoying peculiar privileges, and therefore being more honorable than any other, is not congenial to our institutions. *And that any class should be paid for their particular services in empty honors is an obsolete idea, belonging to another age and to a state of society hostile to liberty and equal rights.*

The legal profession having been thus properly stripped of all its odious distinctions and peculiar

emoluments, the public can no longer demand of that class of citizens any gratuitous services which would not be demandable of every other class.²³

Many courts that have rejected Fifth Amendment challenges by lawyers have relied on the “officer of the court” doctrine and a misunderstanding of the British court system.²⁴ Most of these courts cite or quote language from *United States v. Dillon*.²⁵ At least nine states and at least two U.S. Courts of Appeals, including the Fifth Circuit, have relied upon *Dillon*.

Dillon’s application of the “officer of the court” doctrine to American lawyers is clearly wrong. The majority of commentators on the subject recognize this and reject the reasoning in *Dillon*.²⁶ Because *Dillon* is wrongly decided, so are all of those decisions that “cite or quote language from [*Dillon*] without discussion”.²⁷

The description “officer of the court” is a nominal, empty title. The “officer of the court” doctrine, exposed for what it is, simply cannot support a taking of private property without just compensation.²⁸

Tradition Does Not and Cannot Justify a Taking of Private Property

The attempted justification of “tradition” raises two issues. First, is it true that the obligation of the legal profession to serve indigents on court order is an “ancient and established tradition”? Second, if such a tradition really exists, can that tradition – which is alleged to have existed before the adoption of the United States and Texas Constitutions – take precedence over express constitutional provisions? The answer to both questions is “no”.

To justify coerced, uncompensated legal services on the basis of a firm tradition in England and the United States is to read into that tradition a story that is not there.²⁹

¹⁷Roper, 688 S.W.2d at 765 (citing Martineau and R. Pound, *The Lawyer from Antiquity to Modern Times*, 100-101 (1953)) (hereinafter Pound).

¹⁸T. Plucknett, *A Concise History of the Common Law*, 226 (1956), quoted in Roper, 688 S.W.2d at 765.

¹⁹Roper, 688 S.W.2d at 765 (citing *Mayor of Norwich v. Bury*, 4 Burr. 2110 (1767)); *Respublica v. Fisher and Mifflin*, Pa. (1 Yeates) 350, 351 (1794); Leigh’s Case, 15 Va. (1 Munf.) 468 (1810)).

²⁰Martineau, *supra* note 13, at 549.

²¹*Id.* at 547.

²²Shapiro, *supra* note 7, at 746.

²³*Webb v. Baird*, 6 Ind. 13, 16-17 (1854) (emphasis added).

²⁴*Cunningham v. Superior Ct.*, 177 Cal.App.3d 336, 345, 222 Cal.Rptr. 854, 859 (1986) (speaking of *United States v. Dillon*, among others).

²⁵346 F.2d 633 (9th Cir. 1965), *cert. denied*, 382 U.S. 978, 86 S.Ct. 550, 15 L.Ed. 2d 469 (1966).

²⁶*State ex. rel. Scott v. Roper*, 688 S.W.2d 757, 764 (Mo. 1985) (en banc) (citing ten different law review articles).

²⁷*Id.* at 762.

²⁸*DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 442 (Alaska 1987); *State ex. rel. Scott v. Roper*, 688 S.W.2d 767 (Mo. 1986) (en banc).

²⁹Shapiro, *supra*, note 7 at 753, quoted with approval in, *Mallard v. United States Dist. Ct.*, 109 S.Ct. 1814, 1819 (1989).

Dillon relied on this alleged "ancient and established tradition".³⁰ In fact, *Dillon* relied almost exclusively on the government's brief for proof of the existence of this "ancient and established tradition".³¹ The law of the Ninth Circuit – and of all the states that have blindly followed *Dillon* – rests upon a brief of an assistant attorney general and his misunderstanding of English and pre-Revolutionary American history.³²

History establishes that there is no "ancient and established tradition". More importantly, though, is the question of whether any tradition existing before our constitutions were adopted could ever take precedence over our constitutions especially in view of how many other "traditions" our constitutions repudiated. The answer must be emphatically "no". "Tradition alone, regardless of its venerability, cannot validate an otherwise unconstitutional practice."³³

No one would suggest that women may not appear before Texas courts because of an "ancient and established tradition" of keeping women out of the bar. Moreover, no one would suggest that lawyers of African descent may be compelled to provide free legal services, although slavery itself in its most blatant form was an "ancient and established tradition". Tradition cannot justify unconstitutional practices. Accordingly, whether or not there is any tradition of compelled uncompensated legal services, private property simply cannot be taken without compensation on the basis of any such "tradition".

No Lawyer Has a Monopoly on the Practice of Law

The "monopoly" justification is particularly weak. Professor Hazard of Yale Law School has dismissed the argument as "absurd".³⁴ Lawyers have no more of a monopoly on the practice of law than licensed automobile drivers have on driving; no more of a monopoly than licensed plumbers have on plumbing; and no more of a monopoly than any other licensed occupation, profession, or trade.

There are approximately 55,000 lawyers in Texas. Each lawyer is a potential supplier of legal services and each law-

yer is a potential competitor of every other lawyer. Each one is free to charge however much (with some exceptions) or however little he wants to charge.

Moreover, no individual is denied the opportunity to argue his own cause, and everyone is free to obtain the requisite legal knowledge to argue his own cause or pursue a career in law. "A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law."³⁵

The practice of law is not a matter of the state's grace "but of right for one who is qualified by his learning and his moral character".³⁶ Accordingly, subject to being capable of practicing, anyone can practice law; there is no legal barrier limiting entry into the profession to a select few. Moreover, recent years have witnessed the removal of a number of obstacles that previously prevented competition in the legal profession.³⁷ Any other barriers to entry into the legal profession (economic, intellectual, etc.) cannot be blamed on people who are able to overcome them.

Granting the claim that licensing means "monopoly" – and that the "benefits" of that monopoly justify taking private property without just compensation – leads back ultimately and inexorably to a society in which no one has rights, back to the kind of society that existed before the Magna Carta, a society where everyone lives by permissions, privileges, and state-granted monopolies, all of which are subject to being withdrawn at any time.³⁸ Today virtually everyone is licensed by the state; if licensing can justify takings, the right to private property is an empty right.³⁹ This means that if lawyers' property may be taken without compensation, then so may every other citizen's property.

Moreover, Texas lawyers have no choice about the requirement that they be licensed; the State of Texas requires it by prohibiting the practice of law without a license. People who want to earn their livelihood by practicing law

³⁰*United States v. Dillon*, 346 F.2d 633, 635-36 (9th Cir. 1965).

³¹*Id.* at 635.

³²*DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 441-442 (Alaska 1987).

³³*Id.* at 441.

³⁴Proceedings of The Second National Conference on Legal Services and the Public, December 7 and 8, 1989, at 101 (1981) quoted in, *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 765 (Mo. 1985) (en banc).

³⁵*Schware v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 1 L.Ed. 2d 796, 801-802 (1957).

³⁶*Baird v. Arizona*, 401 U.S. 1, 8, 91 S.Ct. 702, 27 L.Ed. 2d 639, 648 (1971).

³⁷*Cunningham v. Superior Ct.*, 177 Cal.App.3d 336, 345, 222 Cal.Rptr. 854, 860 (1986) (citing *Bates v. State Bar*, 433 U.S. 350 (1977); *Goldbarb v. Virginia State Bar*, 421 U.S. 773 (1975), among others).

³⁸See *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 765 (Mo. 1985) (en banc).

³⁹*Knox County Council v. State ex rel. McCormick*, 29 N.E.2d 405, 412 (Ind. 1940).

should not be penalized for obtaining a license; that is, for doing what the State requires of them in order that they may practice their chosen profession. In any event, "the mere power of the State to license certain occupations does not justify a taking of property."⁴⁰

The Practice of Law is a Right, Not a Privilege; States Cannot Condition This Right Upon the Relinquishment of Constitutional Rights

Two other justifications have been asserted for taking private property without compensation: that the practice of law is a privilege, not a right, and that the license to practice may be conditioned with the obligation to represent the poor without pay. These claims are without merit.

Notwithstanding the *dicta* in *State Bar of Texas v. Heard*,⁴¹ Texas courts recognize that the practice of a profession is a right.⁴² But regardless of whether the practice of law is called a "right" or a "privilege" or a "license", a person cannot be prevented from practicing law except for valid reasons. The practice of law is not a matter of the state's grace "but of right for one who is qualified by his learning and his moral character".⁴³

The right to practice law, or to engage in any occupation requiring a state license, may not be predicated upon the relinquishment of constitutional rights.⁴⁴ Moreover, although the right to earn a livelihood in any lawful calling is subject to licensing, the state cannot impose restrictions on the acceptance of the license which will deprive the licensee of his constitutional rights.⁴⁵

CONCLUSION

A court appointment compelling a lawyer to represent an indigent is a taking of private property for which just compensation is required. Lawyers' services are undeniably property within the meaning of the takings clause, and the appropriation of that property is a taking. Forced labor of lawyers without pay unfairly burdens lawyers by disproportionately placing the cost of a program that is

intended to benefit the public upon lawyers rather than upon the citizenry as a whole. As such, the appropriation of a lawyer's labor is unconstitutional under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 17 and 19 of the Texas Constitution. Private property cannot be taken without just compensation. Empty titles and non-existent traditions cannot justify unconstitutional takings; even "ancient and established traditions" must fail in the face of constitutional prohibitions.

III. AN UNCONSTITUTIONAL ABRIDGEMENT OF FREEDOM OF SPEECH

A. INTRODUCTION

In *Wooley v. Maynard*,⁴⁶ the United States Supreme Court said:

[T]he right of freedom of thought protected by the First Amendment against state action includes . . . the right to refrain from speaking at all. . . .⁴⁷

The United States Supreme Court has also held that the free speech provisions of the First Amendment protect the right to be free from coerced association with causes, ideas, and conduct espoused or engaged by other.⁴⁸

Any program of forced labor of lawyers seeks to do exactly that which the First Amendment prohibits: forcing lawyers to speak when they do not want to speak at all and forcing lawyers to associate with causes, ideas, and conduct with which they do not want to associate.

B. FORCED LABOR OF LAWYERS VIOLATES THE FIRST AMENDMENT AND ARTICLE I, SECTIONS 8 AND 27

In pertinent part, the First Amendment says: "Congress shall make no law . . . abridging the freedom of speech . . ."⁴⁹ In pertinent part, Article I, § 8 of the Texas Constitution

⁴⁰*Roper*, 688 S.W.2d at 765.

⁴¹603 S.W.2d 829 (Tex. 1980).

⁴²*Waller v. State*, 68 S.W.2d 601, 605 (Tex. Civ. App.—Amarillo 1934, writ ref'd).

⁴³*Baird v. Arizona*, 401 U.S. 1, 8, 91 S.Ct. 702, 27 L.Ed. 2d 639, 648 (1971). *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239, 77 S.Ct. 752, 1 L.Ed. 2d 796, 798 (1957).

⁴⁴See *Baird v. Arizona*, 401 U.S. 1, 91 S.Ct. 702, 27 L.Ed. 2d 639 (1971); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 102, 83 S.Ct. 1175, 1179, 10 L.Ed.2d 224, 229 (1963); *Cunningham v. Superior Ct.*, 177 Cal.App.2d 336, 348, 222 Cal.Rptr. 854, 861 (1986); *Roper*, 688 S.W.2d at 764.

⁴⁵*Ruchenbrod v. Mullins*, 133 P.2d 325, 327 (Utah 1943); *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 440 (Alaska 1987).

⁴⁶430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed. 2d 752 (1977).

⁴⁷*Wooley v. Maynard*, 430 U.S. 705, 714, 97 S.Ct. 1428, 1435, 51 L.Ed. 2d 752 (1977) (emphasis added).

⁴⁸*Id.*; *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed. 2d 261 (1977); *Lathrop v. Donohue*, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed. 2d 1191 (1961); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943).

⁴⁹U.S. Const. amend. I.

says: "Every person shall be at liberty to speak, write or publish his opinions on any subject . . . ; and no law shall ever be passed curtailing the liberty of speech. . . ."50

Whether lawyers are forced to labor on behalf of others or to "contribute" money in lieu of forced labor, lawyers' free speech rights are violated. Taxing lawyers to pay for legal representation of the poor or for some other "public service" violates lawyers' free speech rights under *Lathrop v. Donohue*,⁵¹ and *Abood v. Detroit Board of Education*.⁵²

In *Abood v. Detroit Board of Education*, the United States Supreme Court held that the First Amendment prohibits the government from requiring people to contribute to the support of ideological causes that they oppose.⁵³ The Supreme Court also made clear in *Abood* that the government may not require an individual to relinquish individual rights guaranteed him by the First Amendment as a condition of public employment. This means, in the case of lawyers, that the state cannot require lawyers to relinquish their First Amendment rights as the condition of granting a law license. Lawyers' First Amendment rights are not lessened because they are licensed by the state.⁵⁴

Forced labor of lawyers without pay is even more objectionable under the First Amendment than the financial "contribution" alternative.⁵⁵ Lawyers' First Amendment rights are violated when they are forced to advocate for or associate with persons or causes in which they do not believe because they will naturally feel compelled to respond by stating their own views. It is this "forced response [which] is antithetical to the free discussion that the First Amendment seeks to foster".⁵⁶

Lawyers may disagree on principle with any program of forced labor of anybody, including lawyers. Requiring lawyers to represent indigents upon court order on pain of disbarment would require lawyers at the very least to associate with persons who seek to obtain the benefits of a program of forced labor. Lawyers may object to associating

with such people for the same reason that they may object to associating with robbers, burglars, or others who seek stolen property.

Additionally, any program of forced labor of lawyers would require lawyers to use their property, their labor, as a vehicle for spreading a message with which they may disagree. This is expressly prohibited by the United States Supreme Court in *Pacific Gas & Electric Co.*⁵⁷

[A]dvocacy and belief are not always separable, in the mind of the lawyer or the laity, no matter what the code of the profession may provide. A lawyer is a person, with a conscience, and one who cannot square particular representation with the dictates of conscience should not be subject to discipline for refusing to serve.⁵⁸

C. CONCLUSION

Because lawyers cannot under our constitutions be required to subsidize or associate with causes that they oppose or to accept representation in any particular case against the dictates of their consciences, any program of forced labor of lawyers is unconstitutional under the First Amendment of the U.S. Constitution and under Article I, Section 8 of the Texas Constitution.

IV. UNCONSTITUTIONAL DISCRIMINATION

A. INTRODUCTION

In *Village of Norwood v. Baker*,⁵⁹ the United States Supreme Court said:

But the guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improve-

⁵⁰Tex. Const. art. I, § 8.

⁵¹367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).

⁵²431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977).

⁵³*Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed. 2d 261 (1977).

⁵⁴*Consolidated Edison Co. v. Public Serv. Comm.*, 447 U.S. 530, 534, n.1, 100 S.Ct. 232, 665 L.Ed. 2d 319, 325 n.1 (utility's First Amendment rights not lessened because it is a regulated monopoly).

⁵⁵Shapiro, *supra* note 7, at 765.

⁵⁶*Pacific Gas & Elec. Co. v. Public Utils. Comm'n*, 475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed. 2d 1, 12 (1986).

⁵⁷475 U.S. 1, 16, 106 S.Ct. 903, 89 L.Ed.2d 1, 12 (1986).

⁵⁸Shapiro, *supra* note 7, at 766.

⁵⁹172 U.S. 269, 19 S.Ct. 1187, 43 L.Ed. 443, 447 (1898).

ment, irrespective of any peculiar benefits accruing to the owner for such improvements, could not be questioned by him in the courts of the country.⁶⁰

Under the United States Constitution and the Texas Constitution, legitimate state functions cannot be accomplished at the expense of one particular group of people. Yet, any program of forced labor of lawyers seeks to charge the costs of an operation of the state, conducted for the benefit of the public, on a particular class of persons.

It is a denial of equal protection when the government seeks to charge the costs of operation of a state function, conducted for the benefit of the public, to a particular class of persons.⁶¹

B. ANY PROGRAM OF FORCED LABOR OF LAWYERS DENIES LAWYERS THEIR EQUAL RIGHTS AND DENIES THEM EQUAL PROTECTION OF THE LAWS

In pertinent part, the Fourteenth Amendment says: "Nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."⁶² In pertinent part, Article I, § 3 of the Texas Constitution provides: "All free men, when they form a social compact, have equal rights . . ." ⁶³ A lawyer who is appointed to represent an indigent without compensation is forced to give away a portion of his property while other professionals, merchants, artisans, and other state licensees, are not similarly required to give away their services or their goods for the benefit of the public. This is a classic violation of equal protection of the laws.⁶⁴

It is unfair to put on any working group the burden of providing for the needy out of its stock in trade. . . . The lawyer's stock in trade is intangible – his time fortified by his intellectual and personal qualities, and burdened by his office expenses. To take his stock in trade is like stripping the shelves of the grocer or taking over a subdivision of the builder.⁶⁵

If we accept, for purposes of argument, that some people are entitled to legal services, then the root of the problem is the lack of state-appropriated funds with which to compensate counsel.⁶⁶ But constitutional rights are not measured or limited by monetary considerations. "[V]indication of conceded constitutional rights cannot be made dependent upon any fact that it is less expensive to deny than to afford them."⁶⁷ This means that lawyers cannot be compelled to work for free just because it is cheaper to compel them to provide legal services than to appropriate funds for legal services. "It would be ironic to provide justice to the indigent litigant but to deny it to his attorney."⁶⁸

C. CONCLUSION

Any program of forced labor of lawyers violates lawyers' equal rights and denies them equal protection of the laws.

V. SLAVERY

A. INTRODUCTION

In *Bedford v. Salt Lake County*, the Supreme Court of Utah said:

The legislature can no more require a lawyer to represent a client for free than it can compel a physician to treat a sick or injured indigent patient without pay. For the legislature to attempt to compel a lawyer to work by passing a statute requiring the judge to order it done, would be to . . . impose a form of involuntary servitude upon him.

B. FORCED LABOR OF LAWYERS IS SLAVERY OR INVOLUNTARY SERVITUDE

The Thirteenth Amendment says:

Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the

⁶⁰*Village of Norwood*, 172 U.S. at 279, 19 S.Ct. at 1190, 43 L.Ed. 443, 447.

⁶¹*Cunningham v. Superior Ct.*, 177 Cal.App.3d 336, 348, 222 Cal.Rptr. 854, 861 (1956).

⁶²U.S. Const. amend. XIV.

⁶³Tex. Const. art. I, § 3.

⁶⁴*Cunningham*, 177 Cal.App.3d at 351, 222 Cal.Rptr. at 863.

⁶⁵Cheatham, *Availability of Legal Services: The Responsibility of the Individual and of the Organized Bar*, 12 UCLA L.Rev. 438, 444 (1965).

⁶⁶*Id.*

⁶⁷*Watson v. City of Memphis*, 373 U.S. 526, 537, 83 S.Ct. 1314, 1321, 10 L.Ed. 2d 529, 538 (1963).

⁶⁸*Cunningham*, 177 Cal.App.3d at 351, 222 Cal.Rptr. at 864.

United States, or any place subject to their jurisdiction.⁶⁹

On its face, the Thirteenth Amendment prohibits the forced labor of lawyers. However, Thirteenth Amendment jurisprudence is at odds with the organic laws of the United States. The Declaration of Independence says: "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness . . .". Yet, notwithstanding the Declaration and despite the unlimited language of the Thirteenth Amendment prohibiting slavery and involuntary servitude, except as punishment for crimes, courts, including the United States Supreme Court, have grafted onto the Thirteenth Amendment an exception allowing states to conscript its citizens to "serve public needs," such as working on roads and bridges, working in public school cafeterias, and serving in the military. Justifiably, this line of Thirteenth Amendment cases has been questioned.

If enforced service in the public interest, or in fulfillment of a "debt to society", is beyond the scope of the thirteenth amendment, why did the drafters think it necessary to provide an express exemption for penal servitude? . . . Moreover, arguments based on historical tradition seem especially flimsy here. The custom of conscripting able-bodied men to work on road gangs may have long been recognized, but so was the custom of slavery itself in its most blatant form.⁷⁰

In *Butler v. Perry*, the United States Supreme Court said:

In view of *ancient usage* and the unanimity of judicial opinion, it must be taken that, unless restrained by some constitutional limitation [Fifth Amendment? Thirteenth Amendment? Fourteenth Amendment?], a state has inherent power to require every able-bodied man within its jurisdiction to labor for a reasonable time on public roads near his residence without direct compensation.⁷¹

This decision should shock the conscience of every freedom-loving lawyer. Here again, "tradition" and "ancient usage" is being used to avoid specific constitutional provisions. The United States Constitution and the Texas Constitution should not be interpreted by reference to "ancient usage" because of the ancient usages and traditions which the constitutions themselves repudiated. We undermine and degrade the achievements of the Founding Fathers

when we interpret our constitutions by reference to government practices that existed before the great achievement of constitutional government.

What is particularly disturbing about the so-called "public service" exception to the Thirteenth Amendment is that in declaring it, the United States Supreme Court has relied upon the laws of other countries, countries which do not have constitutional forms of government and countries which do not respect individual rights or democracy. For example, in the Selective Draft Law cases, the United States Supreme Court upheld a military draft in view of "the almost universal legislation to that effect now in force", referring to the laws of such countries as Bulgaria, Chile, China, Rumania, Russia, and South Africa.⁷² Surely, interpretation of our constitutions should not be guided by the laws of Chile, China, Russia and South Africa.

In any event, service as a witness, in the military service, and even in road gangs, is service which is clearly different than coerced legal service under any type of program of forced labor of lawyers. All who labored on public roads ultimately benefitted from access to the roads, and the work was evenly divided among members of the public rather than allocated to a select class. Similarly, all who appear as witnesses have a reciprocal right to call upon others to appear as witnesses. Moreover, the obligation to testify falls equally upon all residents. Finally, all who are conscripted into the military ultimately benefit from the defense of the country. In contrast, forced labor of lawyers is an obligation that falls only on lawyers and does not benefit lawyers in any way.

C. CONCLUSION

The forced labor of lawyers without pay is involuntary servitude and is unconstitutional under the plain language of the Thirteenth Amendment of the United States Constitution.

VI. CONCLUSION

The foregoing establishes that any program of forced labor of lawyers is unconstitutional. Any such program violates lawyers' rights to be free from uncompensated takings; it violates lawyers' rights to refrain from associating with persons or causes with whom or with which they disagree; it violates lawyers' rights to equal protection of the law; and it violates lawyers' rights to be free from slavery and involuntary servitude.

⁶⁹U.S. Const. amend. XIII.

⁷⁰Shapiro, *supra* note 7, at 769 (1980).

⁷¹240 U.S. 328, 330 (1916).

⁷²245 U.S. 366, 390 (1918).

Forced labor of lawyers is forced altruism.⁷³ Altruism is inconsistent with the organic law of the United States. As noted, the Declaration of Independence provides that we have the right to pursue happiness. "One cannot combine the pursuit of happiness with the moral status of a sacrificial animal."⁷⁴ Altruism, of course, is at the root of the call for mandatory pro bono. The essence of the argument is: Indigents *need* lawyers, therefore lawyers must serve. But how can one person's need be a claim against another person's life? Only by accepting the philosophy of Karl Marx that "from each according to his abilities, to each according to his needs", can one accept that one person's need is a claim on another person's life. We should learn from the failure of this philosophy in Eastern Europe and the Soviet

Union, rather than embrace it and impose it upon ourselves.

The principle that force is appropriate if the need exists – that the ends justify the means – must be repudiated. In a civilized society that cherishes liberty, individuals pursue their values, including pro bono legal services, by persuasion and mutually agreeable arrangements; they do not instigate a mob and take what they want by force. Of all people, lawyers should not be associated with forcing their values on others for participating in any program which forces values on others, no matter what the sought after values may be.

⁷³ *Cunningham v. Superior Ct.*, 177 Cal.App.3d 336, 351, 222 Cal.Rptr. 854, 864 (1986).

⁷⁴ A. Rand, *Man's Rights*, in *The Virtue of Selfishness* (1964).

Martha Siegel, Acting Director, Legal Practice Skills Program

Acting Director of the Legal Practice Skills Program, Martha Siegel is trained in two fields: the law and education. She graduated from Harvard Law School, *cum laude*, in 1985 and received her Ed.D. from Harvard in 1976, concentrating in curriculum and program development, teaching, and psychology. She also received a Masters of Arts in Teaching from Harvard in 1968.

Dr. Siegel's legal experience includes a clerkship with the Honorable William G. Young, United States District Judge for the District of Massachusetts. She also worked for a year and one-half as a litigation associate at Ropes & Gray. In 1988, she served as Assistant Legal Counsel to Governor Michael S. Dukakis. In 1989, she joined the Massachusetts Teachers Association as staff counsel. Just prior to joining Suffolk University Law School, Dr. Siegel served as Special Assistant to the Dean of Boston University School of Law.

Active in the Boston Bar Association, Dr. Siegel writes a regular column on professionalism, "Spotlight on Professionalism," in the *UPDATE*, the Boston Bar Association newsletter. She recently served on the BBA Committee on Professionalism and has been appointed to a three year term on the editorial board of the *Boston Bar Journal*.

In December of 1991, Dr. Siegel published an article in *NAPLA NOTES*, a newsletter for pre-law advisors, titled, "Law School: An Informed Choice or A Career By Default?" More recently, she presented a paper to the National Conference of the National Association of Law Placement titled, "Legal Employment: Issues for the 90's; Demographics, Priorities, and Values—The Brave New World."

Another professional commitment, Dr. Siegel counsels attorneys who are considering or reconsidering occupational decisions in their legal careers. She has conducted workshops based on the Myers-Briggs Type Indicator for the Women's Bar Association, the Office of Career Planning and Placement at Boston University School of Law, and the faculty and students in the Civil Clinical Program also at the Boston University School of Law.

Curriculum development occupies much of her academic concern. While a law student, Dr. Siegel helped develop the video on "Martha Miller," a videotape used to teach students in legal aid clinical experiences about interviewing clients. Beyond curriculum development, Dr. Siegel's concerns include legal education, in general, and legal writing, in particular. She continues her research on the effect legal education has on the moral development of women and the ways in which legal education can be structured to respond to the differences in women's strategies of solving moral dilemmas. Currently, much of her work focuses on legal professionalism—the reported decline in standards of civility and legal ethics in daily practice.

In related areas, Dr. Siegel has taught legal research and writing at Boston University School of Law. As a secondary teacher, she taught high school English and social studies. She has also served as a consultant on gerontology and retirement planning issues and was appointed to the Board of Directors of the Center for Law and Education. In 1989, she participated in the Subcommittee on the Courts of the Gender Bias Committee of the Supreme Judicial Court.

New Legal Practice Skills Instructors

Bernadette Feeley is a first year instructor in Suffolk University Law School's Legal Practice Skills Program. Before joining the Suffolk Faculty, Ms. Feeley prosecuted criminal cases as an Assistant District Attorney in Middlesex County. She also clerked for United States Magistrates Robert DeGiacomo and Patti B. Saris in the United States District Court for the District of Massachusetts. In that capacity, she assisted the court in criminal and civil matters, and in the management of the federal asbestos litigation for Massachusetts.

While a law student at Suffolk University Law School, Ms. Feeley served on the Moot Court Board and was a co-director of the Tom C. Clark Moot Court Competition. As a law student, she also participated in the Voluntary Prosecutor's Program and clerked in the United States Attorney's Office in Boston as well as several private practice firms.

Ms. Feeley lives in Marblehead with her husband and two daughters.

Thomas H. Seymour is a new instructor in the Legal Practice Skills program at Suffolk University Law School. He comes to Suffolk University from Boston College Law School, where he taught legal research and writing and professional responsibility. Previously, he practiced corporate law at Csaplar & Bok in Boston.

Mr. Seymour is a 1987 graduate of Harvard Law School. He also holds a B.A. in English from the University of Nebraska and an M.A. in English from Simon Fraser University in Canada.

Prior to entering law school, Mr. Seymour taught writing and communications courses at several institutions,

including Boston University, Harvard's Kennedy School of Government, and the Harvard Business School.

A trained mediator and commercial arbitrator, Mr. Seymour has acted as a small claims court mediator, and investigator and mediator for consumer complaints filed

with the Massachusetts attorney general's office, and as an arbitrator under the state's automobile "lemon law".

Mr. Seymour is the coauthor of two articles on discharging student loans in bankruptcy and is also the author of several Harvard Business School case studies.

POWER OF ATTORNEY: LEGAL WRITING FOR THE PRACTITIONER

Dr. Martha Siegel

Good legal writing initially answers three questions: Who? Did what? To whom?¹ This sequence of questions anchors the document in the active voice, rather than the passive. Although appropriate uses for the passive voice exist, this article focuses on the function and utility of the active voice in legal writing.²

The active voice meets the goals of good persuasive or "advocacy" writing: controlling tone, crafting suspense, and allocating responsibility. As a consequence, the active voice should dominate briefs, memoranda, and demand letters. The active voice actually asks: "who? who? who?"

Placing the real "actor" or agent first in a sentence virtually guarantees the active voice and its concomitant virtues: clarity, drama, and focus. The active voice partners well with persuasive techniques that require the practitioner to (1) forswear vagueness and generalities, (2) create a sense of dramatic tension, (3) control tone and cadence, and (4) transmit essential information efficiently. Ironically, this task falls to the simple, short sentence – and the active voice.

In a busy world, we all benefit from a formula. A way exists essentially to eradicate the passive voice from legal writing: stop using any form of the verb "to be." Banish from your writing: "to be" and its offspring – *am, is, are, was, were, and been*. By abstaining from "to be," you will virtually eliminate the passive voice.³

Some examples prove the case.

Passive: Compliance with the standards for the safe removal of asbestos *is* mandatory on the part of the employer.

Active: The employer *must comply* with the standards for safe asbestos removal.

The word count keeps score: passive: 18, active: 11. Measured by drama, focus, and urgency, the active voice example simply works better.

In short, the passive voice relinquishes "agency" – a sense of the people involved in or causing the problem.⁴ When legal writing loses agency, it loses "human interest" – that vital element we sell to judges and juries every day.

Passive: The stolen truck was abandoned after the fatal accident.

Active: Tom Jones abandoned the stolen truck after the fatal accident.

The first allows our attention to wander, missing the cause of the fatality. The second points the finger directly at the perpetrator. The passive voice allows the actor to escape responsibility for his or her actions, remaining structurally anonymous.

As a form of writing, legal composition loves "gossip." The legal system's business concerns "who" "did what." As a result of focusing on the actor, then, the action – as expressed through the properly crafted verb – leaps off the page.

Passive: Smoke detectors were not installed in the apartment.

Active: The landlord failed to install smoke detectors.

Depending on the circumstances, the attorney might even select a stronger verb: "refused to install" or "delayed installing." The passive voice has a purpose, too, which this column will explore in the next issue.

To wrench students into the world of the active voice, I ask that they limit their use of the forms of the verb "to be" to no more than one usage per page. You will find this challenge much harder than it may appear, but it truly works.

If in doubt whether "to be" or "not to be," don't. ***

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*** Except when directly naming the "to be" verbs, this article contains not a single form of the verb "to be."

¹The last question: "Why?" initiates the chain of analysis that forms the basis for legal reasoning.

²Part of a regular series of tips to "refresh the recollection" of legal practitioners, the next article will consider constructive and purposive use of the passive voice to achieve specific and planned rhetorical objectives.

³See, e.g., Cullen Murphy, "To Be," in *Their Bonnets: A Matter of Semantics*, Reports & Comments, 269 *The Atlantic* 18 (February 1992) (reviewing the history of the E-Prime movement, a group of writers and oralists who eschew all form of the verb "to be" in both writing and speaking.)

⁴In the next article, I will discuss those occasions when an attorney serves the client by intentionally concealing agency.

LEGAL EMPLOYMENT: ISSUES FOR THE '90s

Demographics, Priorities, and Values – The Brave New World

Dr. Martha Siegel

In 1983, almost ten years ago, Derek Bok, then President of Harvard University, noted in his report *A Flawed System of Law Practice and Training*, "Law schools have traditionally been the refuge of able, ambitious college seniors who cannot think of anything else they want to do."¹

More than ever before, these individuals – the able, ambitious, and undecided – challenge the personnel who work in law placement. In some ways, then, the task of placement remains the same: helping identify job opportunities for a group of highly trained legal professionals. In other ways, the '90s requires innovative employment solutions to a complex set of new issues: diversity, gender, student debt, parenting, and reawakened altruism.

The current state of the general – and legal – economy exacerbates the problems of placement personnel. Worse yet, students, inundated and frantic with debt, often force themselves to premature closure, taking any job available without attempting to match their interests. Unfortunately, premature closure virtually ensures dissatisfaction, these attorneys returning often to ask placement personnel to "fix" their legal careers and sometimes their lives.

A BRIEF (THEORETICAL) RETROSPECTIVE: 1970-1990

The new generation of law students evolved from the patterns and practices of the last three decades. After doing their part turning on, tuning in, and dropping out, the students of the '70s entered law practice seeking two things: they sought to "do" and to "do good." A legal career promised efficacy ("doing") and altruism ("doing good"). For many, law became an instrument of social justice. If students discussed salaries at all, a good living was as much serendipitous as planned. As part of the "can do" or "fix it" generation, law students of the '70s sought a variety of legal jobs from the traditional to the pro bono.

In the '80s, many students severed "doing" from "doing good" and coupled it, instead, with "doing well." Law practice became much more of a personal than a social instrument, designed to benefit the individual lawyer financially.

A large number of graduates, although certainly not all, opted for efficacy defined by deal-making and professionalism defined by Wall Street.

Financial success came to measure professional prowess. In the worst cases, "doing well" became a separate goal – sometimes the only goal. As long as the economy and Wall Street thrived, this new alliance of efficacy and indulgence asked placement services for job match-up rather than job generation. The '80s blessed us with the microwave and the expectation of instant results. A law degree conferred instant professionalism and respect. Perry Mason did his part, but "L.A. Law" seemed to promise the world.

Today's students grew up in – and grew out of – these two decades. If we look beyond the current economic desert, signs of the itinerary of this new generation materialize. Indications abound that today's graduates seek a balance – or better – a blend of "doing," "doing good," and "doing well." They seek to harmonize social efficacy with communal or global altruism and financial resilience. Many placement dilemmas derive from the strains repayment of the debt burden places on this fragile symbiosis. Unfortunately, the need to repay debt often limits job choice severely – placing the able-but-indentured graduate in battle dress just to pay for the past with little left to invest in the future. Many of these students are twice-impooverished – by debt and in spirit.

TODAY'S MYTHS AND REALITIES: THE 1990s

The '90s heralds the end to at least three myths about legal careers:

1. Law is a monolith;
2. A legal career is progressive, unitary, and linear; and
3. A job placement is a unique and singular event.

Today, law practice is no longer a monolith – if, in fact, it ever was. Rather, now more than ever, law practice is a

¹Bok Report: *A Flawed System of Law Practice and Training*, Derek C. Bok, 33 *J. Legal Education* 570, 884 (1983).

finely tuned ecosystem of law firm size; public and private alternatives and sequences; attorney preference, personality, and work style; evolving legal substance and theory; personal and law firm economics; value systems; power hierarchies; and personal, corporate, and governmental ideologies. Law placement must operate within this ecosystem.

Similarly, a law career is no longer progressive, unitary, or linear. Lawyers who "married" law firms find themselves today divorced and divorcing. Today's legal careers often seem retrograde, circular, and discontinuous. Sometimes trained lawyers simply abandon the profession. *The New York Times* reported in 1990 that 40,000 lawyers leave the profession per year – roughly the same number that enters it.² Law placement must help graduates think of employment in terms of stepping stones rather than as paved superhighways.

Finally, placement offices field an increased number of alumni inquiries. Graduates some years out in practice return for placement services when they find their established law firms collapsing, their political position suddenly without its elected sponsor, and their friends defecting to form small or mid-sized boutiques. Displaced or disaffected attorneys challenge placement services to stretch beyond finding jobs for current graduates to finding jobs for established-but-career-disrupted alumni/ae. As law schools tighten placement budgets, the issue of who to serve and how to squeeze more minutes from an hour will continue to tax nerves and resources.

Not impressed by placement difficulties, students arrive at placement offices with one request "JOBS NOW." Without realizing it, they ask for other things, too. Frequently, they even seem to be asking "permission" from placement personnel to leave the practice of law entirely.

Welcome to the Brave New World.

CURRENT DEMOGRAPHIC TRENDS

A recent report of Law Services data suggests some important trends in demographics.³ Indications exist that the 1990-1991 law school applicants were racially and ethnically more diverse, younger, and – although gender data is incomplete – more likely to be female than the previous year. Law Services reports applicant increases of 27.5% among Native Americans and of 21% among Mexican-Americans. Other noteworthy increases over last year include a 19.8% increase among Asian-American applicants, a 14.9% increase among black applicants, a 11.4% increase

among Puerto Rican applicants, and a 8.6% increase among Hispanic applicants.

Significantly, Law Services reports that women comprised approximately 42% of the applicant pool, although the report notes that an increasing number of applicants did not report gender data. Finally, the report notes that the number of applicants aged 22 and younger increased by 10.3%.

Placement professionals must respond to the increasing diversity of its clientele. Placement services must focus in the '90s on a more sophisticated understanding of group and individual difference and how to generate job opportunities that respond to those differences. To illustrate the role difference plays in placement strategies, I turn to a short case study of a group of law students that in the span of 20 years has quadrupled, moving from about 10% to almost 50% of law admissions and law graduates: women.

To the extent that women now constitute almost 50% of the placement clientele and to the extent that women serve as a case-study of value and priority difference, a review of the data by gender can pave the ways for new strategies and more effective placement for a large number of law students.

WOMEN LAW GRADUATES: A CLOSER LOOK

Women graduates and practicing attorneys are speaking out about the suffocation of falsely-neutral norms of the workplace, the pressures not to take intellectual risks, and the uniqueness of their perspective on life and legal experience. Women have begun to redefine their "weaknesses" as "strengths" and insist that their priorities be recognized.

In 1989, the Harvard Business Review published Felice Schwartz's ground-breaking article, "Management Women and the New Facts of Life."⁴ Set in the world of corporate business, Schwartz's article argued that corporations ultimately benefit when they allow women the flexibility to balance their careers and their personal lives – to choose the "Mommy Track."

Although employing women costs more than employing men, Schwartz argues that both "career-primary" and "career-and-family" women have particular value to the corporation. Schwartz laments that the male corporate culture rejects both extremes of the spectrum on which they place women. The male corporate culture regards women who want the flexibility to balance their families and their

²"Careers, Reducing "The Stress on Unemployed Lawyers," *The New York Times*, § D at 20, January 23, 1990.

³91-4 Law Services Report at 12-14 (July/August/September 1992); see also 92-1 Law Services Report at 9-11 (January/February 1992).

⁴Felice N. Schwartz, "Management Women and the New Facts of Life," 67 Harv. Bus. Review 65 (1989).

careers as not adequately "committed" to the organization. On the other hand, the culture regards women who perform as aggressively and competitively as men as abrasive and unfeminine.

Women in law practice wrestle daily with these issues and others. Women attorneys struggle against the "glass ceiling" — a point in the political hierarchy of a firm beyond which they cannot rise. They wrestle with "balancing" (if that can ever be done) the demands of partnership with the demands of birthing, biology, and parenting. Still disproportionately responsible for child care, women in law practice worry about child care — and even if that problem seems under control — illness often forces instant readjustments. Chicken pox has never picked a "good time" on a working mother's calendar.

Women serve as a case study in different values. Evidence is accumulating that women speak with a "different voice" than men in their moral development and, perhaps, legal reasoning.⁵ Evidence also exists that women may well even have a different way of "knowing" — different perspectives from which they draw conclusions about truth, knowledge, and authority.⁶ There even exists a body of critical legal analysis and scholarship devoted to women's differences, "feminine jurisprudence."

The Supreme Court itself has recognized that "[w]omen bring to juries their own perspective and values."⁷ More significantly for issues of appropriate placement options, women tend to reject the view of life and law as a zero-sum game, the traditional model for the adversary system.⁸ Although initially participating, women after several years of practice — and often as they come to terms with the demands of a young family, frequently reject the competitive male model.⁹

Carol Gilligan was the first theorist to describe women's different styles of moral reasoning. Her work focuses on describing how women speak "in a different voice." React-

ing to the work of Lawrence Kohlberg whose stage-based, hierarchical developmental theory was based on a male-only group of subjects, Gilligan repeated the study using women. Briefly, Gilligan's research supports the notion that women and men tend to reason differently about moral dilemmas.

Both Gilligan and Kohlberg's studies involved a "story" about a man named Heinz who lives in Europe. Heinz's wife is dying from a rare form of cancer. The doctors identify one drug that might save her. The druggist, who recently discovered the drug, asks for a sum of money, ten times the cost. Heinz has little money and tries to borrow from his friends to no avail.

Should Heinz steal the drug?

Gilligan observed that men tend to reason that Heinz should steal the drug because human life is more important than property.¹⁰ "Jake" — the name given to the male prototype — sees the world in a hierarchical order of rights and rules, solving moral dilemmas "like a math problem with humans."¹¹ For Jake, responsibility lies in freedom from interference, with separateness from others. Jake represents the "justice ethic" and orders individual rights on a ladder in rank order.

The female voice, called "Amy," looks for ways "to burst the frame,"¹² to invent options, to prevent harm and to satisfy as many people as possible in a response that is win/win, rather than zero-sum. Amy responds to the Heinz dilemma by wondering: "I think there might be other ways besides stealing it."¹³ For Amy, the dilemma comes from the druggist's failure to respond, and she solves the problem by resorting to the complex, interconnected world of relationship, commitment, obligation and responsibility. Amy evokes the idea of a "web" of interconnected people and gives name to the "ethic of care." Amy makes moral choices by balancing harms and inventing solutions in the anxious hope that all concerns may be served without harm to any.¹⁴

⁵C. Gilligan, *In a Different Voice, Psychological Theory and Women's Development*, 1982. See also C. Gilligan, J. Ward, J. Taylor eds., *Mapping the Moral Domain, A Contribution of Women's Thinking to Psychological Theory and Education*, 1988.

⁶*Passim*, M. Belenky, N. Goldberger, J. Tarule, *Women's Ways of Knowing, the Development of Self, Voice, and Mind*, (1986).

⁷*Taylor v. Louisiana*, 419 U.S. 522, 532 n.12 (1975).

⁸K. Karst, "Women's Constitution," 44 J. Legal Educ. 446, 488 (1984).

⁹E.g., L. Bender, "A Lawyer's Primer on Feminist Theory and Tort," 38 J. Legal Educ. 3, 7 (1988) (*Describing the competitive male model as an intellectualized substitute for duelling and medieval jousting*); see also C. Menkel-Meadow, "Portia in a Different Voice: Speculations on a Women's Lawyering Process," 1 *Berkeley Women's L. J.* 39, 51-58 (1985); and *passim* R. Jack and D. Jack, *Moral Vision in Professional Decisions, The Changing Values of Women and Men Lawyers*, 1989.

¹⁰C. Gilligan, *In a Different Voice*, at 26 (1982).

¹¹*Id.* at 28.

¹²L. Bender, "A Lawyer's Primer on Feminist Theory and Tort," 38 J. Legal Educ. 3, 9 (1988).

¹³*Id.* at 28.

¹⁴*Id.* at 151-174.

Some critics have noted that law has absorbed and strengthened the male model – the competitive, acquisitive values associated with American individualism and capitalism.¹⁵ Practicing law from a women's perspective often means looking to a real, concretized, contextualized, and experiential dimension in which the context of a case is as important as the case itself.¹⁶

These different styles of moral reasoning illustrate one of the tensions of the new generation of the '90s. Leslie Bender, a leading theorist on feminist jurisprudence contrasts the "justice" ethic or perspective, often linked to male moral reasoning, to the "care" ethic or perspective, frequently linked with female moral reasoning. She writes of the inverse relationship one has with the other.

The hallmark of mature judgment in the justice perspective (detachment) is *the* moral problem to the care perspective (failure to attend to need). In contrast, the justice perspective considers the mark of mature judgment in the care perspective (attention to the particular circumstances and needs of the party) as the paradigmatic failing (treating people unequally). (Emphasis added.)¹⁷

While moral reasoning does not predict priorities or values, the ways in which individuals reason about right and wrong surely affects both priorities and values.

GENERAL IMPLICATIONS FROM A FEMALE CASE STUDY

Approximately 50% female, the new generation of lawyers (once the economy improves) will ask placement offices for more than jobs. They will begin to ask about "caring" jobs that improve the human condition and world environment. They will look for jobs that preserve relationships – that is, require fewer billable hours so that time remains for friends and family. Returning alumni in particular will ask for positions that allow for creative and alternative dispute resolution.

Women – as well as other students of the '90s – are seeking the kind of equilibrium in their career choices that allows for both cognition *and* conscience, rights and responsibilities – in short, ethics of both justice *and* care.

Unfortunately, the legal employment market does not currently offer positions with reasonable hours *and* salaries large enough to pay off student loans *and* socially or politically significant work. Precisely because the genera-

tion of the '90s is asking for what does not yet exist, placement offices should expect increasing numbers of returning alumni/ae who, in agony to find ways to mesh the head and the heart, hopscotch around the landscape of legal employment seeking just the right mix. Placement personnel can help students adjust to the idea that shopping around for a good employment fit should be viewed over several years, not a one-shot-deal.

The case for gender differences raises several ethical questions for placement personnel as they fully enter the '90s and look to the year 2000.

FIVE POTENTIAL ETHICAL DILEMMAS FOR PLACEMENT PERSONNEL

Reasoning as Amy does, in context and in webs of interdependent variables, I pose five ethical dilemmas for those in placement serving the new generation of students.

One. If, in the '90s, students will ask placement personnel to pay closer attention to *suitable*, rather than merely *existing*, jobs, how will placement personnel deal with the responsibility to *counsel choice* not merely *dispense choice*? How can placement offices allocate scarce financial and scheduling resources to do more counseling with fewer people and fewer dollars? How far can placement offices realistically – and financially – go towards individuating service?

Two. If debt burden so clouds and distorts appropriate job choices for our students, what responsibilities, if any, do placement personnel have to set in motion forces to provide alternative funding, reduce debt loads, or provide programs of loan forgiveness?

Three. If women exist as a case study in "difference," what responsibilities, if any, do placement personnel have to seek out and match job opportunities to differences of all kinds? Do placement personnel have specific responsibility to seek opportunities that respond to racial, ethnic, and gender difference?

Four. How should placement personnel balance responsibilities to the students served and the supporting institutions? Law schools as institutions care about graduate job statistics. When might institutional goals of *full* employment clash with student demands for *appropriate* employment?

¹⁵J. Auerbach, *Justice Without Law, Resolving Disputes Without Lawyers*, at 138 (1983).

¹⁶C. Menkel-Meadow, "Feminist Legal Theory, Critical Legal Studies, and Legal Studies or 'The Fem Crits Go To Law School,'" 38 J. Legal Educ. 61, 80 (1988).

¹⁷L. Bender, "From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law," 15 Vermont L. Rev. 1, 38 (1990).

Five. If able and ambitious students continue to enter law schools simply because “they cannot think of anything better to do” – what I have called in another context a “career by default,”¹⁸ what responsibility, if any, do placement personnel have to counsel graduates “out” of legal careers? What role, if any, should placement personnel play in suggesting to a graduate or returning alumni/ae that they might be better placed in a non-legal job altogether? How far can, or should, placement personnel go in non-legal placements for their graduates who reject a career in the law?

LOOKING FORWARD TO A MORE DIVERSE CLIENTELE IN THE NEW LEGAL ECOSYSTEM

At least three tasks face placement personnel in the '90s: (1) a more articulated response to the differences that moti-

vate and animate our increasingly diverse populations; (2) the augmentation of the range of opportunities to include non-traditional employment or quasi-legal placements; and (3) the implementation of sequential career services that recognize multiple sequences of graduate counseling and placement.

Placement professionals have frequently been asked – or expected – to work miracles. Why should things change in the '90s?

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¹⁸See M. Siegel, “Law School: An Informed Choice or A Career By Default?”, 13 NAPLA NOTES 13 (1991).

RECENTLY PUBLISHED

Professor Eric Blumenson has published a supplement to his 1990 book, “Massachusetts Criminal Defense”. The supplement, published in July, 1992, was co-authored with Professor Stanley Z. Fisher of Boston University Law School.

“Massachusetts Criminal Defense” is a two volume work addressing the law and tactics involved in all phases of

criminal defense work, including such arcane areas as civil and immigration consequences of criminal cases, parole eligibility, post-conviction remedies, forensics, and probation revocation. It also contains directories of sources for investigators and dispositional planning. The book is available from Butterworth Legal Publishers, 90 Stiles Road, Salem, NH 03079; (800) 548-4001.

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