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The Suffolk University Law School Journal

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Note From the Advocate

THE ADVOCATE WELCOMES COMPLETED MANUSCRIPTS AND IDEAS FOR ARTICLES THAT WOULD BE
OF INTEREST TO OUR READERSHIP. PLEASE CONTACT PROFESSOR JOSEPH D. CRONIN, SUFFOLK UNI-
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To The Advocate:

The fall 1992 issue of the Advocate contained an article by Professor Charles E. Rounds, Jr., in which he conveyed some of his thoughts on the teaching of trusts. It is very disturbing to learn that less emphasis is currently placed on trust courses in this country's law schools.

The trust course contains various substantive elements of the common law, which most law schools attempt to survey in a typical first year curriculum. Similarly, a study in the law of trusts also reinforces the law student’s analytical thought processes which standard courses in property, torts and contracts attempt to mold. Additionally, the fiduciary relationships involved in trust issues form concrete studies, whereby the required professional responsibility curriculum is more fully understood.

The law of trust transcends the practice of law. Most members of the Bar confront trust issues in one form or another during their careers. In this country today, almost three trillion dollars are held in trusts. In Boston and Philadelphia alone, there are assets of approximately four billion dollars under fiduciary management in the largest law firms.

One of the nation's most historically rooted personal rights regards the control of one's own property. In a modern legal academic environment which focuses on individual rights and personal freedoms, law schools should give this right proper emphasis through a strong academic study of the law of trusts. John Locke, in his Second Treatise of Government wrote:

From all which it is evident, though the things of nature are given in common, yet man, by being master of himself and proprietor of his own person and the actions or labor of it, had still in himself the foundation of property; and that which made up the greater part of what he applied to the support or comfort of his being, when invention and arts had improved the conveniences of life, was perfectly his own and did not belong to others.

Inherent in the right of property ownership is the power to dispose of it as one chooses. The trust concept emanates from the plenary ownership interest in one’s property. As Professor Rounds stated in regard to private trusts: “the trust provides enlightened property owners and their lawyers with a mechanism for seeing to the needs of the young, the disabled, and the elderly.” It is in this regard that the purposes of trusts remain unlimited.

Suffolk University Law School should be recognized and congratulated for its status as one of the last of the nation's law schools to require a trust course for its Juris Doctor degree. I only hope that the faculty and administration will recognize this fine distinction and continue to maintain it.

Sincerely,

John J. Spillane, '93
To The Advocate:

I was happy to see the carefully written article by Michael J. Mazzone in your fall 1992 issue, entitled Mandatory Pro Bono. Mr. Mazzone’s scholarship exposes the cliches and well-worn phrases which mandatory pro bono proponents try to pass as arguments. The truth is that those “arguments” find their support not in the highest ideals of the law, but in popular culture. I hope that anyone who disagrees with Mr. Mazzone will respond to his arguments and his authorities honestly and directly. Most advocates of mandatory pro bono either bypass the constitutional issues altogether or briefly cite a case or two and pretend that the issue has been resolved. They do not favor an open discussion of its constitutionality, because the issue is only an obstacle to their goal; they are not seriously concerned about the rights of lawyers.

Like many proponents of popular ideas, supporters of mandatory pro bono are relying upon unstated cultural beliefs to persuade the listener. In this case, the cultural belief is that lawyers do not really deserve what they are paid. That belief is held by envious non-lawyers who do not know what practicing law entails, and by those lawyers who truly do not deserve what they are paid. For those working lawyers who struggle to find time even for their family, mandatory pro bono is a heavy burden.

Mandatory pro bono represents a superficial compassion which lets others make the hard sacrifices. That kind of compassion not only destroys the rights of lawyers, but also continues to erode the freedoms which give the intended beneficiaries of mandatory pro bono any chance of escaping their condition.

As lawyers, we ought to recognize mandatory pro bono for the creeping tyranny that it is, and oppose it.

Yours very truly,

David L. Pybus
Houston, Texas

To the Advocate:

Many thanks for including Professor Rounds’ comment on his project with Eric P. Hayes, Esq., writing the Seventh Edition of Loring’s A Trustee’s Handbook, particularly their discussion of the decline of the teaching of trusts in law schools. I hope the “critical legal studies” battle against the teaching of trusts is confined to the faculties of so called elite law schools and has little impact on schools like Suffolk whose clear mission and focus has been and should continue to be the education and training of “real lawyers” in their important mission of serving “real people” and their families beset with “real problems.”

The association of Suffolk with a treatise such as Loring’s is something of which all those associated with the Law School can be proud. I beg the faculty and administration to hold their ground and not make elective or otherwise marginalize the study of trusts. What area of law is both ancient and modern at the same time? What area of the law has at pivotal times in its evolution provided more creative and just solutions to individual and societal problems?

Like many of my generation, I gravitated to the law without any specific focus or ambition at the time of my admission (1979). I returned to my home town in Northeastern, Massachusetts (population 17,000), hung out my shingle, held elective office, became involved in charitable and civic activities and started a family. My practice, like most who go out on their own when they pass the bar exam, was a mosaic of civil and criminal litigation, real estate conveyancing, representation of small businesses and wills and trusts. As time passed I, like most I think, found myself gravitating towards specialization in an area which best suited my skills and the needs of my clients and potential clients. For me that was wills, estates, guardian and conservatorships, in short, the law of trusts. It challenges one’s moral sensibilities and judgment in ways that those who have not grappled with applying the uses of trusts on behalf of clients and their beneficiaries cannot begin to understand.

It is no longer (if, indeed, it ever was) an area of practice that is the exclusive province of a small closed circle of socially connected practitioners. Virtually everyone in Massachusetts who owns real estate or has even a modest estate and has reached later middle age should consider the uses and advantages of trusts. One of the fastest growing areas of competition for the legal profession from non-lawyers is financial planners and insurance salesmen who market full blown estate plans and trusts to folks who recognize the need for trusts in their personal and family lives.

Our profession has failed miserably in appreciating and fulfilling the needs of the public for personally crafted ap-
proaches which include well tailored trusts. They and our nonprofessional competition understand this better than we do. Why? Apparently because the statistists, including the critical legalists, are infiltrating our law schools more widely and deeply than I had realized. It is becoming clearer each year that the currently fashionable legal education is hell bent on minimizing the recognition of and education as regards property rights. It is ideological and political in its basis. How many of Suffolk’s current faculty have even experienced the teaching of trusts as a core course in their own law school educations? (Judge Harry T. Edwards explores this problem with great understanding and in depth in an October 1992 article in the Michigan Law Review.)

As Professor Rounds pointed out in his review, “the center of gravity in this country (has) move(d) from the private individual to the state.” The real question for law schools is the extent to which it is proper for them to encourage and participate in the movement, rather than reflect it. Clearly, to me at least, they have crossed the line.

The tragic and clearly immoral result has been the emergence of two generations of lawyers who are unable to assist individuals (and their families) in coping with and reacting to the burgeoning anti-individual, anti-family and anti-property state that permeates today’s culture.

Professor Rounds said it best: what is needed today is “a bench and a bar that understand the concept of the trust and its myriad possibilities. It also needs a corps of incorruptible and conscientious trustees . . . Each person who is properly cared for is one less person who has to deal with and be a burden to the welfare bureaucracy.” Perhaps therein lies the real problem for critical legalists; people who are not a burden to the bureaucracy are independent of it. What this battle is really about is the unquenchable appetite of statistists for power; dependent people are grist for the appetite, independent people are not.

My appreciation to the Advocate for continuing to be a forum for points of view which dissent from what is currently fashionable and politically correct. Perhaps graduates of Suffolk who share the view that the teaching of trusts was for them and still is integral to a sound, well rounded legal education should find ways to make their views known to the faculty and administration.

Sincerely,

John W. Pramberg
Suffolk Law School Class of ’84

To the Advocate:

After reading the fall 1992 edition of “the Advocate” I was saddened and disturbed to learn that Suffolk’s Curriculum Committee is reviewing whether or not the course on Wills and Trusts should remain as a required course in the law school curriculum. Having confirmed this with Professor Joseph Cronin I felt compelled to share my thoughts on this subject with the readers of “the Advocate” and hopefully with the members of the Curriculum Committee. While I strongly disagree with Professor Rounds’s historically inaccurate opinion that sometime in the 1960’s the center of gravity in the U.S. began to move from the private individual to the state, I applaud him for his well stated case for the importance of the teaching of Trusts. As for the center of gravity in the U.S., Professor Rounds seems to have ignored the movement back toward the individual from 1980 to 1992 which more than compensated for any movement toward the state up to 1980; if he slept through those twelve years then I forgive the inaccuracy of his opinion.

Nevertheless, the teaching of Wills and Trusts is an important and essential part of the law school diet for two very good reasons. The first reason, which should be considered high on the long list of reasons, is the protection of the public from incompetence and negligence. Secondly, to prevent a generation of law students from depriving themselves of a full and complete understanding of the law of property.

When I state that requiring a course on Wills and Trusts serves to protect the public, this point can be best illustrated by calling the reader’s attention to the headlines for Lawyer’s Weekly on December 14, 1992 and February 22, 1993. Without going into the details of the cases reported under those headlines, please trust me when I say that the major themes running throughout both stories were negligence, at best, in Estate-Plan Drafting and shame to our Profession. While we all have an ethical obligation not to represent a client in a matter unless we are or expect to become well versed in that area of the law, all too often this obligation is ignored. I think that I can safely speculate that a law student who has completed a required course on Wills and Trusts and come to understand and to respect what a complex body of law that it is, would be a lot less likely to cause the damages suffered by the victims involved in the two articles mentioned above. The goal of Suffolk Law School has not been and should not be to rely on the Ethical Code to fill in the gaps in its curriculum, but rather Suffolk Law School should continue to educate their students in such a way that they learn enough about a certain body of law either to serve the public well, or so that they understand that they are not proficient enough to
practice in that field of law. For these reasons alone Wills and Trusts should be a required course, not only at Suffolk, but also at every other law school.

With respect to my "deprivation" argument let me add this. Although the deprivation in learning would be self-imposed by those students who opted not to take Wills and Trusts, which according to Professor Rounds's poll would be 50% of the students, the void in their understanding of Property Law would be as great. As you proceed through the required course on Property and your professor skims over several topics which he assures you will be covered in the course on Wills and Trusts, you imagine that once you eventually cover those topics in Wills and Trusts your understanding of Property Law will be complete. However, it is only after you have completed the course on Wills and Trusts that you realize how incomplete your understanding of Property Law actually was. The two topics are so closely intertwined it is inconceivable to think that one can be taught without the other. The course on Property provides an essential understanding of the nature of property and its ownership, but only partially explores the limitless possibilities involved in the incidents of ownership of property. By not taking Wills and Trusts students will have unknowingly deprived themselves of a complete understanding of the transfer and alienation of property, and worse may someday deprive a client of her complete utilization of the rights which accompany the ownership of property. The only suitable analogy to describe a lawyer without the benefit of a course on Wills and Trusts, would be a chess player who only understood the rules that apply to pawns.

Finally, as to the reasoning that most other law schools do not require a course on Wills and Trusts, I say that "everybody else is doing it" has never been a good reason to do anything.

Sincerely yours,

John F. Keefe
Boston, MA
Class of '92

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ROUNDS RESPONSE

Mr. Keefe and I share the opinion that the trust is a fundamental legal relationship which every student must master as early as possible in the student's law school career. We disagree, however, as to why law schools in the late 60s—Suffolk excepted—set about the process of marginalizing the teaching of the law of trusts. I have suggested in In the Matter of Trusts and elsewhere that these developments have had something to do with the shifting of the nation's center of gravity from the individual to the state, a process that I have asserted began in earnest in the late 60's and has continued unabated. Mr. Keefe questions the factual premise that the process has been inexorable; in fact he suggests that in the Reagan-Bush years, there was a movement from the state back to the individual.

First let me say that I have enormous respect for Mr. Keefe who a few years back was the top student in my Trusts class. A teacher often wonders how well he would have done on his own exam. Also let me say that since the Advocate received Mr. Keefe's letter he and I have some good times debating the issue, and a good laugh over his comment—that I cannot get him to retract—that I have been snoozing lo these past 12 years.

As a reader or two may wish to weigh in or one side or the other of the debate, allow me to explain the factual basis for my assertion that the flow of power to the state has been inexorable:

According to William Niskanen, chairman of President Reagan's Council of Economic Advisers, "almost every program Clinton would increase expanded rapidly during the Bush years," children's programs (increased 67 percent), education and training (16 percent), aid to states and cities (16 percent), infrastructure (32 percent), nutrition (72 percent), research and development (20 percent). David Wessel of the Wall Street Journal writes that "... even Reagan, that fervent foe of big government, didn't manage to make it any smaller." Finally, Charles Krauthammer writes that "the problem with Clinton is not that he is raising revenues ... it is how he is raising them: with a massive expansion of state power into the inner workings of the economy." These and numerous other scholars and commentators have expressed the view that I essentially parroted in my article, namely that while the rate of the flow of power to the state may moderate from time to time, the flow nonetheless continues inexorably. It is suggested that if this perception is "historically inaccurate," it has more to do with the quality of the supporting data rather than my sleeping habits. A response from Mr. Keefe?

May I also take this opportunity to clear up some misunderstandings that may have been caused by my article. While the major theme of the article is that there has been an all-out national assault on the teaching of the trust relationship—
and I stand by that assertion – I did not intend to leave the impression that here at Suffolk vultures are circling around the Trusts course or that the Trusts course has been singled out for marginalization.

The Curriculum Committee is reviewing and debating a number of proposals and much work remains to be done. No action has been taken and none is contemplated this academic year. There is on the table, however, a proposal to downgrade all courses that happen to be currently scheduled in the second year to either items on a menu or elective status. These would include not only Wills and Trusts but also Evidence, Agency and Corporations, and the UCC courses. This proposal has been endorsed in principle by the faculty. The thrust of my article was that the trust and the agency are fundamental legal relationships that deserve a place in the required component of every law school’s curriculum, not just Suffolk’s.

Charles E. Rounds, Jr.
Member, Editorial Board

The Dean and Vice-Dean of the Russian International Juridical Institute recently visited Suffolk University Law School to examine the American system of legal education. They held conferences with administrators and members of the Suffolk faculty and were especially interested in Suffolk’s moot court, clinical, law review and library programs. Shown with Associate Dean Charles Kindregan in the moot courtroom are Zoia B. Tishenko, Deputy Rector of the Juridical Institute and Professor of Economics and Vladimir A. Boockov, the Rector of the International Juridical Institute and Professor of Law. The Institute is located in Moscow and offers a four year study program for law students and a recertification program for judges. The visiting Russian educators praised Suffolk’s program as both academically sound and practical legal education, the same model they are constructing in their law school.
On February 9, The Black Law Student Association at the law school sponsored a symposium on Thurgood Marshall in memory of his life-long contribution to the causes of civil rights and to the country, most notably from his tenure on the court. Numerous faculty members participated. They were introduced by Stewart Lancaster of Balsa. The Remarks of Professors Kelley, Clark, Day and Polk are reproduced below.

PROFESSOR KELLEY:
I am going to make the first part of my presentation extremely personal by talking about my growing up.

I started school at the age of three when I attended a nursery school in West Medford, Massachusetts. I have an older brother who was two years ahead of me in school. Our father was an officer in the 272nd Field Artillery Battalion of the U.S. Army. In October 1951, he was stationed in Germany, and my mother, brother and I joined him there in June 1952. If we had remained in West Medford, I would have attended nursery school for another year. However, the schools that were established in Germany for the children of U.S. servicemen started with kindergarten. That meant I had to stay at home with my mother while my brother was able to attend the first grade. My brother would constantly tease me because he was able to go to school and I wasn’t. I cried because of his teasing. In an effort to console me, my mother would take the papers that my brother brought home from school and would go over his lessons with me. What he did in school one day, I did at home the next. I was very gung-ho about learning. I felt as if I was in the first grade and I was very enthusiastic. I wanted to read all of my brother’s school books, and my mother, who had taught me to read, helped me. My brother continued to tease me, but I thought that I was getting a first-grade education at home. I attended kindergarten during the next school year.

The school was first-class; I remember a modern facility with plenty of books and supplies. I was still gung-ho about learning and enthusiastic about school. I started the first grade at the beginning of the following school year. At that point, my mother and I had been going over my brother’s lessons for two years. After approximately three weeks in the first grade, I was promoted to the second grade, because I had already done the work. Now I’m really gung-ho and enthusiastic about school and learning. Since I had also done much of the second grade work, I thought that by Christmas time I could get another promotion and catch up to my brother in the third grade. He would then be unable to continue to tease me about school.

Shortly thereafter, my father was assigned to the 93rd Field Artillery Group at the Artillery School at Fort Sill, Oklahoma. My family lived on the army base, and much of the time a white family lived next door. Our family could go to the movie theater that was on the base and to the commissary, the post exchange and the other facilities on the base. However, and this was in November of 1954, my brother and I could not go to the school that was on the base, because Oklahoma had a state statute that prohibited school integration.
hibited school integration. My brother and I played with the white and black kids in our neighborhood, but each morning two school buses arrived to bring children to school. One took the white children to the school on the army base; another took me, my brother and all of the other black children a couple of miles off the base to the Douglas School in Lawton, Oklahoma.

Every negative stereotype that one has ever heard or read about segregated schools was a fact of life at the Douglas School.

Every negative stereotype that one has ever heard or read about segregated schools was a fact of life at the Douglas School. Plus, to make things even worse for me, I had several strikes against me. First, I came in during the middle of the year. Second, I was the youngest and smallest child in the second grade because of the double promotion I had received in Germany. Third, because I was still trying to catch my brother in the third grade, I acted as if I was smarter and better than the other kids.

My recollections of the Douglas School are that there were very few books, pencils, paper or other supplies. Reading was taught by having each student read a few sentences aloud from a single book that was passed from student to student. My brother and I thought that much of the food that was served in the Douglas School cafeteria was inedible. Part of the problem might have been that the food was prepared southern style while my family is from the North. However, I can remember thinking that I wouldn't have fed the Douglas School cafeteria food to my dog. The Douglas School was the only school I've attended that had a candy store. I told my mother that I needed a few pennies each day as milk money. On many days, I bought my lunch at the candy store because I could not eat the food in the cafeteria.

The Douglas School was a complex that went from the first grade through the twelfth grade. It is a very poor mix of education and the desire to learn. However, if I had attended the grammar school. We had plenty of books and school supplies. We were able to check books out of the library at the school. The food was edible and the water was drinkable. They still had corporal punishment, but the punishment was doled out by a slight, white woman instead of by a large man. The first time I got in trouble at the post school it was with a friend who had also attended the Douglas School. Well, we were used to real corporal punishment, not the patty cake version she gave out. My friend and I couldn't believe that it was over, and we began to laugh as we left her office. She heard us laughing and called us back for a second dose of punishment that didn't hurt any more than the first.

But the damage was already done because my love for school had been quenched after eight or nine months in the Douglas School. We lived in Oklahoma for less than three years, and I was able to recover from my experiences at the Douglas School by the time I was in the eighth or the ninth grade. By that time I had again developed a love for learning and the desire to learn. However, if I had attended the Douglas School for all three years, I suspect that I never would have recovered from the experience. I also suspect that there are several thousand adult African-Americans who never have and who never will.

One of the happier times in my life occurred on May 20, 1991 when I was admitted to the Bar of the United States
DIFFERENT GENERATIONS

When the swearing in ceremony and exclaimed "I've just seen Thurgood Marshall in action at the Supreme Court!," Tyrone became an instant celebrity— for his few minutes of fame—as other students eagerly pressed him for details. My point is, Justice Thurgood Marshall was able to gain acceptance by, and respect from, people of many different generations, including my parents' generation, my generation and my children's generation, and that, too, made him special.

PROFESSOR CLARK:

I want to thank BALSA for hosting this occasion. It seems most appropriate that we pause and reflect upon the legacy of one of the truly great appointments ever made to the United States Supreme Court. Certainly Marshall's experience before the Court prior to his appointment qualified him for that position. And his record on the Court is really second to none in being an insistent voice for his race, for the underprivileged, for the minority. I had three things that I wanted to look at with you today. One is what I consider to be his greatest opinion, his dissenting opinion in the Bakke case. I'd like to compare that with another case that he penned, a dissenting opinion in an old equal protection case of 1970, Dandridge v. Williams, which some of you might remember from the constitutional law course, and then some words from Judge Higgenbotham, in which Higgenbotham recalls the Marshall legacy in a letter which he writes to Clarence Thomas.

In Bakke, the first affirmative action case decided by the Court, Marshall's dissent explains the history of the black race of this country in twelve short pages. Alan Bakke claimed that he deserved to be admitted into the University of California medical school in 1975 and would have been admitted but for the existence of an affirmative action plan. He claimed that affirmative action deprived him, a white male of equal protection of the law, which the Court, with no majority opinion, essentially agreed with. Marshall responds that: "three hundred and fifty years ago, the negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland, thrust into bondage or forced labor the slave was deprived of all legal rights. It was unlawful to teach him to read, he could be sold away from his family and friends at the whim of his master and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized master and slave." He discusses, Dred Scott and then suggests that after the civil war congress engaged in affirmative action.

After the civil war and after the southern states reenslaved the slaves with the black codes, Congress responded to the legal disabilities being imposed in the southern states by passing the reconstruction acts and the civil rights acts. Congress established the Bureau of Refugees, Freed Men and Abandoned Lands that are known as the Freedman's Bureau to supply food, hospitals, land and education to the newly freed slaves. Thus if the negro might be protected from the continued denial of his civil rights and must be relieved of the disabilities that prevented him from taking his place as a free and equal citizen, extensive affirmative action was necessary. The Bakke dis-
sent then criticizes three cases which Marshall considered total disembowelments of the advances made in the thirteenth, fourteenth, and fifteenth amendments. The Slaughter House Cases, which essentially said the privileges or immunities clause in the Fourteenth Amendment protects nothing. The Civil Rights Cases, which invalidated the integration efforts which Congress made in 1875 and finally Plessy v. Ferguson and its approval of separate but equal. Marshall viewed these cases as reversals of the attempts of the post-civil war Congress to equalize the freed slave. Marshall finds it somewhat ironic in Bakke that here again this equal protection clause, which was essentially enacted to protect him and the descendants of the slaves, is used against blacks one more time when a university system in California attempts to alleviate some of those effects.

Moving to the modern era he points out that the negro of today has a life of expectancy which is shorter by more than five years than that a white child, a negro child's mother is over three times as likely to die of complications of childbirth and infant mortality of negroes is twice that of white families and more and more of these very terrible statistics, many of which we are familiar with. The relationship between those figures and the history of the unequal treatment afforded to the negro cannot be denied. At every point, from birth to death the impact of the past is reflected and instilled in the disfavored treatment of the negro. In the nineteenth century, no one made any suggestion that this attempt to alleviate the past was a violation of the constitution; how ironic here in this period that it is being invalidated.

In the nineteenth century, no one made any suggestion that this attempt to alleviate the past was a violation of the constitution; how ironic here in this period that it is being invalidated.

In response to the plurality Marshall claimed that it is unnecessary in the twentieth century America to make indiguated showings of racial discrimination. The racism of our society has been so pervasive that none, regardless of wealth or position has managed to escape its impact. The experience of negroes in America has been different in kind, not just in degree, from that of any other ethnic group. It is not merely the history of slavery, but also that of a whole people who were marked as inferior by the law which has endured. The dream of America as the great melting pot has not been realized for the negro. Because of his skin's color the negro has never made it into the pot.

Marshall's legacy in opinions like this will continue. But he was a craftsman who was not afraid of the detail of the law and digging into legislative history and reading the debates of Congress around particular laws.

In Dandridge v. Williams, which is a case which I always thought was particularly nasty, you might recall that Maryland put a cap on their AFDC payments. Family size determined the grant that a family would receive but in Maryland those increases capped at the number five and further additions to the otherwise eligible unit were rendered irrelevant. The Court validated this cap, finding that it was a valid cost saving measure; it must merely meet a somewhat vague rationality standard under equal protection. Marshall investigated the legislative history of the AFDC program and tells us that its purpose was to keep families together. His factual analysis was that a cap like this would encourage families to break up, because one can obviously create more than one household of less than five and increase one's benefits. He attacks the majority equal protection analysis for their citation of an old gas utility case in which the Court said that when dealing with economic relationships Congress has a great deal of freedom in creating statutory classifications as they see fit. This offends Marshall. It is the individuals' interests here at stake that most clearly distinguish this case from business regulation equal protection cases. AFDC supports needy dependent children and provides them with food, clothing, shelter. Marshall argues that if the program is necessary to sustain life, stricter constitutional standards, both procedural and substantive have to be applied.

Finally, the last thing that I would like to discuss is Judge Higgenbotham's famous letter to Clarence Thomas published in the 1992 Pennsylvania law review. In it Higgenbotham describes Marshall as a man very much in touch with his history. He reminds Thomas to recognize what James Baldwin called the force of history within. And he goes on to ask Thomas to recognize his history and not forget it. He quotes from some of Thomas's speeches in which he was critical of Marshall and the NAACP and seeks his assessment of the civil rights organizations and their leaders. "I suggest, Justice Thomas, you should ask yourself every day what would have happened to you if there had never been a Charles Hamilton Houston, a William Henry Hastie, a Thurgood Marshall and that cadre of other lawyers associated with them who laid the ground work for success in the twentieth century racial civil rights cases. If there had never been an effective NAACP, isn't it highly probable that you might still be in Pinpoint, Georgia working as a laborer as some of your relatives did for decades?"

PROFESSOR DAY:

It is a honor to be asked to speak about Justice Marshall. I was asked to address Justice Marshall's impact, from a personal and professional point of view. And as I thought about Justice Marshall from a personal point of view, my eye scanned my life and landed on two moments, two images from my childhood, that at the time,—like a child at play,—I didn't realize the significance of those moments.

One moment was in the summer time. My father was a research scientist and we spent our summers in Woods Hole where he did his research. My father had a small outboard motor boat and together we traversed the small string of islands that flow off Woods Hole, called the Elizabeth Islands. As we cruised along in the outboard, my
father pointed out to me that the islands, all of the Elizabeth Islands, were criss-crossed with wonderful, elegant, stone walls that carved the island from rocky shore to smooth beaches, through sheep grazing fields and across the scrub pines. There are no roads on any of these islands even today; there are sheep herders and there are horses and there are very few buildings and houses.

My father pointed out these wonderful, rocky walls and asked whether I noticed something different about them—different than what I noticed about the rest of the island. And I said no, I didn't, they were grey and they were beautiful and the island was green and grey and beautiful. My father told me they are man made, he said nature had not put them there. And he then told me that it remains a mystery today why the stone walls are there. The white settlers who took over the islands have no written history of why the stone walls carve and mark the islands. The Native Americans who were displaced from the islands who now live in Gay Head or Mashpee have no oral or written history of why the island is carved by these walls.

My father thought it very odd that I didn't know the difference between that which is natural and that which was man made. I think, in part, the reason I didn't know the difference was because my father was rather an extraordinary man. And this made me think of the second image of my childhood. In the winter time, when we were in Canada where my father taught at a university, my father would go off to his lab. In the evenings, he would come home with his students. This very small house was filled with four children, a mother, a grandmother, a dog, and a research scientist and, suddenly, each night this house became extraordinarily filled—he brought his students home from his lab to have dinner with us. Being a Canadian university, my father's students came from all over the world. There were students from England, from Scotland, from Poland, from Czechoslovakia, there were students from Hong Kong and there were students from Africa.

I did not know as a small child that man had made walls between the races. It was not so in my house and it was a great blessing, the innocence that I grew up in. In that dining room, where people of all colors from all countries got together, the truly most fascinating thing for a small child was to watch people eat differently with a knife and a fork. This was the only bewildenment. In that dining room, there was no fundamental difference in the difference in color.

In later years, as we watched what was the civil rights movement emerge in the United States, we watched from Canada. My father said to me, "Race science made the color line and the color line is man made. There is no moral significance to the color of one's skin; there is no social significance to the color of one's skin; and even from a scientific point of view, there is hardly any biological significance to the color of one's skin."

So when I came to law and I came to the privilege of teaching law, one of the things that intrigued me, was how it was that something of no moral significance had come to dominate our lives and control our destinies—so much determined by the accident of the color of skin. My father showed me the walls that carved through that island, and taught me that there were sources you could use to illuminate the mystery. You would go to history; you would go to voices. There are many voices you can turn to to understand how the wall between the races was built and what it was like to live on one side of the experience or the other. There are the voices of Sojourner Truth, and Zora Neale Hurston; there are the histories of W.E.B. DuBois and John Hope Franklin.

There is a very special voice for all of us who are trained in law and it is the voice of Justice Thurgood Marshall. As one reads Brown v. Board of Education, we read the words of Chief Justice Earl Warren, but I think that what we see in Brown, what is illuminated there is the light of relatively young Thurgood Marshall and his twenty years of labor, his attempt to dismantle the wall between the races, a wall that had its foundations in slavery, its perpetuation in black codes, and its continuation in segregation. Professors Kelley and Clark have spoken very eloquently, both personally and professionally, about Thurgood Marshall, his impact on history and his sense of history.

One of the truly wonderful things about reading Justice Marshall's dissent in Bakke is that history cannot be denied. If we are ever to fully dismantle the wall that separates us as races, it cannot be done unless we understand all the lies and myths and damaging, horrible things that went into the construct of that wall. When we understand that, only then do we have the possibility to tear it down. There is no other human being of this century who did more to deconstruct the wall, the artificial man-made wall between the races, than Justice Marshall.

And I would just like to close with a few hopeful words from James Baldwin about the wall and about history. "For nothing is fixed forever and forever it is not fixed. The earth is always shifting, the light is always changing, the sea does not cease to grind down rock. Generations do not cease to be worn and we are responsible to them because we are the only witnesses they have. The sea rises, the light fails, lovers cling to each other and children cling to us. The moment we cease to hold each other, the moment we break faith with one another, the sea engulfs us and the light goes out." Justice Marshall is someone to cling to forever. He
is a gift to give to our children, his words will illuminate that wall forever.

Life is short. Justice Marshall did not live to see the full dismantling of the horror of the wall that divides the races. In my last boat ride with my father before he died, he said, "I guess I won't know the meaning of that wall." Our children may never know the meaning of all the stone walls on those islands of my childhood. But, I hope the wall that divides the races will be dismantled forever and in our children's life time.

PROFESSOR POLK:

I am going to tell some stories this afternoon, all but the first of which are true. A young man was climbing a mountain. He was quite experienced but he got a little overconfident. He was very, very high up in this craggly section and he fell over the mountain. As he was sliding down, he caught onto a branch. He was hanging there when he looked up to the sky and said "Is there anybody up there? If there’s anybody up there, help me.”

After he pleaded for a while a deep voice said "Yes, my son, I’m up here." The young man cried, "Help me lord, help me, I’m hanging here holding on for dear life." And the voice said, "Well if you’ll have faith I’ll . . ." "I got faith!" the young man cried, "I got faith, just help me.” And the voice said, "Well, believe in me, put yourself in my hands and let go of that branch." The man looked up to the sky and said: "Is there anyone else up there?"

When Professor Kelley introduced the idea of age in talking about his experiences, I realized that I would probably be revealing my age in talking about what I am going to talk about. But I can tell you that when Clarence Thomas was confirmed to succeed Justice Thurgood Marshall, I felt like that guy hanging from a branch: "Is there anybody else?"

When I was about seven years old I walked down the dusty street that I lived on in Tuskegee, Alabama. It was a dusty street because no street where blacks lived was paved. Where whites lived, streets were paved. I was on my way to Mrs. Turner’s house where we got milk almost every evening. They had a little farm and they brought the milk to her house. This particular evening was the first time I heard those two words. I will go to my grave with them imprinted on my mind. Those two words were “civil rights.” I had never heard those words before.

Mrs. Turner was talking to Rev. Kelly about something she had read in the Chicago Defender. This was a black newspaper. I don’t know if it still exists, but it came out weekly and everybody in Tuskegee got it. She was saying, “The NAACP is talking about maybe we are going to get our civil rights.” I hadn’t heard that word before and I was very, very interested in what they seemed to be so serious about. When I went home, I asked my father what were civil rights? And he explained to me that he and my mother and all the people that I knew in Tuskegee and Tuskegee Institute would be able to vote and he told me how important that was. He told me that he and some others had tried to vote but couldn’t pass the literacy test that black people had to take in order to vote. Where they were asked very, very complicated constitutional questions. When constitutional lawyers have looked at those questions years later they said they could have never answered them. Those questions weren’t meant to be answered.

I don’t know how many years later or if it was years later, I went to my father’s studio. He was a photographer, and he was developing some films for some friends, but they weren’t like his other prints. Most of his work was based on portraits, a lot of very famous black people and people who visited Tuskegee Institute. But now he was developing pictures that showed people with tremendous injuries, scars. One man was alive still who had a knife stuck in his head. I asked him what those pictures were, and he said he was making them for the NAACP. He said the lawyer for the NAACP was going to come and meet with some people in Tuskegee to talk about this. I later learned that what “this” was, was police brutality. Because I grew up and was a child in the forties in Alabama, I knew what was going on. These pictures were for a white man in town whom I only knew as Nicodemus. I don’t know whether you know the story of Nicodemus, but he came to Jesus at night. Black people, at least those that I knew, did not know this man’s name other than somebody had called him Nicodemus. Nicodemus had gotten my father on several occasions to take pictures of people who had been brutalized by the police so they could be shown to the NAACP. I don’t know that I then knew what the NAACP was. I later learned that the NAACP was Thurgood Marshall. Because from 1933 on, until the time that he was brought to the Circuit Court in New York, that was his work, to counteract the kinds of things that were going on with Blacks.

I did not know what it would mean. I did not know what a lot of things really would mean, because, if you grew up black in the south, you could not conceive — that was probably the worst thing about segregation — you could not truly conceive of anything that would not be segregation.

I came to New York at the end of my second year of high school. I had been going to school in Louisiana, and I came to New York to study for the Priesthood in Newburg, New York. I think that the first year I did not go back home either for Christmas or the summer. I think it was Christmas time in my second year and I went back home by train. At the seminary I had lived through folks always saying, “Down there you black people—or you colored people—can’t do this and can’t do that and so on.” Lucky for us — my brothers, sisters and I — our father never let us believe that we were inferior. In fact he said, ‘The belief of some white people that you are inferior is going to serve as an advantage in your life, because they won’t be able to know how bright you can be and so if you really are bright, you will
have an advantage." At any rate, going home was a very bad experience to me because when I got to Washington, D.C. I had to move to another car. They stopped the train — it was the Silver Crescent going down to New Orleans — they stopped the train and all the black people had to get off the car they were in and go to the back for the "colored" car. It was a different car! On the return trip, I decided that I was going to try something out. I was seventeen years old at this time and I decided I was going to ride back like everybody else. Now I was quite a good mimic, so I decided to call up the railroad station to make a reservation. However, I was going to call up as a white man. So I picked up the phone and did my best impersonation of a white man. I said "Hello, I'd like to make a reservation going up to New York." They said yes and they took my name. Then I went out to the station to pick up the ticket and board the train. When I got on the train I was in the colored car. And I wondered how this happened. A porter told me. He said "You know, they wait until you come to the station to assign you your seat."

There were a lot of things that were done to black people and some I experienced, but I didn't experience as many as many others because I lived at Tuskegee Institute. There was the college, a veterans hospital and a United States Air Force base — where the Tuskegee Airmen, who are at last beginning to be recognized for their exploits in the Second World War, trained. So we were quite protected from having to deal with what was around us a great deal.

The first time I really remember understanding Justice Marshall's role was in 1954. I can tell you exactly where I was as if I had a picture. A friend of mine, Paul Benoit from Leominster, had a copy of the New York Times. We had known that Brown v. The Board of Education was going to be argued. Now the decision was in the New York Times, and I was just delighted.

I did not know what it would mean. I did not know what a lot of things really would mean, because, if you grew up black in the south, you could not conceive — that was probably the worst thing about segregation — you could not truly conceive of anything that would not be segregation. People could talk about it, but you could not really conceive of it. And now, here was this case that was going to end all that. And I was happy as all the other blacks in the school were. But Paul Benoit said, "Wait a minute, this isn't all that great, because it says with all deliberate speed." Nobody knew what all deliberate speed was, but all deliberate speed was all deliberate slowness in ending segregation.

The next thing I knew of Thurgood Marshall had to do with public accommodations. The suits that he was bringing before the Supreme Court on public accommodations. I was a college student at Fordham University. I had left the seminary obviously. Marshall was talking about the experience that black people had in this country, traveling through this country, not being able to stay at what were then travel lodges, and so forth along the way, no hotels, and so forth and so on. I had experienced that, I had experienced that in traveling from Tuskegee to Chicago and traveling from Tuskegee to Lafayette, Louisiana to go to school. I remember, I think the words he used were something like this — I know that they had an impact on me then — he said that these experiences were a badge of our former condition as slaves. By this time I was in college and I understood that very, very well. Any time you are in a situation where, because you are black you are something less, it is like wearing a badge. It is like wearing a badge and saying "I'm a former slave, treat me as you will." Marshall was not going to allow that to continue to exist, and I think it was about that time I determined neither was I.

In 1962 Thurgood Marshall was appointed to The Second Circuit in New York City. By this time I was a graduate student in the School of Social Work at Fordham University. I went down town thinking that I was going to be able to see his swearing in. Well there must have been forty or fifty thousand other people who went down, because I had never seen such a turn out. The only such occasion I can remember seeing black people turn out in those numbers was John F. Kennedy with Adam Clayton Powell before he was elected president.

I can remember first thinking about whether I also wanted to be an attorney when Marshall was appointed Solicitor General in 1965. When I look up his record as Solicitor General it was 29 out of 32 cases. Twenty-nine won. We in Massachusetts loved Ted Williams because he batted 406. This is a batting average of 906. A batting average of 906 with cases having to do with education, having to do with discrimination and housing, having to do with public accommodation. What a fantastic record!

Then Marshall was appointed to the Supreme Court. His work on the Supreme Court has been referenced, better than I can do it, here this afternoon. I just want to say to you though, that somehow if you grew up as I grew up, you never get over being proud of black people's achievements. Every time is a reaffirmation. I remember my father once told me that I should be careful thinking like that, because if I thought that was a source of pride for me then I would have to bear shame for everything bad that black people did. I never understood how he could think that way. I don't think that way now. But, this was quite something — a black Supreme Court Justice.

I think I can end by saying I have two sons. When I was President of the Urban League here in Boston and later in New York City, I very often had to confront racism and ab-

So, when we talk about the impact of Thurgood Marshall on my life and maybe on the life of my sons, I can't describe it as an "impact." He changed the face of my reality in this life, just changed the whole surface of me.
sence of civil rights. I frequently took my boys with me to special occasions. I didn't know what they would turn out to be and I don't think that I made any special effort to tell them what they should be. But, at the end of his first year in law school at NYU, my oldest boy decided that he was going to Alabama to work at a death penalty program. He went down by train. I drove down to pick him up and we drove back. One of the things that he talked about was the kind of information that he was able to get from Justice Marshall's fights against what he saw as an onslaught of the return of the death penalty. Last summer my younger son came back to Boston—he's at Union College in Schenectady New York and said, "Dad I want to do an internship, but I want it to be something political because I'm majoring in political science." I said, "There are any number of things you can do." So I took him over to the state house and introduced him to some legislators and took him around to several offices. He decided he wanted to work for the Black Caucus. They said: "We have two or three things—one of them is the death penalty." My son responded "I want to work with that." Again, he was exposed. I don't mean just exposed, I mean really turned on by the thinking of the man we are honoring today. So, when we talk about the impact of Thurgood Marshall on my life and maybe on the life of my sons, I can't describe it as an "impact." He changed the face of my reality in this life, just changed the whole surface of me. It wouldn't have been this way, but for his efforts and those of his colleagues, a number of other great attorneys.
PRO BONO: A ROLE FOR THE LAW SCHOOL

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I. INTRODUCTION

An issue that has been receiving much attention lately at both the national and local level is pro bono representation by members of the private bar. While every member of the legal profession has a responsibility to devote some time and attention to providing legal services for those unable to pay, nevertheless, it appears that a relatively large segment of the disadvantaged have legal needs that are currently not met. Among the reasons for this is the fact that while most lawyers acknowledge their pro bono responsibility, not enough are fulfilling it. At the 1988 Annual Meeting of the American Bar Association, the House of Delegates publicly acknowledged that “the number of lawyers participating in pro bono programs is too low to meet the needs of the poor.” In an attempt to maximize its membership’s participation the ABA adopted a resolution which: (1) strongly encouraged lawyers to devote at least 50 hours to pro bono activities in a given year; (2) suggested that law firms and corporate employers support lawyer’s pro bono work by recognizing time devoted to those activities as counting toward billable hours requirements; (3) recommended that law schools require law firms recruiting on campus to provide a copy of their pro bono policy.

Most recently, on February 8, 1993, the ABA House of Delegates adopted certain revisions to ABA Model Rule of Professional Conduct 6.1 codifying the 1988 Resolution by incorporating it into the Rule as a direct aspirational standard of 50 hours of pro bono legal services per lawyer per year.

On the local level, in July 1988, John M. Callahan, then President of the Massachusetts Bar Association, released the results of a study entitled “Massachusetts Legal Services Plan for Action” conducted by the Massachusetts Legal Assistance Corporation. In general the “Plan for Action” concluded that “the situation of the state’s poor is critical.” In reaction, Mr. Callahan asked every member of the Massachusetts Bar Association to take at least one pro bono case per year. The Massachusetts study found that only 1 in 8 of the State’s 32,000 lawyers were actually performing pro bono work each year.

According to the Massachusetts study, completed in 1987, more than 760,000 residents lacked the legal assistance means to secure and maintain such basic necessities of life as food, housing and medical care. Only 1 in 6 of the civil legal needs of low-income people in Massachusetts is met by legal service delivery systems currently in operation. Surveys in other states relating to the legal needs of the poor over the past decade indicate an annual rate of 1.0 to 5.5 unmet legal needs per household. (For a compilation see, "Legal Needs Assessment and Priority Setting Resources, National Social Science and Law Center, 1987). According to the Massachusetts study, while the legal problems of the poor are varied, nevertheless, the two areas of law where problems requiring legal representation most frequently arise are landlord/tenant and domestic relations. Of the total recognized problems among the poor in Massachusetts 29.2% were in the family law area followed by 17.3% in the landlord/tenant area.

Legal service providers, private attorneys and bar associations in Massachusetts and elsewhere have acknowledged the problem and continue to assume an active role in developing a response.

Clearly, attracting and retaining competent lawyers to existing public legal service programs is essential and efforts to increase funding for these civil legal service providers will remain a primary objective of the profession. However, appropriate levels of representation of those in need can only be accomplished through a combined effort of both the public and private bar. The increased need for legal services demands that private bar efforts also increase. More private attorneys must be encouraged to participate in pro bono opportunities. These attorneys must be actively solicited, trained and supervised if the profession is to be successful in addressing this problem.

An important issue is what role can/should the law school assume in assisting the profession and the community in resolving this critical problem. Clearly, faculty members and administrators as lawyers must individually meet their professional obligation in this regard. In addition, the responsibility and rewards of pro bono representation should be impressed upon students in a meaningful way. Beyond this, however, is the broader question of the legal education institutional role in addressing this problem.

This is not to say that law schools generally are not responding to the need in this area. A number of law schools currently have pro bono programs which mostly center on requirements mandating student participation as a condition for graduation.
This concept was initiated at Tulane Law School in 1988 with a requirement that all students complete 20 hours of public service in order to be eligible for a law degree. Nationally, to date, some 11 law schools require students to participate in pro bono work as a prerequisite to graduation. It is questionable whether a law school should mandate student involvement in "pro bono" activities as a prerequisite to graduation while the profession itself is generally reluctant to mandate such a requirement for its practitioners and before the educational institution commits itself more directly to the concept.

The primary thrust of this paper is to demonstrate that there is a direct institutional role for the law school in assisting the legal profession in meeting its pro bono responsibility. While the role can take a number of different forms, the one presented herein generally draws upon the law school's clinical program expertise for direct assistance. To the knowledge of this author, no law school is currently involved on this issue in a manner as proposed in this paper.

II. ROLE OF THE LAW SCHOOL

While one could summarize the primary role of any law school as an obligation to develop its students intellectually, practically and ethically to become competent, responsible members of their profession and community, few would dispute that an additional responsibility of the law school is to make a meaningful contribution to the professional and civic community in which it exists. If there are members of the community whose needs for legal services are unmet, it seems appropriate and necessary for the legal educational institution which forms a part of that community and which is responsible for preparing competent and ethically responsible members of the bar to attempt to alleviate that need. It is appropriate because institutionally it demonstrates a general concern and commitment to the betterment of the civic community in which it exists. It is particularly appropriate for a law school because the faculty and students of the institution either are or are about to become members of a profession which holds the means of access to the legal system within their grasp. Since members of the legal profession have an individual ethical responsibility to assist the legal profession in making legal services available to those unable to pay, what better way for the faculty and institution which epitomizes the profession to convey the importance of this responsibility to its students, the organized bar and others than through an active commitment and involvement in pro bono representation. In short, one can argue that a law school is both morally obligated and particularly capable of offering the legal and lay community a service that is much needed and currently unmet. In addition, it can do so without detracting from its primary mission of developing aspiring members of the bar.

Whether it stands alone or forms a part of a larger University system, a law school is a unique institution. It educates and graduates a large number of lawyers who become active members of the legal community. Many of these alumni(ae) remain locally and all retain an allegiance to the school. In addition, most, if not all, law schools are committed to clinical education as an integral part of their curriculum. These programs are staffed by highly qualified and experienced clinical faculty competent as both legal educators and practitioners. Among other things, most often clinical programs will focus on both landlord/tenant and domestic relations matters to provide students with a clinical experience. In short, the law school has ready access to a large number of lawyers and an existing resource of experienced educators, scholars and practitioners trained in areas of law where the needs of the poor are most dramatic and who are particularly suited to imparting that expertise to others.

III. ONE SUGGESTION FOR IMPLEMENTING THE LAW SCHOOL'S ROLE

Generally a pro bono program can be broken down into the following parts: 1. Solicitation/recruiting of participating lawyers; 2. Training and supervision; 3. Selection/screening and referral of clients. It would seem that depending on its level of commitment a law school could effectively assist in any one or all of these areas. The most pressing concern regarding pro bono representation is attracting lawyers who are willing and able to participate in such a program. The second major concern is that while many lawyers are willing to participate in principle in pro bono activity, nevertheless, they are generally reluctant to commit themselves based upon what they perceive as a lack of expertise on their part. For example, corporate lawyers are unfamiliar with the substantive law, practice and procedures necessary to represent a client with a landlord/tenant problem.

As mentioned, it seems as though a law school is uniquely qualified to assist the private bar in these two areas of concern. It has the ability to solicit, educate and supervise lawyers as they meet their responsibility.

Solicitation of lawyers to participate in pro bono activity can take any number of different forms and need not be limited to graduates of the law school although initially this group would seem to be the most receptive and logical target. Many law schools recognize that they can play an important continuing role in the professional development of their students post graduation. As an example, some law schools have developed continuing legal education programs for the bar utilizing their existing faculty to provide their alumni(ae) and others a vehicle by which they can keep abreast of current developments in law. Alumni(ae) remain both a general resource and some might argue a continuing responsibility of a law school. Alumni(ae) represent a pool of talent with a special allegiance to their school. Law schools usually keep close contact with their alumni(ae) for a variety of reasons and thus have access to them periodically as the occasion arises. It is suggested
that this resource can and should be approached directly to encourage broad based pro bono activity. A law school that both strongly encourages and provides necessary support can substantially increase the ranks of lawyers willing to provide pro bono services. Of course, to be successful a law school would have to demonstrate a strong moral and at least initial financial commitment to a program of this nature. A campaign analogous to traditional fund raising efforts would be essential.

Thus, the first step in the process is to develop a program to recruit alumni(ae) specifically to provide pro bono services. This would require a strong publicity effort which can take any number of different forms. In order for the recruitment process to be most successful it would also be necessary to establish a program of education, supervision, and client screening and referral as both an incentive to attract alumni(ae) and a necessary component to competent representation.

As mentioned above, many lawyers who are willing to perform pro bono services in principle are concerned because they perceive a lack of expertise in the areas of substantive law where the bulk of unmet legal needs exist. Resolution of this dilemma takes two forms. First, there is a basic educational concern. Second, there is a general supervisory need that must be addressed. It is here that a law school's clinical education program can be of assistance. The clinical faculty and staff can be utilized by the law school to provide its alumni(ae) with the necessary training sessions and thereby alleviate this impediment to pro bono representation.

This training can take a variety of forms. A law school could establish a seminar program for practitioners utilizing its existing clinical staff and others who are qualified to instruct on the necessary prerequisites to pro bono representation. As mentioned, the bulk of legal needs seems to be in the areas of landlord/tenant and domestic relations; thus the seminar would be developed as a practical training session in one or both of these areas depending on how broad the program is initially conceived. These seminars could be conducted on law school property using existing facilities and administrative support. The content of the course work would be developed with the input of clinicians who are most acutely aware of the substantive, procedural and interpersonal issues that are most common in this area of practice. Since clinicians essentially perform this service for students, it would take little effort to tailor the material and presentation for practicing attorneys. In fact, it might be possible to recruit alumni(ae) who practice in the field of concern to devote their time to the educational component of the program and thereby assist the faculty in educating other alumni(ae).

The second component of the educational aspect of the program involves supervision of alumni(ae) as they proceed with the representation. This could unfold as a type of mentor service whereby a participating lawyer would be assigned to a more experienced faculty member or alumni(ae) volunteer who would then be available to consult with and assist that participating lawyer as the need arose.

Mentors should be practitioners with some expertise in handling landlord/tenant matters. Again, this is a function in which clinicians have special skills and generally perform with their students. Ideally it would be useful to develop a group of mentors from among the law school alumni(ae).

Alumni(ae) with the requisite expertise might be willing to volunteer their time to other participating alumni in this regard. The mentor does not necessarily have to meet regularly with the participating attorney or appear in court with that attorney. Essentially a mentor would simply make him or herself available to consult with a participating attorney as the need arises. When a participating attorney is assigned a case, he or she would also be assigned to a particular mentor who would then be available to consult with a participating attorney until the case is resolved. It would be necessary for the mentors to participate in a general information session in order to develop a cohesive understanding of the expectations and policies of this phase of the program.

Obviously, faculty clinicians have responsibilities to students that demand a great deal of their time and effort. A program such as that contemplated in this paper would impose additional demands on that time that will have to be addressed. Indeed, success of a recruitment campaign will have much bearing on this issue. The greater the response the more lawyers involved, resulting in a correspondingly larger program for training and supervision. Most likely, demands will be greatest and least predictable in the first year of the program. Thus, in this phase more will be expected of clinicians and other participating faculty than in subsequent years when adjustments can be made accordingly. However, even in the first year of a program, the bulk of the clinician's time will be devoted to preparing and conducting an educational component for participating lawyers. Since this aspect of the program is something that clinicians typically engage in with their students, it should require minimum adjustments and effort to accommodate practicing attorneys in a training session. Indeed, the supervisory or mentoring aspect of the program should not present an inordinate problem to the clinician since even attorneys who are inexperienced in the field of law involved would be more secure and require less direct supervision than a law student under similar circumstances. Many clinicians might voluntarily participate in a program of this nature based on their individual commitment to the concept. In certain instances it might be necessary for the law school to make some accommodations to meet the extra demands on the time of the clinicians involved.

As mentioned above, eventually a program as contemplated could be operated by alumni(ae) themselves under
the guidance and necessary support of the law school. At this point, clinicians would assist in a less demanding and time consuming manner.

In order to be successful a program as contemplated in this paper would require a person to act as coordinator or director. This person would be a professional with experience in legal services and a background in administration. The director would be responsible for coordinating, in conjunction with the clinicians, all aspects of the program. In the first year of the program the director should have no other responsibilities. Although it's not inconceivable that an existing faculty member might be qualified and willing to undertake this responsibility, it is highly unlikely that it can be accomplished along with other obligations. Thus, this is one aspect of the program that in its initial year of operation would most certainly require a direct financial commitment from the law school. Subsequently reassessment and adjustments can be made.

An aspect of the program that has not been directly addressed relates to the client selection and referral requirements. It is clear from all reports that there is no shortage of clients who have valid legal needs that are currently unmet. It is also clear that there are many well developed and competently administered public and private organizations currently engaged in the client selection and screening process.

A law school has many options relative to this aspect of a pro bono program. In its initial stage, however, it would seem to make financial and practical sense for the law school to work with an existing organization to obtain its client base. The organization involved could accomplish the initial screening function and refer the client to the law school coordinator who in turn would be responsible for developing the file for transmission to the participating alumnae attorney.

In some instances a law school either operates a self-contained clinical program with a client base of its own or it has an ongoing relationship with an established legal service provider which acts as a source of clients for its program. In either of these two instances it would take minimal adjustment to accommodate a pro bono program as suggested herein.

IV. CONCLUSION

There can be no dispute that many who have need for legal services are currently unable to obtain those services. The organized bar both public and private has been attempting to address this problem with varying degrees of success. Individual lawyers, bar association, law firms and others are contributing to a resolution. The time has long since come for law schools to become more aggressively involved in this area. This is not to say that individual members of the law school community are not responding to this need; rather, it is to call for a more direct institutional commitment. Student loan forgiveness programs, clinical training and vocal encouragement of students by faculty and others are steps in the right direction. However, more can and should be done. From April 13, 1993 through April 17, 1993, in an attempt to encourage and facilitate involvement, the ABA sponsored a Pro Bono Conference in Baltimore, Maryland devoting two days to discussions on law school pro bono programs. The law school has many options available. One option is suggested in this paper. However, it should not be viewed as the only one or necessarily the best or most practical one. Many issues need to be addressed and resolved before any program of this nature can be successfully implemented.

There is no doubt that initiation of any pro bono program will involve some financial, personnel and facilities commitment by the law school. The extent of this commitment will vary depending upon the nature of the program. Funding is available for programs of this nature and might be a worthwhile consideration at some point.

This paper suggests one option available to a law school which utilizes the expertise, staff and perhaps facilities of the clinical programs in conjunction with an active effort to encourage alumnae participation. These seem to be the most logical resources available that directly impact on two areas of pro bono representation where the need is greatest.
Like most professionals, legal educators belong to a national organization. Ours is the Association of American Law Schools. It publishes journals and newsletters and sponsors conventions and workshops for law professors. Its annual meeting is always in January, between semesters. At this year's meeting, which was held in San Francisco, the hot subject of discussion was the McCrate Report. This is a comprehensive report and set of recommendations about legal education in American law schools prepared by a prestigious group of practitioners, judges and legal educators under the auspices of the A.B.A. Section on Legal Education and Admissions to the Bar, which also inspects and accredits law schools.

The 414 page Report calls for radical change in law schools and goes on to challenge the Bar to participate in the training of new lawyers. Its primary thrust is that law schools over emphasize doctrine and underemphasize skills and values.

The courses in a law school curriculum can be arranged in a continuum running from the theoretical to the practical. At one extreme is jurisprudence and at the other might be law practice management. Both ends of the continuum have always made legitimate claims for inclusion in a well balanced legal education. Somewhere near the middle of the continuum stand the large bulk of law school offerings, doctrinal courses, which make use of the case method of instruction. First year courses are doctrinal but also introduce the student to the basics of reading a case and of legal reasoning, including fact sensitivity, deduction and reasoning by analogy. Suffolk, like most American law schools, succeeds in the endeavor of teaching legal reasoning and imparting doctrine. However, by using the case method in virtually all doctrinal courses including many electives, the educational experience overemphasizes the importance of case analysis and ignores the essentiality of the two ends of the continuum.

The McCrate Report calls for a radical shift in legal education away from doctrine and toward skills and values. Of course none of this is particularly new. Over fifty years ago Jerome Frank called for the abolition of law schools in favor of lawyer schools. Llewellyn and his realist colleagues looked to the real world and found that case analysis had very little of what lawyers really did from day to day. But, in spite of their calls for reform, very little happened. Legal education has proved very resistant to change since 1870, when Dean Langdell introduced his first casebook. Indeed a review of the catalogues of the law schools of the country demonstrates an amazing amount of homogeneity. A majority of what most of them do is the same as what we do at Suffolk — teach legal doctrine through the reading of casebooks.

The McCrate Report starts from the same place as Llewellyn, the real world of the nation's 770,000 lawyers. In its first three chapters, the report investigates the demographics and the organization of our $91 billion profession of today and how that varies so greatly from the profession of only twenty years ago. It makes for fascinating reading; indeed its information belongs somewhere in the required curriculum of every law school.

Some of the most dramatic changes of late have occurred in the growth of the large firm. For instance, in 1972 the twenty largest firms in the country had an average of $14.7 million in receipts. By 1987 that number had grown to $158 million. Today firms of more than 100 lawyers employ over 28 per cent of our 43,000 new lawyers produced annually. Corporate work grew at an incredible rate of eight percent annually between 1967 and 1982 surpassing in volume individual work which also grew at a healthy rate of four percent.

Another source of recent major change has been in the growth of the prepaid and group legal services plans. For instance, the Union Privilege Legal Services Plan of the AFL-CIO provides free or discounted legal services to its 17 million members. These services are primarily provided by small firms that the plan recruits into their ranks of providers. Hyatt Legal Plans, Inc. provides a variety of benefit plans which are serviced by their 110 local offices as well as 1,400 private law firms. A 1989 American Bar Founda-
tion study found that 18% of U.S. households, representing some 43 million people reported at least one person as a member of a prepaid legal services plan.

Other changes surveyed in the first three chapters include specialization, advertising, the use of in-house counsel, government law departments and the legal needs of the public.

Having made the case that the profession has changed dramatically, the Report suggests that equally dramatic change needs to be made in legal education by expanding skills instruction and promulgating values that might assure that we produce the good lawyer.

SKILLS

The central chapter of the report is chapter five: the statement of fundamental lawyering skills and professional values. The commission suggested that lawyers need training in the following skills: problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution procedures, organization and management of legal work, and recognizing and resolving ethical dilemmas. Law schools do a good job of developing the skill of legal analysis and reasoning and the skill of bringing a matter through the litigation process. In addition of late, courses on counseling, negotiation, legal research, alternative dispute resolution and law practice management have been added as electives to the curriculum at Suffolk as well as most of the law schools throughout the country. A required course in professional ethics would help students recognize and resolve ethical dilemmas. The report suggests, however, that in light of changes in the profession these skills can make a claim of essentiality to the training of lawyers equal to training in substantive law. Ideally, each of these skills would be included in existing substantive courses. However, existing faculty may not have the knowledge or the skills themselves in order to impart them. Further, the report makes clear that skills training has three components: the development of concepts and theories underlying the skills being taught, the opportunity for students to perform the lawyering tasks with appropriate feedback and the reflective evaluation of the student's performance by a qualified assessor. This description obviously requires more individualized student-instructor interaction.

VALUES

The values section of the report goes on to recommend instruction in "promoting justice, fairness and morality in one's own daily practice," ensuring legal services to the indigent, and selecting employment which "will allow the lawyer to develop as a professional and to pursue his or her professional and personal goals." Law schools would need to provide instruction in the meaning of the terms justice, fairness and morality. These terms have generated a rich literature beginning with many of the earliest writings of the western world and some investigation of this literature would seem to be indicated. Instruction that advances indigent access to legal services might be achieved through instruction on the legal needs of the poor or through the creation of a public service requirement. Further all of the values may best be imparted by specific inclusion in first year courses with additional hours if needed. The pursuit of goals needs sensitive individualized counseling for all students and an improved placement effort. Additional placement efforts may be needed, but again organizing the faculty to assist in the academic and career counseling might best serve the student.

THE BAR EXAM

One subject about which the McCrate Report is unequivocal is the negative influence of the traditional bar exam on sound lawyer instruction.

If anything, the bar examination discourages the teaching and acquisition of many of those skills, such as problem solving, factual investigation, counseling and negotiation, which the traditional examination questions do not attempt to measure. For example, the examination influences law schools, in developing their curricula, to overemphasize courses in the substantive areas covered by the examination at the expense of courses in the area of lawyering skills. The examination also influences law students, in electing from among those courses offered, to choose substantive law courses that are the subject of bar examination questions instead of courses designed to develop lawyering skills. Finally, the examination discourages law professors from integrating skills training into their substantive law courses.

The Massachusetts bar exam continues to be an obstacle to our achieving this goal. Massachusetts makes use of the Multistate Bar Examination and tests the subjects of contracts, torts, constitutional law, criminal law, evidence and real property, which typically require about 25 credit hours of instruction. Massachusetts continues to test in 14 additional subject areas. If the additional 14 courses, currently tested on the bar exam, each involve three credit hours, 42 credit hours need to be added to the basic 25 for a total of 67 credit hours for bar preparation. This leaves only 17 additional hours of instruction (approximately one semester) either for any specialization the student might wish to take (like tax or copyright or environmental law), for skills instruction like negotiation, drafting or trial practice or for value based instruction like legal philosophy or economics and the law. It also discourages clinical education which is probably the best place to impart professional ethics and the bar's obligations to the poor, in favor of administration of estates, equity, conflicts of law and federal jurisdiction and venue.
Likewise, the bar exam inhibits law school specialization. Each school must have an essentially generalized faculty with specialties in each of the 20 bar required courses. Thus a professor whose specialty may be international law, economic analysis, jurisprudence or poverty law is less attractive as a candidate for a new faculty position. This ultimately undermines our academic freedom. Bar Examiners should follow the lead of states like California and New Jersey and reduce the coverage of the exam to the subjects covered by the multistate.

A FEW COMMENTS

The McCrate Report has been a long time coming. The prestige of its participants will force every law school in the country to re-evaluate what it does. The comfortable old case method will have to give way. And while the report and its recommendations are certainly sound, it contains a number of oddities that are worthy of mention.

First, its description of the skills mentioned above goes on for sixty-five pages in excruciating detail. For instance, the first skill of problem solving is literally codified into five sections including identifying the problem, generating alternative solutions, developing a plan of action, implementing the plan, and keeping the planning process open to new ideas. As if this were not bad enough, the report breaks down identifying the problem into eight subsections and nine additional sub-subsections that recommend instruction in the development of skills that allow the lawyer to understand “the precise circumstances that make the situation a problem for the client” including not only client definition but “aspects... that the client may not have perceived” as well as “additional problems that the client may not have perceived.” The recommendation goes on to recommend investigation into the “interpersonal framework, economic and interpersonal factors.” Problem solving, we are told, requires investigation of the “limits of what is presently known” as well as what “will become known in the future” along with its “timeframe” its “cost” of acquisition and the “impact of informational gaps.” This all strikes me as very silly. Did the Commission really think that it could write a comprehensive manual for problem solving? Indeed doesn’t such codification undermine the essential message of the report that it is only in the practice-based setting (either real or simulated) that these skills can be imparted?

Second, the report’s call for instruction in values, while welcome, is quite weak. Indeed, the overall impression created by the report is that it is a call for skills instruction with values thrown in as an afterthought. There are only four values recommended as opposed to the ten skills, mentioned above. And three of the four values do not really qualify as values at all.

The first value is the provision of competent representation. While no one could dispute a professional goal of competence, which includes continuing legal education and declining cases beyond one’s competence, do we really need a prestigious A.B.A. Report to urge it? Is it not self-evident? Is the goal any different than such a goal in the training of doctors, managers, plumbers or hairdressers? Likewise the fourth value is professional self-development, which includes “assessing one’s own self-performance,” “taking advantage of courses of study... and meeting with other lawyers...” for the purpose of discussing... topical issues.” This value varies only slightly from the pursuit of competence.

The third value is “striving to improve the profession.” The comment suggests participation in bar associations and continuing education efforts. Putting aside the question of whether bar associations improve the profession or simply insulate the profession from government regulation in furtherance of professional self-interest, the enhancement of collegiality among the membership is assumedly a desirable goal. Stating it as one of only four values that need to be imparted to future professionals, however, inappropriately elevates its importance.

The second value of “striving to promote justice, fairness and morality” has three parts. “Enhancing the capacity of law and legal institutions to do justice” draws on the ethical considerations in the Code of Professional Responsibility that encourage law reform and court reform. However, having just witnessed the bewildering debates that culminated in the passage of the 1993 Massachusetts court reform act, with its 227 sections, it is hard to know just how the individual lawyer can make much of a contribution to this process.

This leaves only two subsections in this whole report that can really be referred to as values. “Insuring that adequate legal services are provided” to the poor is a call to altruism. As the comment notes, the profession has always recognized that rich and poor are unequally served by the profession. The call to the law schools to attempt to inculcate a sense of responsibility for minimizing the advantages of the rich is a positive step. Responses from the law schools may include the expansion of their clinical efforts or the imposition of some alternative type of public service experience during law school to acquaint students with the realities of the life of the impoverished. But as the report also notes these efforts are resource-intensive and absent alternative sources of funding, can drive up the cost of legal education, making it less accessible to students from poor and middle class families.

Finally the Report recommends instruction in “promoting justice, fairness and morality in one’s own daily practice.” This is a welcome recommendation. The profession has labored long under the charge that lawyers are hired guns who are frequently used as tools of the unscrupulous. Indeed, the Code’s requirement of zealous advocacy and commitment to client advantage frequently present the
practitioner with difficult moral judgments. To exclude instruction on justice and morality from the curriculum implies to the student that these kinds of considerations are irrelevant to the life of the lawyer. Still the Report's dedication of just one page out of 414 to this crucial aspect of the education of the lawyer may signal insufficient emphasis and explanation for the Commission to achieve its worthy purposes, especially when compared to the arduous detail of the skills section.

Third, the principles of professional responsibility are relegated to the status of a skill, that of "recognizing and resolving ethical dilemmas." "Lawyers," we are told, "should be familiar with the skills, concepts, and processes necessary to resolve ethical dilemmas." What does this mean? The content of the recommendation talks about "being alert" and learning the "warning signs" to problems and engaging in "self-scrutiny." It also lists the sources of ethical standards and suggests that lawyers be familiar with them.

My first problem with this is that it again suggests that somehow one can codify the process of realization of ethical dilemmas in practice. What does codification of "being alert" add? But far worse is the reduction of all of the principles of professional responsibility to a skill of problem recognition. Does not the legal profession have a tradition of professional service, of commitment to client good, of fiduciary responsibility? Why are these not included in the values section of the report and what could possibly have been the rationale for reducing all of professional responsibility to the skill of problem recognition?

Finally it is interesting to note the absence from the list of skills of the skill of advocacy. Twenty years ago this skill would surely have headed the list. However, in recent years, advocacy has been receiving a bad reputation, by virtue of its service of unscrupulous clients. Indeed the Boston Bar Association is considering the recommendation that the word zealous be stricken from the Mass. Code's duty of zealous advocacy.

CONCLUSION

While the McCrate Report is primarily directed at the law schools it clearly calls for participation of the bar in the training of young lawyers. The report finds a weakness in the educational process at the point of transition from law school to the profession. It encourages the profession to participate in the training of the "neo-phyte" lawyer by various means including in-house training programs, apprenticeships and what it calls transition programs, which primarily involve post-graduate skills programs.

This is a useful challenge to both the law schools and the profession. Both should strive to institutionalize links between the two. In the Internship Program which I direct I find a great willingness among professionals in governmental and non-profit law offices to dedicate their energies to student instruction. Harnessing this expertise and goodwill is a useful challenge for the future.
INTERVIEW BY
PROFESSOR GERARD J. CLARK
WITH PROFESSOR JOHN J. NOLAN
WORKERS' COMPENSATION:
TROUBLED WATERS.

Advocate: Jack, you've had a long-standing interest in Workers' Compensation. How did you get interested in the field?

Nolan: That's a rather interesting story, to me at least. The fact of the matter is that I had been teaching here for many years in the Property area, from the basic Property course up to and including Estate Planning. One summer in the late sixties a friend and law school classmate, whose career path led him from defense counsel for a large insurer to a workers' compensation claimants practice, bumped into me, literally, on the street and asked what I was doing. In effect he wound up asking me if I would help him during the summer with his case load as he had more than he could handle and wasn't interested in going into a partnership with anybody and didn't want to take anybody on.

Not being otherwise occupied and knowing virtually nothing about "workmen's compensation," as it was then called, I said "why not?" Thus began my involvement with workers' compensation law. Then in 1974 another very close friend died. He had been a former commissioner of the Industrial Accident Board and had a substantial compensation practice. I had done an estate plan for him and became the executor of his will. The practice was ongoing and needed tending and while I searched around for someone to take it over, I was pressed into keeping it from floundering for the remaining months of the school year. When I was not able to reach any satisfactory arrangement, I decided to take a year's leave of absence from the law school to work full time on settling the estate.

At the time I optimistically thought that the bulk of the work could be done within the year. As it turned out, that portion of the project took three years. It is perhaps some commentary on the practice itself that there are still a few of the original 300 or so files still active after almost two decades. I suppose there is also a lesson to be learned about the difficulties of winding up a compensation practice if you are going to go down to the last case. Compensation files, like many domestic relations files, have a longer life than in other practices because of their open-ended nature.

In any event, after that three-year hiatus, where I was engaged in full-time practice and was not here at the law school, I developed a very large interest in the subject of workers' compensation. When I returned to the law school that interest, undoubtedly combined with my gradually developing disenchantment with our monstrous tax laws as well as perhaps some burn-out with respect to what I had been teaching, caused me to embark on a new teaching career with Administrative Law and Workers' Compensation. That was in the fall of 1978.

Advocate: What is workers' compensation? Who's protected? What do they receive from it?

Nolan: Like so many things in law it was the result of an evolving social situation that came to be regarded as politically unacceptable. For most purposes the law of workers' compensation is recognized as having its origin in the first third of the 19th century in England prior to the Industrial Revolution. At that time claims by employees against their employers for work injuries were resolved under tort principles. Like the "Common Law" traditionally being recognized as beginning with the Battle of Hastings in 1066, the traditional beginning of the history of workers' compensation begins with another single English event, a case by the name of Priestly v. Fowler, which was decided in 1837.

That case had to do with an employee, then regarded as a "servant," being injured when he was thrown from a van which had negligently been overloaded by one of his co-workers. The
injured worker brought an action against the employer relying on what was then an evolving respondeat superior doctrine, where the negligence of one servant committed within the scope of his employment is imputed to the employer for the benefit of a party injured thereby. It was decided in this case, however, that this doctrine did not apply for the benefit of a fellow servant, and this was the notable beginning of the problems of workers claiming tort damages for work-incurred injuries. It took almost until the end of the 19th century before lawful workers' compensation systems were created.

I say "lawful" because there was a recent, rather intriguing article in the Boston Bar Journal by an alumnus of this law school, Judge Richard Tirrell of the Industrial Accident Board, dealing with pirates affording compensation benefits centuries earlier to their fellow buccaneers for injuries received in the process of pirating. Insofar as legitimate arrangements are concerned, the first workers' compensation act was something that came out of Bismarck's Germany in 1884. In the meantime, between 1837 and 1884 you had the industrial revolution, you had the emergence of steam power, the railroads and the advent of the machine age.

You also had a coincident development having to do with the status of employers. At the time of Priestly v. Fowler, employers tended to be what we now call proprietors, self-employed individuals who operated in an individual capacity, with personal liability and responsibility. In the next half century, operating in the corporate form became increasingly popular and employers then became a fictitious legal person and every natural person engaged in the enterprise then became a fellow servant in the carnage that attended the Industrial Revolution. The railroads were a particular source of that carnage, but overall the escalating numbers of work injuries and deaths created incrementally significant social problems. You had increasingly large numbers of people who because of work-related injuries were no longer able to provide for themselves and their families, where the likelihood of adequate compensation, if any, from their employers under the existing regime was small at best.

How were these people to be supported? For the most part their own resources were soon exhausted as were those of their families and they then had to rely on private charity and public welfare at a time the latter was hardly the massive institution it currently is. The difficulties of maintaining a successful tort claim against the employer involved not only showing the employer had breached some duty owed to the employee, like maintaining a reasonably safe workplace, but overcoming the defenses of contributory fault, the fellow servant rule and the assumption of the risk defense as well. This third defense involved both the assumption of risks that were discoverable as well as those that were hidden so long as the employer had warned the employee of them and the employee continued to work thereafter, regardless of whatever economic necessity compelled him to do so.

These substantive obstacles had procedural counterparts that elongated the process into years before even "successful" resolution was achieved. This in turn tended to induce settlements for relatively trivial amounts. It became increasingly obvious as the numbers of work injuries loomed larger while the tort recoveries remained small in more ways than one, even with some piecemeal assist from the legislatures and the courts, that a more effective remedial arrangement was urgently needed. The response that Europe and America embraced, born of necessity, is what we now call the workers' compensation system. It started by protecting workers in hazardous industries, usually mining, manufacturing and transportation, by providing partial replacement of the wages lost, called "benefits," during periods of disability caused by work accidents.

Advocate: The first act relevant to our interest came out of England?

Nolan: No, it came out of Germany in 1884.

Advocate: Followed by England and the United States?

Nolan: England adopted a workers' compensation act in 1897 and the legislation had pretty much spread throughout Europe before the first successful act was enacted in the United States. The early attempts to adopt workers' compensation systems in this country were generally held to be unconstitutional.

Advocate: The way in which comp changed tort law was by creating strict liability on employers for injuries in the work place?

Nolan: Whether or not compensation is or is not part of tort law is perhaps an academic dispute
The result of the conference, however, was an order that absolutely terminated all benefits, which as much flabbergasted insurer’s counsel as my acquaintance. I have heard variations of this story repeated over and over again by a wide range of people I have known for years and whom I have come to respect.

that may never be resolved and really doesn’t have to be resolved. In the first year of law school students tend to get an overview, with the big dichotomy of contracts and torts, whereby obligations voluntarily assumed are contractual in nature and those that are imposed by law are tortious. Under this dichotomy I suppose workers’ compensation is a subdivision of tort, but so regarding it as the courts did for some time and some still do, has produced some difficulties as some tort concepts really do not carry over and blend well with workers’ compensation concepts. For example, the notion of proximate cause.

Advocate: Under the traditional comp statutes recovery occurs upon injury regardless of fault?
Nolan: If it is work-incurred, yes.

Advocate: Usually, I assume, the focus is on the location of the injury?
Nolan: Time, place, activity—the when, the where, the what and the how—of the event or events that generated the harm to the employee.

Advocate: Now was it a concomitant development of workers’ comp that in addition to changing the rules of liability that comp claims went to a separate administrative agency other than the courts?
Nolan: Generally, yes. In the early days it was not too uncommon for contested compensation cases to be determined in the jurisdiction’s court system, but that now rarely is the case. There are only 4 or 5 jurisdictions in the United States that still try their contested compensation claims in their regular court systems.

Advocate: What’s the rationale for pulling them out of the courts and putting them into an administrative tribunal?
Nolan: There is more to administering a workers’ compensation act than merely determining or deciding contested cases. There is a lot of administrative work that the statutes call for that a court would not welcome having imposed on it. The administration of these acts requires rather massive record keeping; it requires that those that are subject to the act be informed of their rights and duties under it; that there be inspections of work places to ensure that adequate notice is given to employees regarding their rights under the act and in some instances safety inspections are conducted by the administrative agencies. Further, most of the cases are not contested and the agency is obliged to monitor and collect information regarding such cases as well as collect and report data to both the executive and the legislative branches of government. So the existence of the administrative duties was alone enough to cause an administrative agency to be brought into existence.

With respect to the trial of contested cases, it was early on expected that disputed cases would be swiftly and summarily resolved and the adversarial atmosphere and technicalities of the court-room were thought to be unnecessary and counter-productive. You’ll find commonly spread among the worker compensation acts in the country language to the effect that the adjudicative procedure is to be “simple and summary” or equivalent language. This is more or less true, sometimes less than more true, but that was the basic idea.

Advocate: When did we first get a comp commission or an Industrial Accident Board here in Massachusetts?
Nolan: Our act goes back to 1911.

Advocate: Was there always an administrative agency for hearing these cases?
Nolan: In Massachusetts, yes.

Advocate: What is the difference in the recovery for the injured worker as compared to a traditional tort recovery?
Nolan: Traditional tort recovery provides a rather comprehensive remuneration to the victim of a tortfeasor that compensates for the totality of the claimant’s loss, past, present and future. Recovery under the compensation acts is very
restricted. In successful compensation cases, the employee receives nothing for conscious pain and suffering or most other elements of regular tort damages, but only reimbursement for the cost of reasonable and necessary medical treatment of the industrial injury and a weekly benefit that is equivalent to a fraction of the employee’s “average weekly wage,” a defined statutory phrase.

From the employer’s perspective the substantial difference in what was recoverable tended to make the compensation system more acceptable. Early on, the limited elements of recovery were themselves extremely limited. There were tight limits on medical payments, for example. In this state an employee was entitled to reimbursement for medical costs that were incurred for only two weeks following the injury. The weekly benefits also had limits, as they still do, but in the beginning the weekly benefits might be less than $10 and no more than a couple of thousand dollars overall. But from the employee’s perspective, the promise of prompt and certain payment came to be regarded as more desirable than not-likely-to-be-realized common law damages.

**Advocate:** Have the basic elements of the original acts continued to the present time?

**Nolan:** Pretty generally, yes. I should say that the history of workers’ compensation has generally been one of up and out. By that I mean that the range of workers covered today is broader than those covered at the beginning when coverage was pretty much limited to “hazardous employments.” While still not universal in the sense that every employee in every jurisdiction is covered, it is much easier to enumerate the exclusions than the inclusions at the present time. Common workers excluded are agricultural workers, domestic servants, certain public officials and employees of employers with less than a minimum number of workers. On the benefits side, rates have also increased, both in terms of weekly amounts and in terms of maximum overall amounts and the increase has been substantial. In sum, expansion has characterized the evolution of this institution.

**Advocate:** We still have a board, it’s still compensation for disability and replacement of lost wages and no opportunity to get pain and suffering?

**Nolan:** That’s right.

**Advocate:** It’s not an elective system in Massachusetts—if you are a worker you are barred from suing in tort. Is that correct?

**Nolan:** Generally, yes, but that has not always been true. As I’ve said, the earliest attempts to install a workers’ compensation system in this country were unsuccessful because they were regarded as unconstitutional. One particular case that came out of the New York court system, the *Ives* case, in 1911 said that compulsory acts were unconstitutional. And that set the stage for a number of rather interesting developments that I don’t think we have the time to elaborate. In any event, the United State Supreme Court put these constitutional problems to rest in the *White* case in 1917 when it found acceptable a compulsory New York workers’ compensation statute. It was not until 1943, however, that the Massachusetts Act became compulsory, at least with respect to most employers.

**Advocate:** If I could bring you up to the present day, I read in the professional press and I guess even the popular press a lot of dissatisfaction with the comp system today. What are those dissatisfactions?

**Nolan:** Well I’m just as much a spectator in some regards as you are, Gerry. I think the root of the perceived major problem is the cost of providing workers’ compensation. It is no secret that we are in the midst of difficult economic times. The state is not only in competition with our sister states but with the rest of the world as well to find a market for its goods and services. The higher the price placed on those goods and services the less competitive they are and the cost to the producers of providing workers’ compensation benefits for their employees has become a substantial part of the cost of doing business.

In this state those costs have three sources: medical benefits, compensation benefits, and the expense of operating the Department of Industrial Accidents, the latter being somewhat of a novelty. Taking the first two in turn, the cost of medical services in general is something that has dramatically risen in recent years for a number of reasons that are again beyond the scope of this interview, but the fact is this rise has impacted the lives of all of us in many different ways and it has likewise impacted workers’ compensation.

Payments to employees have also greatly in-
increased in recent years. Up until 1977 for example, the maximum benefit in Massachusetts was $95 a week plus $6 per dependent being supported by the injured employee. Although there were some intervening changes the big boost came with the 1985 Amendments when the state went to an indexing system by tying the maximum weekly benefits to the state average weekly wage and required that there be annual cost of living adjustments in some benefit categories. In spite of the recent down turn, the state average weekly wage has continued to rise and now stands at $543.30 as of the moment. Take an employee earning $750 a week. Under the 1976 rate schedule, this employee having, let’s say, a spouse and two minor dependents, would be entitled to $113 a week in benefits. The same employee in 1991 would be entitled to the full two thirds of his average weekly wage or $500, because the then statutory maximum was not exceeded. That’s an increase of approximately 450%.

But there is more. The 1985 legislation introduced the COLAs, the cost of living adjustments. The legislature not only provided that certain long-term categories of disabled workers (or their dependents) whose dates of injury occurred after the effective date of the Act’s provisions would retain the purchasing power of their benefits by tying them to changes in the state average weekly wage, but provided COLA adjustments for prior recipients in the long term categories whose injuries predated the statute. This meant that a worker who was receiving the then maximum of say $70 a week established a couple of decades ago was now suddenly propelled up to a level that approximated interim inflation, more than a 300% increase. The burden of satisfying the increased benefits to preexisting recipients fell on current sources of funding.

You thus had not only a substantial increase in rates to currently disabled workers across the board, but this massive burden resulting from COLA benefits to all long-term disabled workers for which premium adjustments could be made only with respect to insurers of current risks. In addition to paying or providing current benefits, the insurers and self-insurers are charged with supporting two funds under section 65 of the act. One of them pays for the operation of the Department as I have mentioned. The other is to fund a number of payments including these retroactive COLA benefits by way of assessments. In

turn, the insurers turn to the current insureds for repayment in the form of premium increases. Obviously, the increase in cost from this combination of increased current rates and this double-barreled COLA arrangement has been somewhat staggering. It took a few years after 1985 to really hit home, but by 1990 it had become a very great problem to employers in this Commonwealth, many of whom were otherwise struggling to simply stay in business.

Now, that is not to say that either an increase in rates or some form of COLA adjustment was inappropriate and unjustified. I certainly don’t think they were, but some questions can be raised about their magnitude and timing. However, you asked about the problem and I trust I have sufficiently outlined it for you as I see it.

If extraneous influences are allowed to control the results, then you have in fact prostituted, and that is not a word I use lightly, the adjudicative process.

Advocate: And I assume that most employers buy workers’ compensation policies, that is they insure for these losses.

Nolan: In one way or another. Without getting into it too deeply there are some jurisdictions that have a compulsory or an optional state fund, where the state in effect becomes a one-line insurance company. In other states compliance with the act can be made through the provision of insurance from a private insurance carrier licensed to write that kind of business in the jurisdiction. And thirdly, self-insurance is also recognized whereby the employer “qualifies” with some section of the agency that’s administering the compensation act, ordinarily by putting up sufficient liquid assets to secure payment of benefits out of the employer’s cash flow. I suppose that means that yes, you can buy insurance, but not everybody does.

Advocate: I understand there have been recent legislative changes in the compensation law in Massachusetts. What are they all about?

Nolan: That’s not a question that is simply answered. In terms of motivation, I think it clearly was an effort to reduce costs.
Advocate: As to the Section 65 fund, particularly the one requiring the insurers to fund the operation of the agency, I find that extraordinary and unprecedented. Can you think of any other examples where that is true?

Nolan: Well the question has certainly occurred to me, Gerry, but I have never really looked into it like a good many other questions that have from time-to-time occurred to me. The fact is that I know no other, but I can't say that there are none.

Advocate: Does it give rise to conflicts of interest of any kind?

Nolan: In my mind the answer to that is, yes, indirectly. I haven't discovered any that result from the insurer's simply funding the operation of the board. The same is not true with respect to some of the concomitant burdens that were assumed by insurers.

Advocate: Such as?

Nolan: Well, concomitantly with the insurers taking over the cost of operating the Department, which incidently then greatly expanded in personnel, which in turn does provide a basis for some suspicions regarding political machinations I will not further develop. The fees of employees' attorneys were fixed in 1985 to a statutory schedule to be paid only in successful cases directly by the insurers. Now the voluntary resolution of issues is very much encouraged by the Department and the individual administrative judges. In negotiation, as to a given issue at a given step in the procedure an insurer may be willing to pay a certain amount, but the employee wants more. Insurers counsel then suggests that the employee's attorney can reduce his/her statutory fee to make up all or part of the difference. This then obviously places employee's counsel in a conflict of interest situation where the best interest of the client may be adverse to the attorney's own best interest. This is unfortunate and really should not exist, but it does. There are other similar situations, but this is illustrative.

Advocate: Who appoints the administrative law judges?

Nolan: The Governor with the approval of the Governor's Council.

Advocate: That would be true of administrative judges as well?

Nolan: Yes.

Advocate: Give us a little overview of who actually hears the cases?

Nolan: Well let me expand a little on the question. There are four decision levels within the Division of Dispute Resolution at the Department. In the DDR, the first level is the conciliation level with staff conciliators. Here obviously the purpose is to induce the parties to agree on some kind of resolution. Secondly, there is a conference level presided over by an administrative judge with power to issue an order for payment or modification of a pre-existing payment arrangement. The same administrative judge, if one or both of the parties request a hearing, will later preside over an evidentiary hearing in that particular case that will result in a decision which is the equivalent of a judgment after a trial in the court system. The fourth level is really an administrative appellate level on the record with briefs and discretionary oral argument before a reviewing board which consists of administrative law judges.

Advocate: Then there's an appeal to the judiciary?

Nolan: From the decision of the reviewing board judicial review is available, now directly to the Appeals Court.

Advocate: Going back to the most recent legislation, which was in 1991, what else did the legislation do?

Nolan: Well, it undertook to do a number of things. Some of them I think are highly controversial and it may be some time before even their validity is established. Among the less controversial things it did was reduce the two-thirds formula to 60% of average weekly wage for total disability benefits. The duration of benefits was also significantly reduced in the temporary benefit categories. Of great significance in my mind, although still pretty much ignored, is the statutory option to arbitrate or mediate contested issues rather than adjudicate them.

Advocate: Did they reduce attorney fees?

Nolan: Yes, they reduced the statutory fees.

Advocate: Did they change the way in which medical experts are used at the Board?

Nolan: This is one of the major bones of contention at the present time.
Advocate: What did they do?

Nolan: New Section 11A established a mandatory, impartial examiner regime. In moving from the conference level to the hearing level, medical issues must now be referred in the interim to an impartial medical evaluator, selected from a list of Department approved medical evaluators. The avowed purpose of the arrangement was to eliminate the "duelling docs." This may be regarded as a laudable objective, but it raises the basic question as to whether or not you can simply legislate conflict out of a situation in which conflict is inherent. Secondly, how "impartial" is the impartial physician? Many of those on the list have a long track record of providing medical opinion on one side of the fence or the other. To what extent an entrenched orientation is going to continue to operate in the minds of these physicians is a source of considerable concern on the part of the parties involved, if not the legislative and executive officials who are part of the system.

In any event, this impartial medical evaluator is to examine the employee and file a report responding "where feasible" to stated statutory questions, some of which seem really beyond medical competence. This report is then to be afforded prima facie status, while no other medical evidence such as that of the treating physician, can be introduced as a matter of right. Although the impartial physician can be cross-examined by way of a deposition by either party, that involves a substantial expense. The doctor is going to be entitled to a fee for being deposed and the stenographer's transcript must also be paid for. I would expect that anyone who undertakes to depose an impartial physician for purposes of cross-examination is facing an additional charge of something in the range I would estimate of four to five hundred dollars. I should add to this that in order to obtain a hearing a party dissatisfied with the administrative judge's conference order is obliged to pay a sum equivalent to the state average weekly wage, again $543.30 at the present time, to defray the cost of the impartial physician reference.

Advocate: $543.30 as a fee?

Attorney John P. White of the law firm of White, Inker and Aronson presents checks for $500 each to students Margaret Hoag of the Evening Division and Alyssa Friedman of the Day Division for the winning family law essays. Each year the firm donates $1,000 to Suffolk University Law School to sponsor the Family Law Essay Contest, and three members of the faculty pick the winning essays. Shown are Associate Dean Charles Kindregan, Professor Thomas Finn, Margaret Hoag, John P. White, Alyssa Friedman and Professor Marc Perlin.
I think it unfortunate that it is only rarely that a person becomes an administrative judge or an administrative law judge after an apprenticeship within the compensation system itself. Usually compensation adjudicators are appointed from vastly different walks of life and while admittedly some excellent adjudicators have found their way into the Department of Industrial Accidents this way, there are times when the lack of relevant practical experience and sensitivity to the problems of disabled workers is all too obvious.

Nolan: As a fee. But that is not all. The act further provides that an employee who is not represented by an attorney does not have to pay the fee. Now, take the position of an injured worker at this time who has, we will hypothesize, a legitimate injury and a legitimate disability who nonetheless has not been able to obtain compensation benefits. I take this hypothetical individual because this is the person the law is designed and intended to protect. This employee at this stage of the proceedings will likely have been out of work for months. Personal and family resources are likely to be at low ebb or nonexistent. He or she might well be living on welfare.

Look at the dilemma this employee faces. Attorneys take compensation cases really on a contingent basis as a practical matter. They are only entitled to the statutory fees and they are paid only in successful cases. So an indigent employee with a reasonable chance of success will likely not have trouble obtaining competent counsel at no expense. Coming up with $543.30 at a point in time when that employee is having trouble putting food on the table is something else. It is a difficult to impossible task. The employee then has what amounts to a Hobson’s choice. The employee can either fire the attorney, which few will readily do, and which, if done, will provide the Department with more problems than perhaps had been realized in dealing with pro se claimants who are not too articulate or too well versed in their rights, duties and obligations, or the employee can abandon the claim.

Some say, "Well, the attorneys can pay the fee." Obviously there are a number of things wrong with that. The attorney is not a bank. Attorney’s fees in this area have been very much restricted, currently $3,500 plus necessary expenses if successful, but not otherwise. We are not talking about tort claims where fees can run into five and six and sometimes seven figures and successful cases pay for losing cases.

Advocate: Perhaps there is an age gap here as some younger activists seem not to have heard of champerty and maintenance. So, you now have a new regime that carries with it manifold problems that raise some very serious questions not only prudentially but technically that approach constitutional dimensions. I think there are some serious due process questions with respect to the prima facie and exclusive character of the opinion of the impartial medical evaluator. There is a Massachusetts case, Meunier’s Case, that goes back to the mid-forties that said making the report of a three-member medical panel conclusive violated due process. While the current arrangement is not quite so boldly worded, I think there is a serious question that it is nonetheless congruous as a practical matter and just as violative. I also think that impeding or burdening, however you want to phrase it, an employee’s access to an attorney for representation in litigation as Section 11A does, violates contemporary equal protection standards. You have to remember that access to an attorney is a constitutionally protected right I think some people fail to realize.

Nolan: The compensation bar of let’s say 25-30 years ago was a relatively tight group. It was somewhat small in number, pretty uniform in composition and specialist in character. And the same was pretty generally true of defense or insurers’ counsel. There was a certain collegiality that existed and reputation played a very large role in practicing at the old IAB. In my view practitioners at the old board operated at a very high ethical level and, while there was a certain chumminess that did not intrude into areas where an adversarial relationship was appropriate. I frankly liked the old board
and I much prefer the procedure under which practice was conducted. I think many of the procedural changes that were introduced in 1985 and thereafter were wholly unnecessary and unduly expensive and consuming. But that is a whole other subject. At the present time, as a result of a number of factors, things are different. The "old hands" are retiring or dying off and while there is still a significant core of practitioners on both sides who practice compensation law pretty exclusively, there are now a lot of people who do not and who come and go.

**Advocate:** It sounds like the reduction in the fee schedules would require a plaintiff's comp attorney to handle a large volume of cases.

**Nolan:** Yes, I think that's true, but it was also true when the compensation rate was lower and contingent fee percentages produced relatively small fees in individual cases, which tended to make the practice a specialty. You had to handle a lot of cases to make the practice worthwhile and that gave little time for anything else.

**Advocate:** Might the need for having large numbers of clients push advertising and other ways of getting the injured worker to come through the front door?

**Nolan:** You certainly see a lot of it. It's in the newspapers; it's in trade publications; it's even on television. The whole subject of advertising I think is a "touchy" one and there are some who think it unprofessional, but it is certainly lawful.

**Advocate:** Do the changes in the fee structure introduced by the 1991 statute undermine the profitability of being a plaintiff's comp lawyer?

**Nolan:** I think that's undoubtedly true. There are some areas where the fee restrictions are really unjustified. As I have indicated, many legitimately injured and disabled employees must wait a long time before they receive benefits and indeed I would like to say that every employee who is entitled to benefits receives them but not all do. Conversely, there are some recipients getting benefits who perhaps should not be. Our adjudicative system is not 100% accurate here any more than it is elsewhere. The fact of the matter is that many worthy claimants cannot really finance litigation even before the Department. That means that such things as medical evaluations and reports may have to be financed by attorneys. I don't like this idea because it then sets up competition among attorneys on the basis of who is willing to invest the most money on behalf of a particular client, which I think is not healthy ethically or practically.

Compare the case of a physician paying the lab fees for the doctor's patient. Aside from that, an attorney who pays for a litigation-oriented medical report may be a financial loser in any event. I might add that the doctors do not do this for nothing, nor do they consider it part of their obligation to provide medical services, nor part of the payment they receive for such purposes, and for this I do not fault them. It is not unusual to find a physician charging $300, $350, $400 for an appropriate medical report. If the attorney is successful at the conference level, but not otherwise, he receives a maximum of $700 dollars and may receive as little as $350 as a fee (and there is another conflict of interest story here), and then be reimbursed for the medical report. This in my opinion is gross undercompensation of an attorney for the services rendered and the financial risk assumed. One practitioner I know well calls it "involuntary servitude" and that in some instances is not far from the truth.

**Advocate:** Is this an area you would recommend to law students, namely practicing workers' compensation law?

**Nolan:** In spite of the problems, my answer would be yes. The defense bar, of course, is paid on the basis of their services, although hardly handsomely, but there is nothing contingent about their remuneration. Some attorneys regard working for an insurer as part of their legal training, preparatory to becoming a representative of employees. Others make a career of it. Representing employees provides an opportunity to provide a very worthwhile and needed public service to people who can be

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*I think it easy to say that costs have to be minimized, that the processing of cases has to be expedited, that resolution by agreement of claims has to be facilitated, that fraud has to be eliminated. No one disagrees. The problem is how you go about accomplishing such laudable ends.*
truly in need. I don’t want to take the position that there are no phonies or frauds out there, for there certainly are and I think any attorney ought to shun them as if they had a very debilitating, contagious disease. But aside from such individuals, there is a need that has to be filled. Despite the restrictions on fees, I think over a period of time a conscientious and honest attorney can establish a reputation for competence and reliability and integrity and thereby build a practice that will be sufficiently remunerative to be satisfying. I doubt if a compensation attorney is ever going to be among the Commonwealth’s top money makers, but there are other satisfactions.

Advocate: Jack, as a totality it sounds to me that the new act has sold the employee down the river, is that your opinion?

Nolan: Well I don’t know if you can be that strong, but I think you can certainly say that the overall thrust of the act is anti-employee and further, somewhat anti-attorney as well. However, the present act replaced an even more Draconian bill that originated with the legislature.

Advocate: Do you think the Governor has given his new administrative judges marching orders?

Nolan: I don’t know if it comes from Governor Weld or from some other source, but from personal experience and anecdotal evidence from others with whom I maintain casual but ongoing contact who practice before the board, there are too many tales to allow the issue to be ignored. Indeed, it is very difficult to escape at least a strong suspicion that some marching orders have been issued and in fact are being obeyed.

Advocate: What are the marching orders?

Nolan: “Do everything you can to reduce the cost of providing workers’ compensation benefits to employees in this Commonwealth,” phrases it about as bluntly as I can.

Advocate: What does that mean?

Nolan: It means reducing or terminating benefits at every opportunity. If this is the reality what a sad state of affairs!

Let me give you one of the anecdotal stories that I recently heard. The particular source was a participant in a conference proceeding. This individual I have known for decades and

Administrative agencies are not legislatures and they are not courts. Their limits are circumscribed by the legislature through the medium of the empowering statutory language.

has been associated with the industrial accident scene for longer than that. This individual was representing an employee before an administrative judge. The medicals for both the employee and the insurer were almost parallel. The employee had a work-related injury, that was disabling and the treatment currently being provided was appropriate. It might have been a strain, my acquaintance said, to have worked it out that the individual did have some earning capacity, but it could have legitimately been done. The result of the conference, however, was an order that absolutely terminated all benefits, which as much flabbergasted insurer’s counsel as my acquaintance. I have heard variations of this story repeated over and over again by a wide range of people I have known for years and whom I have come to respect.

This kind of thing is exceedingly troubling, whether it be merely the appearance of truth or truth itself. One of the core notions of due process is that adjudicative judgments are to be made solely on the basis of the evidence that is introduced before the judgment-maker and under the law fairly and reasonably applied. If extraneous influences are allowed to control the results, then you have in fact prostituted, and that is not a word I use lightly, the adjudicative process. If this kind of thing is countenanced then I don’t know where we as a state or as a nation are heading. The ramifications of this kind of thing frighten me very much. The adjudicative process is reduced to a dishonest charade.

I should also add that in these anecdotal stories some names have a tendency to recur and other names never appear. This also raises some questions regarding the selection of adjudicators for service in the Department of Industrial Accidents that is a whole other story. I think it unfortunate that it is only rarely that a person becomes an administrative judge or an administrative law judge after an apprenticeship within the compensation system itself. Usually compensation adjudicators are appointed from vastly different walks of life and while admittedly some excellent adjudicators have found their way into
the Department of Industrial Accidents this way, there are times when the lack of relevant practical experience and sensitivity to the problems of disabled workers is all too obvious.

Advocate: But there is sensitivity to the spiraling increases in the cost of comp and comp insurance?

Nolan: I don't see any other reason to justify it. I can't accept a mere perverse impishness or a malevolent desire to simply inflict pain. But whatever the motive, allowing the adjudicative process to be controlled by off-the-record considerations of whatever character, is a perversion and inconsistent with what to this point in time anyway has been a fundamental fixture of our society.

Now I don't want to overstate this. I am not suggesting that all decisions fall into this category, because I'm sure they do not. The point is that it appears that a significant number of them do, or appear to. One of the big problems, of course, is that in some instances the actuality being a mental intangible, eludes detection except in the more extreme cases where it is clear the evidence cannot support the result. I think we all have to recognize that the adjudicative process is not infallible and human beings are going to make mistakes on occasion. If mistakes are made innocently, that is a fact of life. But we're all entitled to have a fair and impartial evaluation of a situation and a reasonable and even-handed application of the controlling law. That is all anyone has a right to expect, but everyone has a right to satisfaction of that standard. I think it is up to everyone involved to recognize the potential of this evil and to be very intolerant of it whenever it appears. This includes not only the administrative judges themselves, but also the practicing attorneys and those who sit in appellate positions with respect to the results of a compensation claim.

Advocate: Would you like to add anything to wrap things up?

Nolan: Well, I'm sure I can't provide a nice neat bundle because I think the situation is a little too tempest-tossed for that. The world is in turmoil, the nation is in turmoil and the state is in turmoil. We all feel threatened in many ways as a result of many forces that presently seem beyond our control. In this situation it's very easy to adopt a survival mode and act in what amounts to varying degrees of panic. I think to a certain extent that is what has been happening with respect to the 1991 Amendments and the subsequent operation of the Department.

Let me say I well recognize that I may be in error as to my factual inferences, although I do not think so, and I certainly don't have all the answers, but we have trouble not just in River City. Power to change honest perceptions, or the basis for those perceptions, lies with the DIA and those who populate it. Power to resolve the legal questions that I have raised and the technical concerns that I voice lies with the court system of the Commonwealth and ultimately perhaps the U.S. Supreme Court. I think it easy to say that costs have to be minimized, that the processing of cases has to be expedited, that resolution by agreement of claims has to be facilitated, that fraud has to be eliminated. No one disagrees. The problem is how you go about accomplishing such laudable ends. As Ross Perot said the other day, "The devil is in the details."

In seeking to achieve laudable goals, we can't just utilize any means. The totalitarian approach of the dictator with de facto coercive power to utilize the most direct and effective means to achieve ends is out of place in our democratic society. There are limitations that are imposed by our constitutions and traditions and our understandings that have to be observed and they are not being observed. Fault here appears to me to be rather widely spread. I think the legislature was overzealous in enacting such provisions as those of Section 11A with respect to the impartial medical evaluation process. There appears to be some overzealousness and overreaching with respect to the determinations of some administrative judges as I have indicated.

And let me add one other illustration of the unfortunate extent to which the matter has been pushed. On January 4 of this year, some regulations promulgated by the Department became effective. The authority to promulgate regulations is found in Section 5 of the Act. The power delegated requires that the rules promulgated be "consistent" with the Act itself. The thrust of some of the recent rules is to convert what the clear language of Section 11A requires be mandatory into an optional resort within the discretion of the parties. Now if you look at the language of Section 11A, the reference to an impartial medical evaluation is stated in terms of "shall"
If the statute requires in every case where there is a "medical issue" reference to an impartial medical evaluator, and there is no compliance with that requirement, then those adjudications would also seem to be ultra vires acts. If the adjudications are invalid, then any compliance with them risks similar invalidity.

which appears at least three times in an unqualified and unambiguous context. It seems to me a very strong if not conclusive argument can be made, if recognition is to be given to the integrity of language and the plain meaning of words, that the rules are outside of the power of the Department delegated to it by Section 5 because they are inconsistent with the language of the Act.

If that is true, what are the potential consequences? I'm sure that the Department will operate in accordance with these rules, which, if ultra vires, are simply a mirage, something that appears to be but is not. If the "rules" are then followed you will risk adjudications that are inconsistent with the statute and thus are ultra vires in themselves. Administrative agencies are not legislatures and they are not courts. Their limits are circumscribed by the legislature through the medium of the empowering statutory language. Those limits apply as much to their adjudicative authority as to their legislative authority. If the statute requires in every case where there is a "medical issue" reference to an impartial medical evaluator, and there is no compliance with that requirement, then those adjudications would also seem to be ultra vires acts. If the adjudications are invalid, then any compliance with them risks similar invalidity. Since it may be years before the courts determine the question of the Department's authority, imagine the debacle, the fiasco, that will result if it turns out that those interim decisions are nullified. How can you put these eggs back in the shell once they have been scrambled?

I think it's time that everybody involved backed off for a spell and took an objective and unhurried look at what has happened since mid-December of 1991. The potential for upheaval and mass confusion is obviously implicit in the present situation. I am genuinely distressed by the potential consequences I see lurking in the existing arrangements and I have not exhausted the problems I see and am certain I have not seen them all. These are very troubled waters.

Professor John J. Nolan
THE RED STAR AND OTHER RUSSIAN TALES

By Professor Barry Brown

The Red Star squeezed steam into the Russian night. An endless stream of railroad cars seemed to stretch all the way from the dingy railroad station on the north side of Moscow to St. Petersburg, the actual and final destination of the railroad train that was once the pride of the Russian railway system. The cars were very old and each bore the marks of the recent changes that no one quite seemed to understand. On the side of every car was a chipped and faded red star, some with a hammer and sickle, but on others the symbol had been removed, torn off, leaving bare rusted metal in its place. As much as any other image, this railroad train in a tired, old railroad station, at midnight in Moscow was a clear statement of the difficult times in this nation.

We were to board this train for an overnight journey to St. Petersburg. The faces around us were tired, not from the lateness of the hour we thought, but the constant battle to survive in an economy that each and every day brought new pressures from the decline of the ruble to the failure to provide enough bread. Even at this hour, shadowy salesmen stood in front of little tables or with their arms filled with cigarettes, clothes, pots and pans trying to sell whatever they had to those boarding the train.

Others just looked weary, not in the sense of the weariness of travellers who board a late train or plane in London or New York, but the weariness that comes from trying too long and too hard to make things work and to make sense out of things that did not work.

Eight days ago we had flown into the Moscow Airport, a place not unlike arriving in Buffalo, New York on a bad day. The airport gives no sense that this was once the capital of America's prime antagonist, no feeling that behind the gates lies a powerful empire or strong military competitor of the United States. Instead, like most of Moscow, the prominent color is gray, the walls are crumbling, the lights are dim and the feeling is not unlike walking into the middle of a 1950’s film noir anti-communist movie. For the new traveller to Moscow, the first terror that one feels is not being able to survive the scrutiny of the airport guards. We have been conditioned to expect that, with one false move, we would be cast away to some Siberian wasteland, never to be heard from again, and simply reported as “missing.” For the first-time traveller, that feeling of despair survives throughout the long drive from the airport past poorly designed and structurally marginal office and apartment buildings into the center of Moscow. If the traveller’s arri-
val is at night, as ours was, one is immediately struck by how few people are out in the streets, not because they choose to travel Los Angeles style on high-speed highways, but rather because the night is not a time to test the political or personal freedom that may have evolved in the Russian Federation over the last few years. The night in Moscow is still a time to keep to oneself or to small groups. There is still a sense of fear, a sense of hiding in the Moscow night, and while it is unclear from what source that fear comes, or for what reason the hiding continues, it is, nevertheless, pervasive and quite apparent to the new visitor.

Perception and reality are always a challenge for an American in Moscow. We were told by our guide that the Hotel Arbat, the small, secluded hotel on a side street near Moscow's commercial district, which would be our home during our entire time in the city, was the former Communist Central Committee's hotel. From that moment on, we thought we saw its rooms filled with serious, heavy set Soviet politicians and planners, all vaguely resembling Brezhnev or Khruschev or Andropov, walking its halls, filling its public rooms and taking notes on our every move. Those days are gone, but the problem of perception remains for an American trying to understand the new Russia. How much has changed and who has changed are constant questions that are not easily answered.

Our guides and interpreters, associated with the Russian-American joint venture known as V.I.S.T., which, together with Dean Margarite Dennis and the Office of Enrollment Management at the University, were responsible for arranging our trip to Russia, were major forces in balancing our feelings of isolation and providing us a better understanding of the transformation which Russian society is undergoing. Our journey was intended to introduce faculty members from different schools in the University to Russian society and to help establish relationships with similar academics and professionals in the Russian Federation. Our group included faculty from the department of physics and government in the University, and myself as a representative of the law faculty.

Although brief in duration, no trip in my recent memory has left me with more intense images, nor established a more valuable level of understanding of an emerging culture in society than the two weeks spent in the Russian federation. The credit for that experience must go to the V.I.S.T. organization including Alexander Belenky of the Russian Academy of Sciences and Dr. Leonid Roginsky, who is now in the United States as a visiting scholar in the Science Department of Suffolk University, and without whom we would not have been able to meet the people, nor to see the Russia that we did during our stay. Most importantly, our guide, Katcha, a graduate student in art and history made the mystery of the new Russia seem more human and added life to what, for us, would have otherwise been a closed and threatening society. These individuals, together with their friends, professional colleagues and relatives, who brought us to a level of understanding of the incredible changes occurring in Russian society and to appreciate the spirit of the Russian people which is often hidden by the Stalinist facade of Moscow.
We came to see Russia as a society on the edge of either greatness or destruction, a condition which may, in fact, have been present throughout its existence. Each and every Russian is aware that they are living in a time of turmoil and a vacuum of political power. Presently, that vacuum is being filled, predictably, by the most opportunistic and unscrupulous segments of the society. One need only walk down the Arbat, the "retail" street, in the heart of Moscow, or to change dollars for rubles with the black market con-men who occupy every corner of the city, or to attempt at night to walk the streets of Moscow which have been turned over to gangs of youth and gypsies without any apparent police control, to realize that the elements that customarily wait on the fringe of every society for signs of weakness, loss of control and lack of purpose have temporarily succeeded in Russia to be the dominant forces: politicians without a purpose or party, but interested in personal gain, the Russian Mafia and the speculators and con-men, both Russian and foreign, including many Americans, have filled this new country to take advantage of every weakness, until some new sense of order and purpose emerges.

But Russians are both wise and maintain a sense that their history has witnessed such changes before. They are cynical enough to realize that instead of an order which supports freedom and personal choice, the reaction to the present power vacuum, which can best be described as virtual anarchy, may be, again, some form of authoritarian control at the expense of personal freedom. The optimism that we heard from each Russian with whom we spoke was tempered by this sense of foreboding, not unfamiliar in Russian history and literature, a sense that after this momentary explosion of energy, some paternal force will tell each Russian to go to his room and get back to a narrow and limited daily existence. If we were left with one impression, it was that we were dealing with youngsters in a society that had been let out to play without being given the rules of the game.

The Russian Institute of Legislation and Comparative Law

Much of my time was spent at the Russian Institute of Legislation and Comparative Law with legal scholars, thinkers and planners whose job it is to transform Russian law and the system of justice to accommodate the change from a communist to a democratic society. Again, time spent at the Institute tested perceptions and reality. Like the rest of Russian society, the physical appearance of the Institute belies its internal purpose, and reflects a kind of schizophrenia with its past that makes its present purposes difficult to attain. The Institute occupies a block of what appear to be beautiful, old townhouses in the center of Moscow. But the townhouse structures are just a facade. Once past the entrance, the entire block of separate buildings has been reconstructed on the inside into a single, large modern office structure. No clue of this transformation is given to a person passing by on the street. It is as if the Institute hides behind a face of an earlier existence. In fact, the Institute's history suggests that such concealment might be presently appropriate. Although tracing its beginnings to the State Institute of Studies on Criminality and Criminal Justice founded in 1925, the Institute's years of prominence came during the Stalinist and post-Stalinist era between 1936 and 1963 as the U.S.S.R. Institute of
Legal Sciences. During that time, the Institute engaged in the “scientific” review of “general problems of law” and, with the assistance of the academics and attorneys of the period, developed the specific legislation and the system of justice that supported the Stalinist government and political institutions. Under the guise of scientific legal research, members of the Institute, law professors from Russian universities and political appointees of the Soviet leadership became the craftsmen of the now discredited communist state.

In 1963, the Council of Ministers of the U.S.S.R. reorganized the Institute as the U.S.S.R. Institute of Soviet Legislation of the Ministry of Justice. Essentially, from the period 1963 through 1988, the Institute was relegated to the task of participation in routine legislative work, codification and systemization of Soviet legislation and studies of foreign legislation.

Following the assumption of power of Gorbachev, the Institute was, once again, reorganized in 1988 as the U.S.S.R. Research Institute of Soviet State Development and Legislation with its stated goals of consulting to the praeidium of the Supreme Soviet, its committees and commissions, as well as the Committee of Constitutional Control of the U.S.S.R., the central electoral commission, and the People’s Deputies of the Soviet Union. The Institute provided the scientific support of legislative work undertaken by the Supreme Soviet of the U.S.S.R. With the dissolution of the soviet state, the Institute has remained the primary source for legislative research and drafting for the Russian parliament and executive branch. The staff and faculty of the Institute are charged with the responsibility of analyzing and implementing political and economic reform, counseling and advising the representatives of the Russian parliament, engaging in research concerning the framework to be established between political and national groups in the Russian Federation, and developing regulations concerning the economic administration, social and cultural development of local governments, and general problems of labor, civil, economic, family, environmental and criminal matters which are intended to be incorporated into legislative reform.

The Institute is also charged with the responsibility for reviewing developments in foreign law and foreign legislation. In fact, the Institute is, apparently, the only state entity charged with the responsibility for analyzing comparative law issues in the Russian Federation, including foreign labor and family law, civil law, and civil procedure in the judicial systems of foreign states. Based upon such comparative studies, the Institute has recently completed the drafting and enactment of new comprehensive environmental laws, land laws, employment acts and collective bargaining legislation in the Russian Federation.

The Institute establishes direct relations with foreign legislative organizations, participates in international conferences and symposia, all with a view to analyzing foreign state development, parliamentary activity and legislation. At the present time, the Institute is comprised of a faculty of 40 academics and practitioners and 70 post-graduate candidates.

My time at the Institute was spent with Igor D.
Romanov, the Director of the Department of Foreign Relations, Professor Boris D. Klukin, who is responsible for property and environmental law issues and Professor O.N. Sadikov, who specializes in contract and arbitration law. All three men provided invaluable insight into the process of reform being undertaken in the laws of the Russian Federation. My particular concern was the manner in which Soviet property law needed to change to accommodate foreign, and particularly western, investment in commercial and residential land transfer, finance and development. In a city with few phones and fewer fax machines, we spent many hours around a table in a grand old Russian conference room now updated to communicate with the outside world. Phone lines, audio and video equipment were everywhere. The only concession to the past seemed to be the attendant who regularly filled the samovar with tea and bought an endless supply of Russian pastry. The discussions seemed important to my hosts. When the hour became too late on our last day and I was afraid we would miss our flight to London, Igor Romanov called over to the airport to ask if the plane could be held.

As we spoke, it became clear to me that certain changes in basic law were relatively easy for the Russian legal system to accommodate. Specifically, legislation which contemplates enforcement mechanisms through the police power of the state such as environmental protection and land use planning, including zoning and community development, were conceptually easy to integrate by updating existing laws to match western models and to put in place procedures, such as local planning commissions and adjudicative administrative bodies to establish new regulatory codes and enforcement vehicles. Much more difficult, however, is establishing the legitimacy of private law and the legislative structure and judicial mechanisms for supporting binding agreements between seller and buyer, lender and developer, and tenant and landlord.

Before capital can flow into the Russian economy for the purpose of building new infrastructures, cities, factories and housing, those who would finance and own interests in such projects must have the security of the enforcement of their agreements through predictable procedures and a consistent body of substantive law upon which courts and administrative agencies can determine post-contractual disputes between private parties. Unfortunately, the structure for maintaining and enforcing private agreements supporting capital formation and development entities is in its infancy. As a painfully clear example, the structures and mechanisms for land transfer and finance must be entirely recreated. It is not enough to acknowledge the existence and right to private property. Priorities among various competing interests in private property must be established and given the force of law in Russia, instantly, while the same process in England and America by which property rights and interests were prioritized evolved over centuries.

In our discussions, Dr. Klukin was quick to point to the enactments that had recently allowed for private transfer of title in Russia. However, as we discussed more complex forms of real estate transactions, such as subordinated ground leases, leasehold mortgages, sale and leaseback of improved real estate, installment sales and similar land development mechanisms common in industrial countries, it became clear that the evolution of Russian land law was
presently locked in the equivalent of England or America in the 18th and 19th centuries and would have to make giant strides both in comprehension and practice if Russia is to take its place alongside and compete with other industrialized nations to attract capital investment to modernize its infrastructure and capital base. It will not be enough for the Russian government or outside entities such as the World Bank to offer loan guarantees or direct aid. Real progress will take place only when Russian law has evolved to the point where a commercial lender or private investor can say with certainty that its financial interest is secured by a first mortgage, or subordinated to a ground lease, or part of a participating loan agreement that combines secure debt with equity. No one is suggesting that Russian law must mimic its western counterparts. However, at present, there is no comparative model which interfaces well with the land and finance law of western societies. Unless the Russians can go beyond paying lip service to the desire to develop a market economy and, as part of that economy, evolve a law which provides predictable and consistent rules for the formation and management of sophisticated financial and real estate vehicles, the Russian economy will continue to languish for want of any serious investor risking large amounts of capital.

This fact was brought home to us when on an afternoon, we travelled from the Institute to a new private bank and the offices of an attorney who was establishing her own practice, specializing in commercial law, banking and finance. The woman, who had been associated with the Institute, had decided to strike out on her own and attempt to become the Russian equivalent of outside bank counsel. To this end, she had located her offices immediately adjacent to the street floor location of the small bank. What we were shown as the location of her practice was both a tribute to her dedication and a clear example of the frustration felt by those who seek to develop private, professional legal practices. After what, we were informed, were months of endless bureaucratic delays and the need to make contacts with the “right” people, she had succeeded in obtaining the space necessary for her office, the office of her partner, an associate, and a small conference room. All were located in dark interior space in a nondescript concrete office building on a side street near the center of Moscow. This new private practitioner was extremely proud of her efforts, but it was clear that it would be many months before the construction work would be completed, the necessary office equipment procured and the office functioning in anything close to the western model of a private law practice.

The immediate need both to develop the conceptual foundation for the evolution of private law and to remove the remnants of the Soviet bureaucracy from control over entrepreneurs and professionals so that they can free the market potential of the Russian economy is at the heart of the problem. In June, 1992, we saw that the spirit of the Russian people was energized and confident that steps could be taken to break the control of the entrenched clerks, administrators and low-level government officials who remained even after the end of Communist domination. It will not be an easy task, and we could not but question how long the euphoric spirit would remain. Those academics and professionals with whom we spent time at the Institute were well aware time may be too short to produce such dramatic changes. Both the academics and people with whom we met outside the Institute, were candid and somewhat fatalistic, as only Russians can be, that those who would reinstitute authoritarian control, or an even more serious form of military dictatorship, were simply waiting, in fact planning, for reforms to fail.

For this reason, the Institute and other similar organizations in Russia have been attempting to reach out to professionals in other countries. At the present time, Suffolk University Law School is attempting to establish a program with the Institute which would allow for the exchange of faculty between the Institute of Legislation and Comparative Law and the Law School on a regular basis in order to assist the Russian parliament in the program of legislative reform and to provide our own faculty and students with exposure to Russian Law and Public Policy. Such an exchange program could be an exciting first step to ex-
panding the range of contact, expertise and reputation of the Law School, while at the same time, providing a major contribution to the development of Russian law.

Our time in the Russian Federation was all too brief. We came to Russia as children brought up in the Cold War with preconceived notions of a society and people armed against us. What we saw was a society in disarray with politicians, criminals and bureaucrats creating a power vacuum that threatens the very fabric of order in the community. But we were also transformed by those Russians with whom we met, whose pervasive good humor and indomitable spirit seemed destined to carry them through this difficult time.

Two very separate experiences, apart from the technical and academic discussions at the Institute, made clear to us that, for this society, there was no turning back at least as far as its people were concerned. On a warm summer afternoon, we were travelling back from the town of Zagorost and, with our guide and driver, stopped for a picnic by a small lake. There, in a field that may have well seen battles in many revolutions, we had a picnic. Our guide, Katcha, set out a blanket and placed on it food that her mother had cooked just for us on this occasion: smoked fish, chicken, caviar and blinis, potatoes and cheese all set out on a blanket in the early summer Russian sun. As we ate, she told us about her family, how times were hard and how runaway inflation had caused the value of the family income to decline almost on a daily basis so that the average Russian family survives on less than fifteen dollars per week and how in her case the family car sits idly on the street because it will cost too much to obtain a new distributor. And yet with all of these hardships, she looked eagerly toward the future, toward a time of change, toward a time in which she and other young Russians could be proud of their whole heritage and not limited by the failed Twentieth Century vision of the Soviet Union. The thought of that field and that picnic remained very real during a second indelible experience, the long Russian night on the Red Star from Moscow to St. Petersburg. Some people can sleep in berths on trains; I cannot. Instead, I became aware of the irony of my place on this train moving through the Russian night. I had been conditioned since youth to think of these people and this country as my enemy, a nation poised to destroy my nation. The things one learns as a child are not easily overcome. But on this train, during this night, it became very clear to me that our two nations have a need for each other, and the people of our two nations have more in common than things which separate us. We should not miss our chance to make a difference in the changes that are about to take place in Russia, not for the economic opportunity, but because there is a nation there that seeks out our help and a people who believe that our friendship and good counsel can lead them to a better existence.
Most of the year my wife and I live and work in the shadow of the Golden Dome. In August, however, between the end of Suffolk's summer school and the beginning of the fall term, we try to get away with the kids.

Our forays have taken us in rented cars through various parts of Europe. While a lot of ground has been covered—from Scotland to Macedonia—seldom had we managed to stay in one place long enough to get much below its surface. Last summer, determined to try something different, to stay in one place long enough to get to know it in depth, we signed on as unpaid "volunteers" to Professor Andrew Stewart's University of California, Berkeley, Archaeological Expedition to Tel Dor, Israel. Tel Dor is a mound of artificial debris, about the size of Beacon Hill, overlooking the remnants of an ancient harbor on the eastern Mediterranean coast between Haifa, 15 miles to the north, and Caesaria, 8 miles to the south. This particular mound, this "tel," is an accumulation of debris left behind by successive occupations, beginning with the Canaanites in the 20th Century B.C. and extending to Richard the Lion Hearted who took the place from Saladin in 1192 A.D. Traces of the Canaanites are buried at sea level 45 feet inside the tel; on the surface, the ruins...
Sifting Through Soil Found Near Doreen

of the crusader fortress support a small Israeli military installation at one corner of the tel.

Centuries before the final destruction of the crusader kingdom in 1291, Dor’s location had faded from memory. Only in the early part of this century was the mound positively identified. This was done by a Yale doctoral student who pieced together various references to the city in Egyptian, Biblical, Persian, Greek, Roman and Arabic written sources. His scholarship revealed that the mound, known to the Arabs as Khirbet el-Burj (the Ruins of the Fortress), was in fact the city said by the Greeks to have been founded by Doros, the son of Poseidon.

Digs for the most part are not flush with money; they depend on volunteer labor -- the more volunteers, the more sectors that can be opened. We came across Dor in the Archaeological Institute of America’s Archaeological Fieldwork Opportunities Bulletin. It seemed a good compromise, less rigorous and dangerous than doing archaeology in some remote location such as Eastern Turkey, but more challenging and intellectually stimulating than hanging around a Club Med facility. We decided to give it a try and are glad we did.

Three other universities were also “up on the tel” that summer: California State University at Sacramento, Hebrew University of Jerusalem, and the University of Saskatchewan. In other summers, Boston University, South California College, and McMaster University at Hamilton, Ontario, have participated in the ongoing project. Professor Ehphraim Stern, a world class archaeologist from Hebrew University, is the site’s general director, the supreme allied commander as it were. This was his twelfth season at Dor.

Each contingent of academics had its separate area, its unique collective personality, even its own flag. Professor Stewart’s flag, as one might guess, was the Scottish Lion. The California Bear guarded the Sacramento excavations. The Israelis labored under the Star of David.

Participants were housed in dormitories at an agricultural school twenty minutes by bus from the site. We were up at 4:30 a.m. and in the trenches by 5:30 a.m. seranaded – harangued might be a better word – by the roosters in the small farm nestled at the base of the site.

At first light, the tel had the look of a fire base. The protective netting, the sandbags, the khaki colored excavated ruins, the flags, the two hundred or so people hauling gear and equipment to the worksites contributed to the military look of the place. At first light, the sky was alpine blue and clear and the moon shone distinct and bright over the excavations; looking back from our stations atop the tel, we could see dark hills in the distance; just above them the sky would be pink; in the plain between the tel and the hills were fish ponds shrouded in haze. At the time of Christ the
low area had been lush with vegetation and infested with crocodiles. By mid-morning the nuance of the scene would be gone and by noon the whole place would be baking.

Tel Dor turned out to be the least expensive of our August sojourns. It also turned out to be the most vigorous physical experience this old man has had since his Army basic training days 23 years ago. Under the direct supervision of graduate students and junior professors we labored five days a week, eight hours a day, sometimes with picks and shovels, sometimes hauling buckets of dirt, sometimes carting away the dirt in wheel barrows after sifting it by hand, sometimes on hands and knees with brushes and light hand tools. Most of Professor Stewart's volunteers were Berkeley students or otherwise connected in some way to Berkeley—with the exception of course of the old geezer from Boston and his wife.

Our 15 year old son Chad had arrived in early July and was well assimilated into the Berkeley ex patriate community by the time his parents and 9 year old brother Mark arrived in early August to complicate his life. Chad will be returning to Dor in 1993—alone.

Mark worked a full eight hour day each and every day, taking time off only briefly to handle the snakes and bother the scorpions that lurked about the tel. At the end Professors Stern and Stewart recognized him for his stamina and enthusiasm. Mark had also become a fixture back at the “kiosk” where the staff and volunteers congregated after work to drink beer and process the mountains of paper that had been generated each day up on the tel. Mark worked the various student cliques like a politician. I suspect someday he, like his brother, will return to the tel.

Every bucket of dirt contained pieces of pottery. Pottery sherds were everywhere; the “uninteresting” pieces were simply discarded except for the few that were taken back to the U.S., Canada, England, France and Germany as souvenirs. However “indicative pieces,” rim or handle fragments, for example, were saved, tagged and bagged. Then at 5 p.m. each day the pottery specialists would arrive to identify the date and source of the tagged items and to speculate with the archaeologists on how these items might contribute to the dating and identifying of the floors, walls and pits from which they were taken. Just as spectral analysis drives astronomy, so pottery analysis drives archaeology. As mentioned before, a properly administered dig generates as much paper as it does dirt.

It was only slightly harder to come across the “special finds,” jewelry and coins for example. Someone found a coin
with a depiction of Macrinus who was emperor when the Romans abandoned Dor about 217 A.D. Chad found a Roman perfume vile; Mark found a third century B.C. lamp from the Hellenistic period; I found a burnished black bone game piece from the sixth century B.C. Persian occupation. These items were on display in the local museum for all to see on the final day of the dig.

But when it came to instant gratification, nothing could beat what was found on that last day. As final photographs were being taken and the site secured for the winter, the Berkeley team found an intact female skeleton, probably Phoenician. Professor Stern thinks she may have been killed by King David's army around 1000 B.C. Professor Stewart disagrees. In his opinion she was an earthquake victim. Whatever the case, it was a page right out of National Geographic. It took forever to get "Doreen" extracted, tagged and bagged. Professor Stewart provided the press with his reconstruction of her last moments:

The woman was standing in her pantry when the earth began to shake. Utensils began to fall; pots tipped off their shelves and shattered on the floor.

Instinctively, she raised her hands to shield her face and turned to run, but it was too late. Rocks pounded into her. One hit her pelvis, dislocating her right leg and cracking her ankle. Her right foot twisted back and under her as she fell. More rocks hit her in the ribs, and two smashed into her head, dashing it into a large storage jar partially sunken into the ground. Razor-sharp sherds and bones sliced into her body when she hit the ground. The impact broke her neck, shattered her skull, and pushed her hands into her face; her right middle finger stabbed into her nose, but by now she could feel nothing. She was dead.

But what about the big historical picture? Did the efforts of those of us on the tel that summer further someone's understanding of the historical context? Professor Stern, writing in the January/February 1993 issue of Biblical Archaeology Review, suggests that they did.

In order to understand how, we need to go back to the Second Milennium B.C when the Canaanites were occupying Dor. Around 1200 B.C. they were "squeezed out" by the Sikil, one of a number of tribes known collectively as the Sea People. The Philistines of biblical fame were another such tribe. 150 years later the Phoenicians, actually descendants of the original Canaanites, pushed the Sikil out of Dor in the course of their colonial expansion westward from the Palestinian coast. The climax of the expansion was the vast commercial empire centered at Carthage. The Romans would later employ the adjective "Punic" to describe the Canaanite/Phoenician colonists of the western Mediterranean area. The remarkable odyssey of the Canaanite/Phoenicians came to an end when the Romans destroyed Carthage in 146 B.C.

But back to Dor. While we know from the Bible and other sources much about the Philistines, we know little about the Sikil, the tribe of Sea People that occupied Dor during that 150 year interval between the departure of the Canaanites and the return of the Canaanite/Phoenicians. We do know that they operated a large fleet out of the harbor below. It is expected that many of the pieces of the puzzle are somewhere in the tel. In the tenth season, for example, the teams found massive evidence of a fierce conflagration that had oxidized the mudbricks and shattered the limestone used in the buildings, leaving great areas of ash and charcoal as much as 6 feet thick. This is probably the remains of the Sikil city. But up on the tel, real progress is agonizingly slow. It will take many seasons to explore the Sikil level fully. Only a narrow strip about 30 feet long and 6 feet wide including parts of two rooms separated by an extremely thick wall has been excavated so far.

Archaeology by its very nature is destructive and thus it will probably take centuries, if not millennia, to work the entire tel down to sea level properly and methodically. Roman floors, for example, must be smashed into oblivion if one is to get to the jumble of layers below. Thus every (continued on page 51)
The thirtieth anniversary of Suffolk Law School (1936).
inch is surveyed, every act is documented, every structure photographed, every artifact tagged and bagged. Ninety-five percent of the tel's surface remains untouched by the archaeologist's pick.

In 1000 B.C. the Israelites under David captured Dor but the Canaanite/Phoenician culture lived on there for another 800 years, even through the Assyrian and Babylonian occupations. Apparently historians have little understanding as well of the Canaanite/Phoenicians who lived in Palestine, which, after all, was the point of origin for the westward colonial expansion that culminated in the great Carthaginian commercial empire. Thus it is hoped that in future years the tel will reveal pieces to that puzzle as well.

I came away from Dor with a profound respect for archaeology's academic rigor. Data is teased from the ground at great expense in time, money and physical effort. Firm conclusions are drawn only after years of collaboration and careful thought. Broad generalizations are treated with a healthy dose of skepticism. I had many occasions to observe this first hand. Often I would find myself uncannily on the sidelines while the archaeologists debated whether I was chipping away at a sump, a wall, a pit, or wasting my efforts on a random pile of rocks. It was humbling to have no clue what they were talking about. It was clear to me, however, that the scientific method was being practiced robustly, yet with meticulous adherence to the highest standards of the profession.
In archaeology, academics move comfortably between the field and the ivory tower. The literature is controlled by the senior faculty. In the classroom, students are systematically taught all the general principles of archaeology and exposed to all the fundamental field techniques. In the field the students practice archaeology in small tightly supervised groups of three or four. Every swing of the pick is carefully monitored.

In the law, there is an ever widening gulf between the practicing lawyer and the law professor. In some law schools there are professors now openly expressing contempt for the solo practitioner out in the field. By contrast, it is impossible to imagine a professor of archaeology who would shun or have contempt for field work. Could archaeology long remain an academic discipline if those who gather and work with the data were divorced from those who come up with the theories? I doubt it. Is the law somehow different? Perhaps it is. Perhaps there is a political component to it that makes it more an instrument of state coercion than a rigorous data-driven discipline such as archaeology, astronomy or medicine.

What would be the reaction of these archaeologists had I told them that the content of most American scholarly legal journals is controlled by second and third year law students? What if they knew that nowadays many law schools have made the conscious decision not to require that their students master all the fundamental legal relationships—standard academic fare a mere 30 years ago?

What if I were to suggest to the archaeologists pondering my manicured pile of rocks that their students should not be required to take the fundamental courses in archaeology, paleo-osteology for example? That their students would be better off instead taking courses about archaeology such as “Archaeology and the Victorians” or “Archaeology from the Male and Female Perspectives” or “Archaeology in a Changing World”? After all, the students can always pick up the principles and techniques of paleo-osteology after they graduate.

Luckily for us, and for “Doreen” as well, the Berkeley team members had received rigorous classroom instruction in the principles and techniques of paleo-osteology and were thus prepared to secure her remains for posterity. They did so without a hitch. May Suffolk Law School al-
ways strive to prepare its law students to be at least as competent in the service of the living.

Anyone interested in participating in the Tel Dor excavations should contact:

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Anyone interested in reading more about the world of archaeology might begin with James Michener's novel, *The Source*. Subscribing to *Biblical Archaeology Review* or *Archaeology Magazine* would also be money well spent.

*The Rounds Family on the Last Day—The Entire Site Has Been Carefully Swept and Brushed for the Aerial Photographers.*
Corner of Temple and Derne streets before construction of Suffolk Law School—
Courtesy of the Society for the Preservation of New England Antiquities
FATAL SUBTRACTION
The Inside Story of Buchwald v. Paramount by Pierce O'Donnell and Dennis McDougal with an introduction by Art Buchwald.
Doubleday, 576 pages (1992)

Reviewed by Professor Joseph D. Cronin

I. INTRODUCTION

Young people considering a career in the law usually have only a vague idea what such a career would be like. Knowing that, they seek the advice of lawyers, both legal academics and others. One of the standard questions is “What can I read?” Fatal Subtraction is the answer to that question. This does not mean that Fatal Subtraction is valuable only for those considering law school or those presently enrolled in law school. It will also prove to be fascinating and valuable for experienced lawyers.

Fatal Subtraction is the story of Art Buchwald and Alain Bernheim v. Paramount Pictures Corporation, which is still being litigated on appeal. In 1982 Buchwald wrote an eight page “treatment,” later condensed to a little more than two pages. This treatment had the title It’s a Crude, Crude, World. Buchwald then entered into an agreement with Paramount giving Paramount the right to make a movie from Buchwald’s concept, then called by Paramount King for a Day. By separate contract with Paramount Buchwald’s close friend Alain Bernheim was to produce any such movie. The expectation was that Eddie Murphy would be the star. In fact Paramount commissioned the writing of a script and then a second script. Ultimately, however, Paramount notified Bernheim that it would not go forward with King for a Day.

Thereafter, Paramount developed a project originally called The Quest but released with the title Coming to America. Eddie Murphy was the star and Eddie Murphy received the “story by” credit. In the meanwhile Bernheim attempted to revive Buchwald’s concept at Warner Bros. but that ultimately failed, apparently in part at least because Paramount was developing Coming to America.

Buchwald and Bernheim concluded that Coming to America had its origins in Buchwald’s concept. When efforts to resolve the matter with Paramount proved to be unsuccessful Buchwald v. Paramount resulted. At the risk of giving away the ending of the story (to the extent there is an ending thus far) Buchwald and Bernheim won in the state trial court in California. It was a “trifurcated” bench trial before Judge Harvey A. Schneider of the California Superior Court. First, the court determined that Coming to America was “based on,” i.e., “inspired by” Buchwald’s treatment. “Based on” was the operative language of Buchwald’s contract. Second, the court determined that the “net profit” provision of the contracts was unconscionable. In the third phase of the trial, the accounting phase, the court awarded, based on a fair market value standard, $900,000 in damages — $150,000 to Buchwald, $750,000 to Bernheim. Thus, pending appeal, Buchwald and Bernheim have won, if you can define $2.5 million in attorney’s fees plus $500,000 in expenses to get $900,000 in damages as winning.

The $2.5 million was largely the worry of the law firm not the plaintiffs because the firm had a 40% contingency fee arrangement. Reportedly Paramount and its insurers spent five to seven million dollars defending the case at the trial stage.

The authors of Fatal Subtraction are Pierce O’Donnell and Dennis McDougal. O’Donnell, the attorney for Buchwald and Bernheim, is partner-in-charge of the Los Angeles office of the New York law firm Kaye, Scholer, Fierman, Hays & Handler. He was a law clerk for Supreme Court Justice Byron R. White. Dennis McDougal covers the motion picture industry for the Los Angeles Times.

This is the world of “turnaround,” producers, postproduction, coverages, high concept, shooting scripts, tentpole

"It was one of the oldest litigation tricks in the books: overwhelm your adversary with a mountain of incomprehensible information when it is too late for him to get expert advice."
theory, one-sheets, trailers, wrap parties, four-walling, gross players, ancillary sources, above the line, negative cost, “gross profits; adjusted gross profits; profits with rolling break-even points and profits with modified rolling break-even points.” It is also the world of contingency fees, conflicts of interest, stipulations, nondisclosure statements, depositions, motions in limine, summary judgment, settlement negotiations, express contract, implied contract, quantum meruit, options, illusory contract and unconscionability.

II. “BASED UPON”

As noted above “based upon” was the key language in Buchwald’s contract. Buchwald was entitled to compensation “If, but only if, a feature length theatrical motion picture shall be produced based upon Author’s Work.” The case involved breach of contract not plagiarism or copyright infringement. “Based upon,” however, was not defined in the contract. The court permitted expert testimony on the meaning of “based upon” in the industry but not on the ultimate issue of the similarity between Buchwald’s treatment and Coming to America.

O’Donnell recognized that “one of my biggest obstacles would be the fact that Art’s original treatment bore little resemblance to Coming to America.” The solution to this problem was to convince the court that the evolution of the treatment through the development process was the key, not just a comparison of the original treatment and the final movie. Thus, the two scripts that were undeniably based on the Buchwald treatment would have to be considered. The scripts were the property of Paramount, not Buchwald and Bernheim, but were still relevant to the issue of the evolution of the treatment to the final movie. The court accepted this theory. “During the trial of this case, an issue arose concerning whether the similarity comparison must be made between Buchwald’s treatment and Coming to America or Buchwald’s treatment as it evolved in the Tab Murphy and Veber’s scripts and Coming to America. The court believes it is the latter comparison that must be made for several reasons.”

The treatment of the breach of contract theory in Fatal Subtraction was puzzling in one respect. O’Donnell presents his hitting upon a breach of contract approach with an almost “Eureka!” tone. So also his unconscionability theory for invalidating the net profits formula. He reveals his request to see the standard form contracts Buchwald and Bernheim had with Paramount as if that were going the extra mile in thoroughness and the discovery of the “based upon” language as if it were a subtle breakthrough. Perhaps this is Monday morning directing but it does not seem that the breach of contract theory, including unconscionability, or the significance of the “based upon” language was in any way obscure. After all, Buchwald and Bernheim had lengthy formal contracts with Paramount. Of course, this does not mean that winning on the “based upon” theory, as opposed to identifying the issue, would be easy or straightforward.

III. SETTLEMENT

“Over 95 percent of all civil cases are settled or dismissed before trial, and in Hollywood that percentage is even higher. Out of two dozen significant cases filed against Paramount during the decade prior to our suit, not one went to trial; they either settled out of court or were found to have too little merit to proceed to trial.” Fatal Subtraction at 87.

Why did this case not settle? On many matters discussed in Fatal Subtraction Paramount would no doubt have a different perspective but that would probably be especially true of the issue of settlement. Although the authors refer to various settlement efforts sporadically throughout the book there is no effort to assess systematically why the case did not settle. The following points did emerge, however.

1As a concession to the uninitiated a few of these terms warrant definition.

“Turnaround”: “After one studio abandons a project, the producer has one year to shop it around to other studios in hopes of getting a new contract.” The first studio must be reimbursed for its investment.

“Coverages”: “Detailed synopses” of draft screenplays.

“High Concept”: Story idea reduced to a one-liner.

“Tentpole Theory”: Blockbusters “held up the big top for the rest of the studio, despite the inevitable flops...”

“One-Sheet”: Theater lobby poster.

“Trailer”: Preview

“Four-walling”: “The practice of renting a theater for a flat sum and keeping all the box office receipts.”

“Ancillary sources”: Revenue from TV, cable, video cassettes, etc.

“Above the Line”: “The creative ingredients: The writers, director, producer, actors, principal actors, secondary actors.”

“Negative Cost”: Production cost.
1. O'Donnell concluded that Paramount, not a stranger to litigation, was more afraid of harming its relationship with Eddie Murphy, who had "story by" credit than it was of being sued.

2. Paramount wanted a confidentiality clause concerning any terms of settlement, as was standard in such cases. Buchwald was adamant, however, that he would never agree to a confidentiality clause. This disagreement alone may have been a crucial obstacle to settlement.

3. The expenses already run up as the case proceeded may eventually have become an impediment to settlement. "I had $5 million in mind. That was the original figure in our complaint, it was reasonable recompense for what Paramount had done to my clients, and the math worked out right: our share of the take would be $2 million and Alain and Art would get $3 million . . . 'I have $2 million in time charges and a 40 percent contingency fee. Your client is smart enough to figure it out.'"

4. The obvious. At least at certain times the parties may not have wanted to settle. O'Donnell reports that eventually Buchwald did not want to settle, although he would acquiesce if Bernheim and O'Donnell preferred settlement.

5. An attorney who handled early settlement negotiations for Buchwald and Bernheim before O'Donnell became involved offered to settle for $600,000. Paramount countered with (roughly) $100,000 plus a gag order. In retrospect perhaps Paramount should have accepted at least as far as the money amount is concerned. Even later Paramount was still talking $100,000 as a settlement amount.

IV. ATTORNEY'S FEES

"Regretfully, law is not exclusively a noble profession. It is also a business." Fatal Subtraction at 343. This is the business aspect of the case from the attorney's point of view. Kaye, Scholer rarely took cases on a contingency basis, although in this case the arrangement was a 40 percent contingency, with Buchwald and Bernheim paying expenses. O'Donnell's usual hourly rate was $400. O'Donnell could not do this unilaterally but had to persuade Kaye, Scholer's billing committee in New York and report to them from time to time thereafter.

O'Donnell says that he took the case not to attack the Hollywood bookkeeping system but because at that time he didn't understand the Hollywood net profit formula.

Not at all. The truth is that when Kaye, Scholer agreed to take the case, we thought that Coming to America would be very profitable and pay hefty net profits. Art and Alain owned between 19 percent and 40 percent of the net, and we projected that there should be at least $25 million of net profits or a minimum of about $5 million for our clients—more than enough to cover our legal fees and pay Art and Alain a tidy sum. If I had known that Paramount would claim that this movie—grossing over $350 million and earning the studio at least $85 million in cash profits—had an $18 million net loss under the standard net profit formula, I would never have taken the case. So, the whole case happened because I made a $43 million miscalculation!

"Everyone's in two businesses. . . . Their own and the movie business."

From Q & A with Pierce O'Donnell provided by Double-day Publicity Department.

In addition, as O'Donnell acknowledges, it was foreseeable that the publicity surrounding Buchwald v. Paramount would generate other business and aid in the recruitment of able, young lawyers. This may well have happened. In an article on the case Los Angeles Magazine reported: "O'Donnell's firm, however, was hardly a loser. Although Kaye, Scholer had to eat millions in legal time, the publicity helped its Los Angeles branch office leapfrog from 6 attorneys to 60 and garnered a host of new business. . . ."

One reference by O'Donnell to contingent fees merits comment. "Typically, a contingent fee lawyer wants to recover a multiple of what he would get paid on a standard hourly rate basis because some of his contingent fee cases pay nothing and the winners subsidize the losers." Fatal Subtraction at 167.

This may seem to be a commonplace but any reader of Fatal Subtraction will observe that the studios attempt to justify their net profit system with a similar argument, the studios must take the lion’s share of profits because of the many movies that are not profitable. O'Donnell would doubtless answer this by claiming that Paramount abandoned this argument precisely because it did not wish to open its books. And it did not wish to open its books because these days most movies are indeed profitable. This in turn is because ancillary revenues (from video cassette sales, cable, etc.) ultimately cause most movies to make money, even those that did not fare well in the theaters. Also, the studio takes its substantial distribution fee off the top.

V. UNCONSCIONABILITY

This raises the question of the economics of the movie industry and why the court in Buchwald held that the net profits provision was unconscionable. On the surface the Buchwald and Bernheim compensation provisions do not seem oppressive. The contract provided that if Paramount made a movie based upon Buchwald's treatment, Buchwald was to receive $65,000 plus 1.5 percent of net profits. Bernheim would be the producer and would receive $200,000 plus 17.5 to 33.5 percent of the net profits.
What is the problem? The problem is that the studio bookkeeping is such that even blockbuster movies that earn large sums for "gross players" may not yield net profits. Eddie Murphy's arrangement in *Coming to America* was $8 million and 15 percent of the gross. This required O'Donnell to educate himself in the realities of film industry economics. Recall that the Buchwald trial had three phases. First, the court concluded that *Coming to America* was "based upon" Buchwald's treatment, thus triggering Paramount's contractual obligations to Buchwald and Bernheim. Next, there was the "unconscionability" phase, where the court held that the net profits formula was unconscionable. Finally, there was the "accounting phase," during which the court determined the fair market value of the plaintiffs' services.

As O'Donnell came to learn, about half the money from theatrical showings goes to theater owners. The other half is the studio gross. The studio's distribution fee is usually about 30 percent of the studio gross. This does not include the studio's revenue from ancillary sources.

The contract also included Paramount's 23 page standard net profit participation agreement. In the unconscionability phase of the trial the court held that seven different provisions of Paramount's net profit formula were unconscionable. These provisions were a large part of the reason why a movie that was a huge hit making hundreds of millions of dollars could show no net profits. In the accounting phase, the court awarded damages based on a fair market value standard.

"Regrettfully, law is not exclusively a noble profession. It is also a business."

VI. DAMAGES

Did Buchwald and Bernheim deserve to win? The "based upon" part of the court's opinion is more convincing than the unconscionability section. The accounting phase is hard to assess.

For "based upon" the court used an "access and similarity" standard. The court concluded that Eddie Murphy (who was not a defendant) clearly had "access to Buchwald's concept." The court then concluded that *Coming to America* was sufficiently inspired by Buchwald's concept to trigger the "based upon" language of the contract. The court added: "Finally, the Court wishes again to emphasize that its decision is in no way intended to disparage the creative talent of Eddie Murphy. It was Paramount and not Murphy who prepared the agreement in question. It is Paramount and not Murphy that obligated itself to compensate Buchwald if any material element of Buchwald's treatment was utilized in or inspired a film produced by Paramount."

This section of the court's opinion, in the context of the broader discussion in *Fatal Subtraction*, seems convincing. But what about the determination that Paramount's net profit formula is unconscionable? This is more troublesome. Both Buchwald and Bernheim did get some up front money, although admittedly a pittance in relation to the revenues of *Coming to America*. Buchwald submitted only a brief concept for a movie. He and Bernheim are not worldly persons and Bernheim at least was sophisticated in the business arrangements of the film industry. The court recognized that Bernheim was not surprised by the net profits part of the contract. Also, a senior executive from the renowned William Morris Agency represented Buchwald and Bernheim in the contract negotiations with Paramount.

"He keeps telling me that Paramount and the other studios don't cook the books, they cook the contracts."

The court concluded that surprise is not a necessary part of an unconscionability claim. A contract provision may be oppressive nonetheless. In the abstract this may be so but in this case we have experienced professionals who entered into a contract on standard industry terms and who were not driven by necessity. In Buchwald's case, the preparation of the brief "treatment" was completely ancillary to his ordinary livelihood as an acclaimed columnist. There are extraordinary variations in what people get paid in Hollywood. This is a function of market "clout" rather than "oppressiveness" in a legal sense. The real problem here may be litigation economics rather than Hollywood economics. Buchwald (and derivatively Bernheim) had an arguably meritorious "based upon" cause of action but it would be economically unfeasible to assert that claim through litigation if success in the courts would only yield the money they were entitled to pursuant to the terms of the contract.

VII. CONCLUSION

Readers of *Fatal Subtraction*, whether they be law students, potential law students, practicing lawyers or law teachers may wish to consider the implications of a book like this for law school education and even undergraduate education. Of course, *Buchwald v. Paramount* is atypical of what many lawyers do in various respects. It has to do with civil trial practice and a case that went to trial rather than settled. It was a super-high profile case with extraordinary time charges generated. Nevertheless, it exemplifies the great variety of things that need to be done in connection with a case by attorneys and their staff. This applies, *mutatis mutandis*, to the work of lawyers in other settings. What needed to be done? What skills were involved? Are they all teachable at least in a rudimentary way in law school, even assuming the teachers have them? Consider just a few of the matters raised in *Fatal Subtraction.*
1. Both sides waived a jury. O’Donnell explains his decision briefly. Paramount reached the same conclusion from its point of view. What were its considerations? Do law schools teach much about this? Should they?

2. O’Donnell rejected the idea of an antitrust claim. He apparently thought that such an issue might be meritorious but concluded that pursuing it against the film industry was beyond the resources of even a megafirm like Kaye, Scholer that had a strong antitrust practice. Law office economics trumps a possibly meritorious claim.

3. Consider also O’Donnell’s decision to take the case in the first place and Kaye, Scholer’s decision to agree to a contingency rather than the normal hourly rate. This involved weighing incommensurate values, including, as noted above, the spin off benefits in terms of future business. Also, while Art Buchwald is hardly a pro bono client, an attorney could reasonably see a public service aspect in taking on the studio in a case such as this.

4. Settlement

This is perhaps the most difficult and important part of the case. Although the possibility of settlement and problems related thereto are discussed throughout Fatal Subtraction, ultimately no answer is provided as to why this case did not settle, especially early when possibilities apparently were better. That is probably because no one person knows the answer. Egos and bruised feelings? Fear of setting at least an informal precedent? Was the unavailability of a confidentiality agreement decisive? Perhaps the various personalities involved did not connect.

To the extent that one can tell from Fatal Subtraction it seems that the willingness of the parties to settle declined as time passed. At first Buchwald and Bernheim might have settled for $500,000 but were being offered only about $100,000. Eventually, Paramount might have been willing to settle on the basis of the contract terms but by that time O’Donnell and the plaintiffs were aware that there would probably be no net profits within the meaning of the contract.

Analysis of the possibilities of settling this case always returns to Paramount’s relationship to Eddie Murphy and Buchwald’s adamant refusal to agree to a confidentiality clause about the terms of any settlement. Paramount Pictures Corporation and not Eddie Murphy was the defendant but Murphy had the “story by” credit on Coming to America. While recognizing Buchwald’s contractual “based upon” claim was not inconsistent with such a story credit, Paramount may have concluded that a substantial monetary settlement, with terms publicly disclosed, could not be entered into without offending Murphy. In his fees memo to the Kaye, Scholer billing committee O’Donnell predicted settlement, while recognizing, of course, the possibility of going to trial. The case did not settle. Perhaps some of the persons caught up in the swirl of events surrounding Buchwald v. Paramount did not do all they could to advance the opportunities for settlement. Or perhaps this is a case that didn’t settle because it couldn’t settle.

How much do law schools teach about settlement skills? How much should they? The answer to the first question probably is: very little but more than in the past. The answer to the second question is more difficult but probably is roughly this. Law schools should do more than they do now to stress settlement techniques but must accept their limitations. Settlement skills involve all that a person is as well as things that are taught. If law schools were to get into all these qualities a lot more than currently, perhaps nonlawyers should be added to faculties at least on an adjunct basis. For now seminar discussions, utilizing books such as Fatal Subtraction, should prove beneficial.

5. Thoroughness and Preparation.

It would seem trite to state it baldly: work hard if you want to be a successful lawyer. Nevertheless, one of the subthemes that permeates Fatal Subtraction is the extraordinary effort and thoroughness of preparation that O’Donnell and those who worked with him (and presumably his adversaries) devoted to this case. O’Donnell relates that he has been labelled a workaholic and acquires in the claim. There is neither space here nor need to recite all Kaye, Scholer did to advance the cause of Buchwald and Bernheim. Nevertheless, the obvious may need restating. The wisdom, training and experience needed to know what to do must be matched with the willingness to do it. O’Donnell describes 20 hour days and work on holidays. Of course, he also described $400 per hour.

6. Courses in law school and undergraduate school.

What law and pre-law education is the best preparation for this (bearing in mind that large firm practice is only one of the things lawyers do)? As to pre-law education there are two aspects: the general skills that will prepare a student for law school and specific courses that will be helpful. College students considering law school (and presumably other students as well) should make certain that their academic program includes courses that sharpen their analytical, writing and public speaking skills. The writing component should include back-to-basics emphasis on rigorous adherence to the rules of grammar as well as the ability to write concise, straightforward prose. The student should develop strong reading skills, not necessarily speed reading, which may not be appropriate for technical material, but the ability to assimilate and retain a large quantity of challenging written material. Also, the student ought to develop the ability, in ways that will vary from student to

“Tell Pierce I'll be in a walker before Paramount pays him any money.”
“Anything that doesn’t recover its negative costs and distribution expenses is a disaster.”

student, to summarize what has been read. Whether through note taking or in some other way the student must learn to miniaturize written material.

Many specific courses come to mind but a few may be noted: Logic; accounting; economics; ethics; persuasive writing; Constitutional Law. These courses would aid in the development of the skills described above. In addition some of them would provide information pertinent to law school and law practice.

What about the law school curriculum? Law students often have only a limited knowledge of what they want to do in the future and, given the job market, only limited ability to control their destinies. Further, while law schools should attempt to peer into the future and not constantly fight the last war, we should be modestly mindful of our limited ability to forecast and respond to long-term changes in the legal profession.

Law schools and law students then have to hedge their bets. Law school should provide a broad grounding in fundamental courses and skills that will be important in different career environments. A rich variety of elective offerings should be available but students should not just load up with trendy “law and” electives. Whether or not formal concentrations are available, certainly a sound program should accommodate students who are confident enough of their career goals that they want a systematic progression of advanced courses in a defined area, e.g., business planning and taxation.

Fatal Subtraction can fuel thought on many of these matters. It tells an interesting story in a vivid way. It also tells the story of what many lawyers do in a particularly thought provoking context. Pierce O'Donnell and Dennis McDougal are to be commended for Fatal Subtraction. A movie “based on” it—script, presumably by Art Buchwald, produced by Alain Bernheim, with net profits for O'Donnell and McDougal—would be fascinating, however unlikely it is to be made. In the meanwhile members and aspiring members of the legal profession should find reading Fatal Subtraction to be abundantly rewarding.

Wayne Carroll, a second year evening student, is presented with a check for $750 for submission of the best essay submitted in the 1992-93 academic year on the subject of commercial law. The competition is sponsored by the Commercial Law League. Presenting the check are Associate Dean Kindregan and David Shorr, J. D. '69 of the Commercial Law League.
INTRODUCTION

Computers play an ever increasing role in our daily personal and professional lives. This change is no doubt due to the astounding growth in computing power that continues to become available at lower and lower cost. The magnitude of that growth is easily understood by recognizing that the combined hardware and software capabilities of today's desktop computers would have required a room full of mainframe computers in the 1970's.

Despite the invasion of computers into the conduct of professional practices, there is little or no reported case law on how courts will treat liability for errors and omissions that arise from the use of computers. This article examines traditional legal principles, extends them to computer related problems, and offers some suggestions on how cases involving computer error should be decided. Although this article is specific to engineers in the building construction industry, the underlying analysis should be applicable to other professionals, like accountants and lawyers, who use computers in their work.

GENERAL RULE

In an action for negligence, the plaintiff must prove three elements to recover against the defendant:

1. The defendant must owe a duty to the plaintiff. The existence and extent of the duty are questions of law. Engineers have contract and tort obligations to many and varied groups of people. They obviously have contractual obligations to their clients, but they also have duties to other parties to the construction process. This article addresses the situation where the existence of a duty has already been established. It looks at how the use of computers affects the way that duty is fulfilled.

2. The plaintiff must show that the defendant breached the duty.

The standard of care that professionals, including architects and engineers, are expected to maintain, is well defined in the law. Briefly, professionals are required to have the specialized knowledge and skill associated with their profession. They are also required to use judgment in applying that knowledge and skill. This article analyzes that standard of care and how it applies to the use of computers in providing a professional service.

3. The plaintiff must prove damage and demonstrate a causal connection between the breach of the duty and the damages sustained.

Even if a plaintiff overcomes the two hurdles of establishing the existence of a duty and a breach of it, there can be no recovery unless the plaintiff proves the...
breach was the proximate cause of the damages claimed. 6 Means of proving damages and the required causal connection are not part of this discussion.

**THE STANDARD OF CARE**

Obligations of parties to a contract are defined by the contract itself with little intervention by the legal system. 4 Contracts, in a sense, are private law. On the other hand, obligations in a tort, or negligence, context are defined by the law.

The law imposes upon every person who enters upon an active course of conduct the positive duty to use ordinary care so as to protect others from harm. A violation of that duty is negligence. It is immaterial whether the person acts in his own behalf or under contract with another. 7

Therefore, two parties cannot agree by contract or other private mechanism to limit the rights of third parties in tort.

The usual standard of behavior the law imposes on individuals is one of reasonableness. However, if a person has knowledge or skill beyond those of the ordinary person, the law expects the person to act consistently with that superior knowledge or skill. 8 Professionals necessarily have specialized knowledge and training, so the law requires them to act in accordance with it. The standard of care for acting in accordance with a professional's specialized knowledge has been described as “the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals.” 9

The level of knowledge and skill demanded of a professional depends in part on the professional's area of practice. “Unless he represents that he has greater or less skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities.” 10 Therefore, the ordinary engineer is not expected to be familiar with all branches of engineering. However, the law will not excuse engineers who practice outside their area of expertise. For example, an electrical engineer who engages in structural engineering will be held to the standard of structural engineers. The claim that the average electrical engineer is unfamiliar with structural engineering is no defense if an electrical engineer undertakes a structural analysis.

In addition to the knowledge and skill aspect of the standard, the “level of care required of a professional engineer

1In a licensing disciplinary action, proof of damage or injury is not required. Damage or injury “is not in and of itself an aspect of 'negligence', only an aspect of a civil cause of action for negligence.” Duncan v. Missouri Board for Architects, Professional Engineers and Land Surveyors, 744 SW 2d 524 at 534 (Mo. App. 1988).

4 Certain exceptions exist, such as contracts which are illegal and contracts which are unconscionable. Also, in appropriate circumstances, the equitable remedies of rescission or reformation are available.

The relative difficulty of performing a contract does not ordinarily affect its enforceability as illustrated by the classic case of Hawkins v. McGee, 84 NH 114, 146 A. 641 (1929). There a doctor who promised his patient “a one hundred percent perfect hand” was liable for damages when the patient wound up with a deformed, hairy hand. The facts that medicine is an imperfect science and that the doctor had no way to insure he could keep his promise did not reduce his contractual obligation. Performance is also not excused even if it “subsequently become[s] unexpectedly burdensome or most difficult.” Mayor and City Council of the City of Columbus, Mississippi v. Clark-Dietz and Associates – Engineers, Inc., 550 F. Supp 610 at 625 (ND Miss., ED 1982) and cases cited therein.

On the other hand, the law does recognize the doctrines of impossibility of performance and frustration of purpose as defenses to a breach of contract claim. A contract becomes impossible to perform if the contract contemplates the continued existence of a specified thing but that thing ceases to exist through no fault of either party. Frustration of purpose occurs when "an event neither anticipated nor caused by either party, the risk of which was not allocated by the contract, destroys the object or purpose of the contract, thus destroying the value of performance." Chase Precast Corp. v. John J. Pusnessa Co., Inc., 59 Mass. App. 371, 515 NE 2d 685 (1990).


Prosser & Keeton, §32 p. 185.

8Klein v. Catalano, 386 Masa. 701, 437 NE 2d 514 at 525 and cases cited therein.

9Restatement (Second) of Torts, §299A (1965). The degree of skill a professional represents he has is an important factor, as illustrated by a case involving an attorney in California. The attorney, a general practitioner, drew a will with a provision which was later determined to violate the Rule Against Perpetuities. There was a dispute among the beneficiaries of the will. Because of the attorney's error, the estate was not distributed as intended in the will. The court excused the attorney for the Rule Against Perpetuities violation because the Rule is highly technical, often misunderstood, and a frequent stumbling block. Since the attorney did not represent himself as having any special skill in estate planning matters, he was only required to have the same relatively little understanding of the Rule Against Perpetuities as other general practitioners. Lucas v. Hamm, 56 Cal 2d 583, 15 Cal Rptr 821, 364 P 2d 685 (1961).
is directly proportional to the potential for harm arising from his design..." 11 This article explores how the use of computers affects the knowledge, skill, and judgment which the law expects of engineers.

USE OF COMPUTERS IN PROFESSIONAL PRACTICES

One way to avoid liability for errors associated with the use of computers would be to refrain from using them. Therefore, a threshold inquiry is needed into whether refusing to computerize a professional practice constitutes a failure to maintain the requisite level of knowledge and skill. At least one commentator has suggested that professionals may be required to use the latest technology to meet the professional's legal standard of care. 12

Case law from disciplines other than engineering supports that conclusion where the technology is readily available: Tugboat owners were found liable when two tugs towing barges lost the barges off the coast of New Jersey in a storm in 1932. The negligent conduct was the failure to use radios as navigational aids, even though the technology was new, and there was no industry standard requiring that type of equipment. 13 An ophthalmologist was liable for malpractice in a case where a young patient suffered a loss of vision due to glaucoma. The glaucoma could have been detected early enough to save her eyesight if the doctor had performed a simple, readily available test. The doctor was liable despite the general practice of the profession not to test patients under age 40 for glaucoma. 14 Courts seem to look to the availability of the technology and whether its application would have avoided the injury, regardless of whether it is widely adopted.

Modern computers make simple tasks of calculations and analysis that would not be practical and might not be humanly possible without them. Back in the days of slide rules, 15 many engineering calculations were based on rules of thumb and simplifications that had been developed over the years. Rules of thumb and simplifying assumptions are intended to be conservative and usually result in oversizing rather than undersizing.

While oversizing is unlikely to result in structural collapse or insufficient heating and cooling capacity, it may well fall below the standard of care expected of an engineer. Oversizing increases the cost of a project with no real benefit to the owner. It may also increase the complexity of a project if oversized ducts and pipes must be shoe horned into a ceiling plenum which is obstructed by larger than necessary structural members. Would a court decide that oversizing falls below the applicable standard of care, making the engineer liable for the extra cost? 16

Undersizing presents a greater danger of loss to property and personal injury than oversizing. Undersized structural systems can collapse. Undersized heating or cooling systems can result in an untenable (and thus "untenable") indoor environment. Rules of thumb are thought to be conservative, so their use would not ordinarily be expected to result in undersizing. However, modern construction materials and techniques make that hypothesis suspect. 17 Rules of thumb are reliable only when applied to situations that are similar to the situation that gave rise to the rule of thumb. Construction practices that were technically in

11 Duncan, supra note 4, at 640.
13 The Tj Hooper, 60 F. 2d 737 (2nd Cir. 1932).
15 A slide rule is a mechanical device for performing calculations. It consists of two or more rulers which are marked with logarithmic scales. Slide rules can perform multiplication and division, square roots, logarithmic functions, and trigonometric functions. Electronic calculators began to supplant slide rules in the early 1970's. Engineers graduating after 1975 may never have even learned to use a slide rule. To illustrate, freshman engineers entering Lehigh University in September 1971 (class of 1975) were instructed to bring a slide rule to their Physics Lab class. Calculators were not then widely available, and those that were had limited capabilities. The next fall, engineering calculators were available, but they were expensive, so freshmen entering in 1972 (class of 1976) were instructed to bring a slide rule or electronic calculator. By 1973 (class of 1977), the instructions for Freshman Physics Lab called for students to bring an electronic calculator to class, with no mention of slide rules.

The popularity of electronic calculators introduced a new source of errors akin to the "garbage in, garbage out" idiom often attached to computers. To use a slide rule, an engineer had to figure out the decimal point in his head or on paper, in effect estimating the answer and using the slide rule only to compute the exact digits. Electronic calculators could (and can) readily keep track of the decimal point, leaving no need for the user to estimate the answer. Calculator users quickly became so accustomed to relying on the devices that they often did not discover simple errors like pushing the wrong button.

The normal measure of the owner's damages for an engineer's error or omission is the incremental cost to correct the error after construction over the cost to do the job properly in the first place. The owner must pay for the value of the added benefit. For example, if an engineer designs an air conditioning system with too little capacity, the owner's damages are reduced by the cost of the additional capacity that was needed in the first place. This reasoning is the concept of betterment. The engineer is only responsible for any increase over what the additional capacity would have cost if it had been included in the original design. For that reason, the owner's damages are often nominal. If the engineer's error or omission involves needless oversizing, the building may have more capacity than it needs, but that capacity has no useful purpose. In that case, perhaps the engineer would be liable for the entire extra cost.

16 For example, consider the collapse of L'Ambiance Plaza in Bridgeport, CT, on 23 April 1987 where 28 construction workers were killed. L'Ambiance Plaza was being erected using a relatively new construction technique called lift slab construction. In conventional construction, the building steel is erected and the concrete floors are poured in place, one at a time. With lift slab construction, all floor slabs are poured at ground level. They are then lifted or jacked into place. At the time of the failure, one of the supports of a slab some six stories up gave way, causing the entire building to collapse. Perhaps a less than full technical understanding of the loads imposed by lift slab construction or the application of inappropriate design guidelines or rules of thumb contributed to this failure. See Schnber, Charles F., "Investigation of the Collapse of L'Ambiance Plaza," Journal of the National Academy of Forensic Engineers, Vol. V, No. 1, June 1988, p. 1.
feasible only a few years ago are now common as materials and techniques advance. Therefore, relying on old rules of thumb can result in design deficiencies that stem from using a method of analysis that fails to recognize some critical factor.

More sophisticated and accurate calculation methods and techniques available only by using computers can prevent oversizing or undersizing that might have resulted from older practices. With the widespread availability of computers, courts are likely to require engineers to employ computerized techniques to meet the engineer's standard of care.

Computers may even have a role in determining whether an engineer complied with the standard of care. Experts analyzing a professional malpractice defendant's design are likely to use computers in their analysis. The admissibility of the results of computer simulations can be a crucial legal issue in some cases. One such case involved an automobile accident alleged to have been caused by the type of differential gear installed on the rear axle of the car.\(^1\) The court was not "concerned with the precision of the electronic calculations, but with the accuracy and completeness of the initial data and equations which are used as ingredients of the computer program."\(^2\) The court held that before admitting the results of computer simulations as evidence, a judge should:

(a) conduct a hearing in the absence of the jury on the question of whether the tests conducted and results ascribed thereto meet the prescribed standards for the admissibility of such evidence, and
(b) that he put into the record, by dictation, for the transcript or otherwise, the findings of fact made by him as the basis for the admission or exclusion of the evidence in question.\(^3\)

Cases involving data entry errors are not well documented, but some involving misapplication are. Misapplication of a computer program has been blamed at least in part for the collapse of the roof of the Hartford Civic Center.\(^4\) The program undoubtedly solved the simultaneous equations it used correctly. However, those equations might not have been the right ones to use.\(^5\) The precise reason for using the computer—its ability to accomplish calculations that can not practically be done by hand—can be its downfall if the model it uses cannot be checked for validity. A computer cannot do impossible calculations and cannot solve problems that science does not understand. The tremendous strength and value of computers lie in their ability to do calculations quickly and tirelessly with no propensity to human error when carrying them out or "crunching the numbers." Computers must still be programmed with algorithms developed by human engineers and mathematicians.

Misapplications are likely to increase as the use of comp-

\(^2\)Id. at 1067.
\(^3\)Id. at 1067.
\(^4\)Lurie and Weiss at 293 and fn 18.
\(^5\)Lurie and Weiss at 289.
computers increases and engineers tend to lose the common sense "feel" they used to develop from calculating by hand.\textsuperscript{24} The availability of computer programs also allows people with less and less knowledge and skill to undertake more and more complex tasks. While the ability to push work "down the line" to lower paid personnel is great for productivity, it may be a collision course for errors and ensuing liability.

An engineer is not likely to escape liability for misapplication or improper use of a computer or computer program, regardless of how complex it is, by arguing that programming itself is a separate professional discipline that requires knowledge beyond that of the ordinary engineer. In deciding the case of \textit{Scott v. Potomac Insurance Co.}, the Oregon court stated: "It ill behooves a man professing professional skill to say I know nothing of an article which I am called upon to use in the practice of my profession."\textsuperscript{23} Some seventy years earlier, a New York court adopted the same thinking. "\[W\]hen, in the progress of civilization, new conveniences are introduced into our homes, and become, not curious novelties, but the customary means of securing the comfort of the unpretentious citizen, why should not the architect be expected to possess the technical learning respecting them that is exacted of him with respect to other and older branches of his professional studies?"\textsuperscript{26}

\textbf{POTENTIAL CLAIMS BY ENGINEER USERS AGAINST PROGRAMMERS}

While engineers may have to bite the bullet and respond to plaintiffs, they will want to look for causes of action against software authors and vendors to recoup the loss. One attempt at that type of recovery was a product liability suit filed by a contractor against Lotus Development Corp., publishers of a spreadsheet program called \textit{Symphony}. In that case, a Florida contractor's bid was $254,000 low on a $3 million bid because the spreadsheet omitted a certain item from a running total.\textsuperscript{27} The contractor claimed the software was defective because it allowed that type of error with no warning or error message. The suit was dropped because the contractor could not find sufficient legal precedent to back his claim, and he did not want to engage in a long legal battle.\textsuperscript{28} Therefore, software publishers' liability for failure to warn users or alert them to possible errors remains unresolved.\textsuperscript{29}

One theory for saddling software publishers with liability for errors in using computer programs is the principle of strict products liability. Under that doctrine, a manufacturer is responsible for the consequences of the use and reasonably anticipated misuse of products it injects into the stream of commerce.\textsuperscript{30} Applying a strict product liability analysis to computer programs has three fundamental weaknesses:

1. Products liability actions and the underlying theory of strict liability in tort typically involve personal injury or property damage.\textsuperscript{31} Misapplying a computer program might not result directly in personal injury or property damage. Rather, the loss is more likely to be economic in the form of higher project costs, extra labor and materials, lost rental income, etc. In addition, the publisher is likely to argue persuasively that the proximate cause of the in-

\textsuperscript{24}Lurie and Weiss at 290.

\textsuperscript{25}341 P.2d 1083 at 1088 (Oregon 1959). This sentence also appears as a quotation in \textit{Mayor, etc. v. Clark Dietz} at 624 where it is attributed to \textit{St. Joseph Hospital v. Corbetta Construction Co., Inc.}, 21 Ill App 3d 925, 316 NE 2d 51 at 55 (1974).

\textsuperscript{26}\textit{Hubert v. Aitken}, 2 NYS 711, at 712, aff'd 15 Daly 237, 5 NYS 839, aff'd without opinion 123 NY 655, 23 NE 954.

\textsuperscript{27}\textit{Engineers at the Bar." Specifying Engineer, November 1986 and Ladino, Michael, "Engineers at the Bar, " Consulting-Specifying Engineer, January 1987.}


\textsuperscript{29}Lurie and Weiss at 290.

\textsuperscript{30}\textit{Prosier, William L., Handbook of the Law of Torts, fourth edition, West, 1971, §102 (emphasis added). This view implies a burden on the plaintiff to demonstrate that an improper use was one the manufacturer should have anticipated. In \textit{Prosier & Keeton, The Law of Torts}, fifth edition. West, 1984 and Supp. 1988, §§99-102, the authors imply a somewhat shifted burden of proof: a presumption that the plaintiff's use was proper and that the manufacturer must demonstrate unreasonable misuse or abuse as an affirmative defense.}

\textsuperscript{31}The \textit{Restatement (Second) of Torts} §402A (1965) states:

\begin{enumerate}
  \item (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to this property, if
  \begin{enumerate}
    \item (a) the seller is engaged in the business of selling such a product, and
    \item (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
  \end{enumerate}
  \item (2) The rule stated in Subsection (1) applies although
  \begin{enumerate}
    \item (a) the seller has exercised all possible care in the preparation and sale of his product, and
    \item (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.
  \end{enumerate}
\end{enumerate}

The Massachusetts Supreme Judicial Court has expressly declined to adopt §402A, pointing to Massachusetts amendments to the Uniform Commercial Code (MGL c. 106 §2-318) which "abolished the requirement of privity" and "has made the Massachusetts law of warranty congruent in nearly all respects with the principles expressed in Restatement (Second) of Torts § 402A (1965)." \textit{Back v. Wickes Corp.}, 378 NE 2d 964 at 969 (Mass. 1978).
jury was not the operation of the program itself but the professional's error of judgment in relying on it.

2. A program is not a product that can be used by itself. It requires a computer to run it. Therefore, any failure or problem might just as easily be due to hardware (the computer) as to software (the program). Failure can also be due to an undesirable interaction between multiple programs in the same computer. As part of the effort to increase speed and power, both hardware and software designers are developing more and more programs that are "memory resident" or run in the "background." These programs can and do affect the operation of the primary program the user is trying to run. There are so many programs on the market and so many types of computers that it would be impossible for a software author or vendor to test its product in combination with all other products on the market.

3. The engineer's contract with the software publisher/vendor may be one of license rather than purchase. It might include disclaimers that effectively relieve the publisher/vendor of any contractual liability for the results of both proper use and misuse of the program.

One glimmer of hope for engineers is that some courts have found computer programs to be "goods" within the meaning of the Uniform Commercial Code. If computer programs are goods, their producers could be subject to liability for bad results that stem from their use.

The traditional principle that there is no recovery in tort for mere economic loss might inhibit this type of action. However, some states, including Massachusetts, are moving away from that doctrine. See Craig v. Everett M. Brooks Co. Massachusetts requires that the defendant know who the potential plaintiffs are and the extent of their reliance on the defendant's contract with the third party. Other jurisdictions have allowed recovery in similar circumstances without the specific limitations stated in Craig v. Everett M. Brooks Co.

**LIABILITY FOR ERRORS – ERRORS IN THE PROGRAM**

A computer program can be utilized properly for an intended application and still produce incorrect results if it contains an error or bug. Complex programs can have thousands of lines of code and involve millions of instructions to the computer. With some programs, an individual could not possibly check each command even in a lifetime, and it is not possible to write a computer program to check the correctness of all other programs. Therefore, professionals must decide what testing and evaluation is required before they can rely on computer programs. That decision may ultimately become a question of law to be decided in a future case.

**TESTING AND EVALUATION**

One way engineers can reduce their risk from errors in computer programs is to test the programs by comparing the results from the computer to those obtained by traditional means. Expecting professionals to conduct rigorous testing to validate every computer program they use is not practical. At the same time, unquestioning reliance is not reasonable either. Some middle ground is indicated. In keeping with customary tort reasoning, the greater the possible injury that could result from an error, the more detailed the investigation into the program's reliability needs to be.
Engineers evaluating computer programs might begin by inquiring how the programs were developed, who wrote them, what type of testing the authors conducted before distributing the program, and what type of technical support is available for users. One organization which purports to fulfill this need is Automated Procedures for Engineering Consultants, Inc. (APEC) in Dayton, OH. Another important question is whether the program listing, or computer code, is available. Some providers distribute their programs only in “executable” or “compiled” format which can only be used to run the program on a computer. Programs in that format cannot be deciphered for purposes of diagnosis or analysis, so the only way to test them is to run examples with known outcomes and compare results. However, it may be practically impossible for a user to conceive and run enough examples to test the entire program. Authors typically justify using these cryptic formats on the basis of reduced computer run time and a need to protect themselves against computer pirates. On the other hand, an engineer with or without programming experience cannot even begin to evaluate the internal logic of a program unless the program itself, or computer code, is available.

Testing by an independent agency can help demonstrate both that the program is reliable and that the engineer was reasonable in relying on it. The fact that a program has been demonstrated to be reliable goes a long way to justify relying on it but is not conclusive that the engineer has met the standard of care. Some rough cross checks and tests for reasonableness of the output by the engineer are in order. Of course, an engineer should not have to duplicate each of the computer’s calculations to avoid being negligent by virtue of his reliance on computer output. Otherwise, there would be no point to using the computer in the first place. Depending on the importance of the calculation being performed, it would not be at all unreasonable to demand that the engineer run the program more than once to check for identical results. Breaking a complex calculation into several parts or modifying the input so the computer solves the same problem two different ways is another method of testing the program for reliability. Finally, users of a new program might be well advised to run problems that they solved by other means (older programs or traditional manual methods) to see if the new program produces consistent results.

**DELEGATION**

To decide when relying on a computer program falls below the standard of care, courts can look to established principles of law that apply in similar situations. Relying on a computer program to perform calculations that previously were performed by hand amounts to a delegation of duties. The analysis hinges on whether a duty is delegable and the qualifications of the delegatee.

When a duty is non-delegable, that does not mean it is never delegated. The practical difference between delegating a non-delegable duty and a delegable duty is that the delegator remains liable for non-delegable duties. Engineers are licensed by the state in every state; computer programmers are not. The ostensible purpose for licensing engineers is to protect the public safety and welfare by insuring that only qualified individuals undertake certain activities. Where an inadequately designed building could collapse and injure many people, the state’s interest in licensing is easy to see, and the argument that the engineer has a non-delegable duty is easy to make. Courts have agreed.

One important inquiry may be whether the programmer is licensed as a Registered Professional Engineer, as many are. In that case, the engineer who uses the program has delegated to a person with equal or greater qualifications in the specific subject area. The argument that non-delegable duties can be delegated to qualified people is an attractive one. Unfortunately for delegators, courts may not agree.

The Kansas City Hyatt case46 is probably the most prominent case on the issue of an engineer delegating design responsibility to another engineer. The Kansas City Hyatt case involved the collapse of a structurally inadequate walkway at the Kansas City Hyatt Regency in Kansas City, MO in 1981. At least 186 people were injured, and 114 died as a result of the collapse of the second and fourth floor walkways in the atrium of that hotel. The appellant,
Duncan, was the structural engineer who designed the support for the walkway. The connection Duncan designed between the walkway itself and the supporting structure was not practical to build, so the steel fabricator redesigned the connection and submitted it to Duncan for review and approval. 48

It is common practice for steel fabricators to provide the design details on some connections, and they typically have licensed structural engineers on their staff. These design details are included on the contractor's "shop drawings" which are submitted to the building design engineer of record for review and approval. 49 The redesigned connection, which was ultimately installed and failed at the Kansas City Hyatt, was designed by a licensed engineer and was submitted to Duncan for his review and approval. Even though the loads on the redesigned connection exceeded the load on the connection Duncan had originally designed (the load was double), Duncan approved the fabricator's design without doing any calculations. The administrative law judge who presided at a disciplinary hearing against Duncan found him ultimately responsible for the design of the inadequate connection, and the Missouri Court of Appeals affirmed, stating:

The responsibility for the structural integrity and safety of the walkway connection was Duncan's and that responsibility was non-delegable. He breached that duty in continuing fashion. His reliance upon others to perform that duty serves as no justification for his indifference to his obligations and responsibility. [citations omitted] 50

If Duncan could not delegate the design of the structural steel connections to a fellow licensed engineer, there is no reason to believe an engineer should be able to delegate design responsibilities to a computer programmer, whether the programmer is licensed or not.

An argument might be made that the decision in the Kansas City Hyatt case was overly harsh in response to the tragic loss of life, tremendous property damage, and the engineer's "indifference to harm" which rose to the level of gross negligence. 51 The court might also have been influenced by the fact that the collapse of the walkway was not the only structural failure on the project. While the Hyatt was under construction, the atrium roof had collapsed. 52

The Hyatt case involved "gross negligence." It might be possible to distinguish a case involving a mere error in engineering judgment and convince a court to allow duties to be delegated to qualified professionals. However, a recent memorandum from the New York State Department of Education makes that argument unlikely to prevail despite the widespread practice of having subcontractors and fabricators prepare "shop drawings" for certain building systems and components, especially structural steel. The basis of the policy seems to be a concern by the Department about design firms abdicating their duty to make sure the buildings they design work as integrated systems. 53 This position finds support in an old New York case where the court said, "It is not enough for him [the architect] to say, 'I asked the steamfitter,' and then throw the consequences of any error that may be made upon the employer who engages him, relying upon his skill. Responsibility cannot be shifted in that way." 54

**VENDOR PROVIDED SOFTWARE**

A common practice in some engineering disciplines is for equipment vendors to distribute software which performs various calculations or helps select equipment for a certain application. The software is frequently made available at little or no cost to engineers who are in a position to specify the manufacturer's products. The vendors often develop the software for their own use and convenience. They have twin motives for making it available to the community of specifying engineers: The manufacturer hopes the software will endear him to the specifying engineer, thereby getting his products specified more often. The second motive, which is related, is to make it easier for the engineer to specify that manufacturer's product than some other brand.

Using vendor provided software can result in the same type of errors as using any other software. The software can contain a "bug" that generates erroneous results, or the engineer can misapply the program by trying to use it for something it was not intended to do, such as select a competing manufacturer's product. Manufacturers attempt to

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50 *Duncan*, at 541.
51 *Duncan*, at 533.
52 *Duncan*, at 530.
54 Hubert v. Aitken, supra note 26.
Manufacturers who provide technical information in the form of written guide specifications have at least one recent decision that insulates them from liability if a competitive product is used. In The Village of Cross Keys, Inc. v. The United States Gypsum Company, 57 an architect specified a special type of wall construction that US Gypsum had developed to promote the use of its products. When water leaks developed, the owners sued the developer who, in turn, sued the architect. The architect and developer also sued US Gypsum claiming that they had relied on USG’s design.

The manufacturer was not liable in the US Gypsum case because its products had not been specified or used. Presumably, a manufacturer who provides software would likewise not be liable if a competitor’s product were installed. On the other hand, the US Gypsum court recognized that it is common practice for architects and engineers to rely on technical specifications published by manufacturers so that design professionals need not “reinvent the wheel” for each project. 48 In light of that reasoning, manufacturers might not be able to escape entirely from liability for their published specifications and design guides whether distributed on paper or on computer diskette.

**ACTIONS AGAINST SOFTWARE PUBLISHERS AND AUTHORS**

The possibility of a products liability action against the software author and vendor was discussed above in the context of means engineers might use to try to recoup losses suffered from errors in running or applying a program. The considerations are the same for claims alleging that the engineer’s error resulted from an error or defect in the program (as opposed to the way it was used). Therefore, they will not be repeated here.

Errors or defects in a program can result if the programmer does not translate the underlying algorithms properly. In cases where the programmer has some expertise in the underlying technology, the programmer might have developed inaccurate algorithms. Those situations give rise to the possibility of a new tort called “computer malpractice” based on a theory of “elevated responsibility on the part of those who render computer sales and service.” 59 When presented with a post trial memorandum suggesting that it create the new tort, in the case of Chatlos Systems, Inc. v. National Cash Register Corp., the court declined to do so. 60

In cases where the programmer is also the person who created the algorithm, the engineer plaintiff should not need the new tort. If the algorithm is faulty, a claim for professional malpractice presumably would lie against programmer/author. The fact that an engineer’s product is a computer program instead of a report or a set of plans and specifications should not diminish the underlying standard of care. The difficulty prosecuting this type of claim might be in gaining sufficient access to the code and internal logic of the program to prove that the algorithm was indeed faulty.

On the other hand, if the programmer simply translated an algorithm developed by others into computer language, liability for professional malpractice might not attach. The function of a programmer as someone who merely translates instructions into computer code “is almost clerical in nature.” 61 Moreover, the error in the program might not be the direct cause of the failure. The judgment of the engineer who relied on the output from the program intervened.

In determining a software vendor’s liability, it is important to distinguish between two types of software programs. One type, like LEXIS, is primarily a data base. It functions like a library. The authors have little liability for missing or erroneous information because the program merely catalogs and retrieves information based on the user’s search request. The program is not actively involved in any part of the professional decision making process. The other type of program is an active resource. The pro-

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60Ibid.

1 Ibid.


58 Ibid.


56 A 2d 1126 (Maryland 1989).

55 Ibid.


"A typical licensing agreement reads: "[Manufacturer] disclaims all warranties with regard to the software contained on disk, including all warranties of merchantability and fitness; [Manufacturer] accepts no obligations nor liability for damages, including but not limited to special, indirect or consequential damages arising out of or in connection with the use or performance of the software."

"Warranties and warranty disclaimers are normally associated with the sale of products as opposed to services. By including this language in their license agreements, are the vendors helping push courts to decide that software constitutes "goods" not "services"? Such a decision would open up the possibility of strict liability for defects in the product.

Another consideration with regard to warranties and state laws limiting disclaimers is that those statutes may be limited to consumer goods. Vendor provided software intended for engineers to use in the course of providing a professional service is not a consumer good.

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gram analyzes data and performs calculations. Its output is a form of conclusion or result that the professional might have reached by using other means. The program functions as a participant in (and sometimes a substitute for) professional judgment. The authors and publishers of those programs are potentially liable as authors for distributing false information.62

Recovering against an author on the theory of distributing false information is an uphill battle. However, several features of the way programs intended for and used by professionals are marketed and distributed may make recovery easier. Unlike programs distributed to the general public, software designed for use by professionals is marketed specifically to those professionals. It is more than a reference provided to ease decision making. The vendor has a good idea of who the likely users will be and intends those users to rely on the programs.63 The fact that authors know users rely on their programs could be a key element in maintaining a successful action for negligent misrepresentation against a software author or vendor.

NEW GROUNDS FOR LIABILITY

The power of the computer and the obligation to use it create some potential new grounds for liability in the area of confidentiality and security. One advantage of desktop computers is their ability to communicate with other computers via telephone lines. This capability opens up access to the power of other computers and makes sharing data not only possible but easy. Just as voice conversations can be overheard by wire tapping a telephone line, so perhaps can data be obtained illicitly by eavesdropping.

Ordinarily, an engineer has a duty to protect his client's confidential information.64 Confidentiality is often an important issue specifically spelled out in an agreement for engineering services when the engineer is hired to design equipment for use in the client's proprietary process. How is the duty to avoid disclosure of confidential information affected when data is transmitted over telephone lines? What is the extent of the engineer's obligation to protect trade secrets which the client discloses or the engineer discovers as an incident to providing engineering services? Does the duty not to disclose extend to inadvertent disclosure? Does it require the engineer to take affirmative steps to guard against eavesdropping? Courts have not yet answered those compelling questions. As computer use increases those issues are almost certain to arise.

One new business that has grown out of the computer revolution is the operation of computer service centers. Service centers invest in expensive equipment like mainframe computers and high speed or large document printers that small to medium size firms cannot afford or need only infrequently. For a fee, the service center runs its customers' jobs. The jobs can range from complex calculations that would take hours or days on a desktop computer to computer aided drafting and design (CADD) services. They might also be calculations using proprietary algorithms that the service center/vendor does not want to disclose. What liability does an engineer face if the service center discloses client confidences or uses client information to further its own competitive position?

Many new buildings now have sophisticated computer based building automation systems that control lights, security, space temperature, and other building functions. Almost all of these systems can be accessed remotely by telephone modem. In fact, many engineers specify that capability in their construction documents. The possibility of access to a building automation system raises the specter of unauthorized persons changing important operating parameters. Unauthorized users might also damage expensive equipment by overriding alarms or disabling safety devices. What responsibility does an engineer have when specifying these systems to protect against this type of problem?

The issues of confidentiality and security apply to almost all business uses of computers.65 While they are important, they are not substantive practice issues and are not specific to engineers. For that reason, further discussion of them is beyond the scope of this article.

SUMMARY AND CONCLUSION

Computers are here to stay, and it is likely that their use will be required to meet the standard of care. When computers were first introduced, they made possible things that previously were beyond the reach of technology. There is little doubt that man could not have traveled to the moon without the benefit of computers. As previously impossible technological achievements become routine, they also become part of the relevant standard of care.

The fact that a professional uses a computer to perform professional duties and make professional judgments should not affect the standard of care applied to those

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63 Ibid. at 335-337.
64 The Rules of Professional Responsibility of the Massachusetts Board of Registration of Professional Engineers and Land Surveyors (250 CMR 4.00) does not contain any specifics on maintaining client confidences. However, section III.4. of the National Society of Professional Engineers’ Code of Ethics for Engineers states: "Engineers shall not disclose confidential information concerning the business affairs or technical processes of any present or former client or employer without his consent."
65 Chapter 147, §1 of the Acts of 1983 added "electronically processed or stored data" and "data while in transit" to the definition in Mass. General Laws c. 233 §30(2) of property that can be the subject of larceny. Of course, this statute addresses the potentially criminal activities of the persons intercepting the data as opposed to the potential civil liability of persons transmitting the data for failure to guard adequately against possible interception by unauthorized persons.
judgments. There is little need for new legal concepts or new torts like “computer malpractice” to determine the legal rights and responsibilities of professional computer users. The same tests of duty, breach of duty (conduct below the standard of care), and causation still apply. The legal updating consists simply of modernizing the standard of care.

Professionals cannot escape liability for their errors of judgment by blaming the computer. The computer is not the professional, and the computer does not make judgments. The professional makes the judgment to rely on the output from the computer. The duty to use professional judgment often cannot be delegated, even to a similarly licensed or qualified professional.

Engineers who make judgments that fall below the standard of care as a result of their use of computers should not be in any different position from engineers who make judgments that fall below the standard of care for other reasons. Under present law, the opportunities for recovery against the authors and publishers are limited. Computer software does not fit the traditional definition of products subject to strict liability, and the vendors may have a good defense in “assumption of the risk” or similar argument. That reasoning is based on the professional’s obligation to evaluate the output and make an informed professional judgment on whether to rely on it. Even in case of an error in the program, software authors and vendors are likely to argue convincingly that their error was not the proximate cause of the injury. Rather, the professional’s use of and reliance on the program constitutes a supervening factor.
INTRODUCTION

Claims based on sexual harassment in all kinds of workplaces have increased greatly, mainly due to the awareness that was stimulated by the 1991 confirmation hearings of Supreme Court Justice Thomas. According to two ABC news polls, one before the confirmation hearings and one after the confirmation hearings, the number of women claiming sexual harassment has more than doubled. The Equal Employment Opportunity Commission ("EEOC") reports an approximate 41% increase in the number of sexual harassment claims filed in the first fiscal quarter of 1992 as compared to 1991.

The omnibus Civil Rights Act of 1991 (Pub. L. No. 102-166, 105 Stat. 1071 (1991)) was passed on November 21, 1991, almost two years after it was originally proposed. Some speculate that the Act was passed in response to the Justice Thomas confirmation hearings. Others take the view that the Act was passed in reaction to several 1988-1989 Supreme Court decisions that restricted the interpretation of civil rights statutes.

Nonetheless, the Civil Rights Act of 1991 changed several key Supreme Court decisions on federal discrimination law and amended seven statutes. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., which prohibits sexual harassment as a form of sex discrimination, was amended also by the Civil Rights Act of 1991. Employees now who prove sexual harassment can be awarded compensatory and punitive damages against their employer if the employer's managers, supervisors, co-workers and even non-employees sexually harass that employee. The aggregate amount of compensatory and punitive damages depends on the size of the employer. An employer who employs 15 to 100 employees can be liable up to $50,000 and an employer who employs more than 500 employees could be liable up to $300,000.

These significant damage amounts have caused employers to take a careful double look at their affirmative duties under federal and state anti-sexual harassment laws in order to reduce the chances that they will be liable. These statutes should be of concern to legal employers as well. As discussed below, the 1989 Final Report of the Massachusetts Gender Bias Study suggests that some type of sexual harassment exists in the Commonwealth of Massachusetts. This article reviews that study, explains how sexual harassment is defined under federal and state antidiscrimination statutes and suggests steps that employers can and should take.

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5Massachusetts law at G.L. c. §§ 4 (1) and 4(16A) provides that a cause of action for sexual harassment is to be brought at the Massachusetts Commission Against Discrimination ("MCAD"). Also, under G.L. c. 214 § 1C, the Superior Court has original jurisdiction to enforce the right to be free from sexual harassment. These statutes will be discussed in this article. Of related importance are G.L. c. 151C, § 2(g) which provides that sexual harassment of students in educational institutions is unlawful and G.L. c. 96 § 102, the Massachusetts Equal Rights Act, which allows persons to seek compensatory, exemplary and other damages for sexual harassment as a form of sex discrimination.

Also pertinent is G.L. c. 12, §§ 11H and 11I, the Massachusetts Civil Rights Act. This Act allows persons to file a complaint in superior court whenever a person or persons "interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion with the exercise or enjoyment ... of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of the Commonwealth." G.L. c. 15, § 11H. Claims can be brought by recipients of sexual harassment who have missed the 6 month statute of limitations in which to file a complaint at the MCAD and have suffered threats which interfered with a "secured right." See O'Connor v. Chasdi, 400 Mass. 666 (1987).
While no one knows the number of sexual harassment incidents which have occurred in all types of legal public and private sector workplaces by job title in Massachusetts, still at least one fairly recent study suggests that offensive conduct of a sexual nature and related discriminatory attitudes on the part of male attorneys and court personnel as well exist in the Commonwealth.

The results of the 1989 Final Report of the Massachusetts Gender Bias Study found that female attorneys are subject to gender biased conduct by male attorneys at least in courthouse interactions, ranging from inappropriate comments of a sexual nature to inappropriate touching. While the Gender Bias Study did not specifically segregate the number of female attorneys employed by the Court or employed by the harasser's place of employment, it did find that the number of female respondents who experienced inappropriate comments of a sexual nature from counsel during the past five years was 27%. Twelve percent of female respondents had been touched in a way that they felt was inappropriate by male counsel during the past five years. The proportion of attorneys in Massachusetts who ever observed women attorneys subjected to inappropriate comments of a sexual or a suggestive nature in the past five years was 39% of all attorneys surveyed.

The Gender Bias Committee found that many of the problems female attorneys experienced resulted from the tone set by older male attorneys. The Committee found that such attorneys are in positions of greater influence and other male attorneys, as various literature states, imitate the behavior of others who are in such positions of high status.

The Gender Bias Committee found that 12% of the women who responded to the survey sent to attorneys said that in the last five years they had been subjected to inappropriate comments of a sexual nature from court employees and 6% said that they were touched inappropriately by court employees over the last five years. Male judges within the Commonwealth display less gender-biased conduct than male attorneys and court employees. One in twenty women surveyed stated that a judge made inappropriate comments of a sexual or suggestive nature in the past five years and one out of every one hundred women reported that she had been touched in an inappropriate way by a judge during that same time period.

SEXUAL HARASSMENT DEFINED UNDER TITLE VII AND G.L. C. 151B

Unwelcome sexual advances, verbal or physical conduct of a sexual nature or requests for sexual favors constitutes sexual harassment when either or both of the following situations occur pursuant to federal or Massachusetts law. “Quid pro quo” sexual harassment occurs when submission to or rejection of such advances, requests or conduct is used as the basis for employment decisions that affect that individual. The “hostile environment” type of sexual harassment occurs where the conduct has the purpose or effect of unreasonably interfering with an individual's job performance by creating an intimidating, hostile, humiliating or offensive work environment.

The “quid pro quo” type of harassment is fairly straightforward. This situation arises when an employee's job conditions are affected when she rejects sexual requests, and is denied a promotion, terminated for protesting or precluded from certain decision making processes.

The “hostile environment” type of sexual harassment is more difficult to define under federal and state law. Under federal law, the sexual harassment must be so pervasive and severe as to actually alter the conditions of the recipient's employment. Sexual harassment occurs through repeated unwelcome verbal or physical conduct that is of a sexual nature. Off-color jokes, vulgarities, unwanted touch-

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8Since the majority of sexual harassment claims are brought by women, the female pronoun will be used in this article. Men can be and sometimes are the recipient of sexual harassment. Harassment can also be directed against the same sex.


10Id., p. 54.

11Id., p. 55.


131989 Final Report of the Massachusetts Gender Bias Study: Gender Bias in Courthouse Interactions, 74 MASS. L. REV. 50, p. 57.

14Id., p. 58.

15See 29 CFR 1604.11 and G.L. c. 151B § 1(18).

16Henson v. City of Dundee, 682 F.2d 987, 904 (11th Cir. 1982).
ing, sexual slurs, prolonged staring, offensive flirtations and sexual advances can create an intimidating and offensive work environment. As under state law too, the sexual harassment need only create an offensive work environment. The harassment does not have to affect any tangible employment benefit or condition.

Since the "hostile environment" harassment can take on many forms, the EEOC will decide on a case-by-case basis as to whether harassment occurred given these factors: 1) the verbal and/or physical conduct; 2) how frequent the conduct was; 3) whether the conduct was offensive; 4) whether the harasser was a co-worker or a supervisor; 5) whether others joined in perpetrating the harassment; and 6) whether the harassment was aimed at more than one person.

The gravamen of a sexual harassment claim is that the sexual advances or sexual conduct must be unwelcome. Evidence of a recipient's provocative dress or conduct can be relevant in determining whether advances are unwelcome. Under Massachusetts law, a recipient who is not subjectively offended or insulted cannot consider the conduct unwelcome. Under EEOC policy guidelines, "... [b]ecause sexual attraction may often play a role in the day-to-day social exchange between employee, the distinction between invited, uninvited-but-welcome, offensive-but tolerated, and flatly rejected sexual advances may well be difficult to discern."

When considering a sexual harassment claim under federal law at the EEOC, the EEOC will look at the "totality of the circumstances" and evaluate claims on a case-by-case basis. If the recipient fears repercussions, such as a job loss resulting from disclosing sexual advances to management, that fear can justifiably explain a delay in complaining about it. Failure to respond to suggestive comments or gestures can be in of itself sufficient to communicate that the conduct was unwelcome.

A person may not successfully claim that she has been sexually harassed where she tells off-color jokes, uses vulgar language, initiates sexually oriented conversations and discusses her own encounters. A claim will be unsuccessful too where there are one or two isolated instances of sexual conduct committed by the harasser. In either case, such a person cannot claim that any alleged harassment was unwelcome or offensive.

In addition, several federal courts have examined whether the harassment occurred from a "reasonable person" standard in evaluating a Title VII "hostile environment" claim. Courts have found it more difficult to find a hostile environment when certain conduct, however vulgar, is pervasive in today's society. The trend has been to shift towards a reasonable woman standard whereby the conduct is viewed from the employee's perspective. The MCAD has adopted an objective/subjective test. The first issue is whether the conduct is offensive based on what a reasonable person may think. The second inquiry is whether the recipient was subjectively humiliated or offended.

**COVERAGE AND SCOPE OF LIABILITY UNDER TITLE VII AND G.L. C. 151B**

Drawing from the 1989 Final Report of the Massachusetts Gender Bias Study, female employees employed by the Massachusetts courts and female employees who are subject to co-worker, supervisor or possibly non-employee harassment might have a cause of action under Title VII and/or G.L. c. 151B for sexual harassment, provided that their complaints were or are filed in a timely manner. A claim at the EEOC must generally be filed within 180 days.
of the discriminatory act or within 300 days of the act if the claim is filed with the MCAD; a request for relief must be first brought to the state authority. Title VII covers employers who employ 15 or more employees for each day in twenty or more calendar weeks. Under state law, employees generally have six months to file a claim at the MCAD from the time the discriminatory act occurred. Chapter 151B covers employers with 6 or more employees.

While a complaint must be filed first with the MCAD to preserve any action, the employee can file a civil suit in superior court thereafter under certain circumstances. If the complaint has been pending at the MCAD for 90 or more days, the employee must simply notify the MCAD that she/he intends to withdraw and file a civil action. If the complaint is pending at the MCAD for less than 90 days, the employee must obtain approval for the withdrawal from a Commissioner of the MCAD prior to filing a civil suit.

Under "quid pro quo" harassment pursuant to federal and state law, employers are liable for a supervisor's harassment, regardless of whether the employer knew or should have known that the harassment occurred. At least one court has reasoned that such a supervisor is acting within his scope of authority when making decisions and his conduct can be fairly imputed to the employer.

Employer liability for co-workers or even non-employees who create a "hostile environment" is somewhat more difficult to discern under federal law. Under EEOC guidelines, liability will be imputed to the employer if: 1) the misconduct is known and the employer did nothing; 2) the individual acted in a supervisory or agency capacity and the misconduct should have been known; or 3) where the employer does not have an effective anti-sexual harassment complaint procedure and the conduct is left unchecked and is tolerated. The Supreme Court, however, has held that in cases where there is a harassing supervisor, the supervisor must act in an "agency capacity" for liability to ensue. The lack of a complaint procedure is an important factor to consider but is "not necessarily dispositive."

Under state law at G.L. c. 151B, an employer is strictly liable for acts of its supervisors, co-workers, agents and is possibly liable for the acts of non-workers which are directed towards an employee. An employer need not be aware of the harassment.

Under federal law, remedies that can be sought under Title VII include injunctive relief, back and front pay, attorneys fees and costs. There was no right to recover compensatory (emotional distress) or punitive damages prior to the enactment of the Civil Rights Act of 1991. As a result of the Civil Rights Act of 1991, compensatory and punitive damages are capped at these amounts: 1) $50,000 for employers with 15 to 100 employees; 2) $100,000 for employers with 101 to 200 employees; 3) $200,000 for employers with 201 to 500 employees; and 4) $300,000 for employers with 500 or more employees. Massachusetts law allows for compensatory damages, emotional distress damages, injunctive relief, punitive damages (if the matter proceeds to superior court) and attorney's fees. Emotional distress damages in the amount of $5,000 to $25,000 have generally been awarded at the MCAD.

MASSACHUSETTS LAW AT G.L. C. 214, § 1C

The Massachusetts Legislature enacted G.L. c. 214, § 1C in 1986. This statute states broadly that "a person shall have the right to be free from sexual harassment, as defined in [G.L. c. 151B]. The superior court shall have juris-

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* G.L. c. 151B, § 5.
* G.L. c. 151B, § 155.
* G.L. c. 151B, § 9; 804 C.M.R. 1.13(2)(a) & (b).
* 29 C.F.R. § 1604.11(c); College-Town, Division of Interco, Inc. v. MCAD, 400 Mass. 156, 162-165 (1987).
* Id. at § 5258, quoting Meritor, supra.
* College-Town, 400 Mass. at 163-167 and n. 4.
* See note 5.
* G.L. c. 151B, §§ 5 and 9.
diction in equity to enforce this right and to award damages."

While there are no reported cases on point, this statute could be used by any person who is the recipient of sexual harassment in the workplace against the employer if a "quid pro quo" or "hostile environment" situation occurs. Given the 1989 Gender Bias Committee's report, it is possible that this statute could be construed to mean that female attorneys could have an action against their employers where non-employee opposing attorneys or court personnel are the alleged harassers. In addition, should the recipient wish to bypass the MCAD or even the EEOC (as where the statute of limitations has run), this statute still gives the recipient the ability to file a claim against the employer in the first instance with the superior courts. It could also be argued that this statute could be used to bypass the employee threshold numbers which are required when seeking remedies under Title VII and or G.L. c. 151B.

LIMITING EMPLOYER LIABILITY: ANTI-HARASSMENT POLICIES

It is crucial for every employer to establish an anti-sexual harassment policy. Under EEOC guidelines, the EEOC will find an employer liable for "hostile environment" sexual harassment where there is no strong anti-sexual harassment policy that is widely disseminated and consistently enforced. The failure to establish an explicit policy which is available to all employees will leave the matter unchecked, tolerated and even condoned. Internal procedures can also encourage employees to come forward so that employers deal with the situation prior to an employee's filing with the MCAD under Massachusetts law.

Under EEOC guidelines, the policy should contain the following: 1) a policy statement that sexual harassment is not tolerated; 2) definitions of sexual harassment ("quid pro quo" and "hostile environment") and examples of verbal and physical conduct that can be sexual harassment; 3) that harassment can come from supervisors, co-workers and non-employees; 4) a detailed complaint-grievance procedure that provides a choice as to whom the recipient can complain to in case the harasser is the person whom the recipient must complain to in the first instance; 5) a statement about the disciplinary actions that can and will be put in force against the harasser; and 6) a statement that employees are urged to come forward if harassed and that this policy should be disseminated to all.

Once such a policy is in place, the policy should be enforced even handedly. If an employee uses the policy, it is more likely that the EEOC will not summarily impute liability to the employer and, under federal and state law, issues of harassment can be dealt with without resorting to litigation. This is true where the harasser is no longer employed or has moved to another location in the workplace. If dealt with early on, it is also less likely that the harassment will be repeated and deemed offensive.

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44 G.L. c. 214, § 1C.
45 EEOC Policy Guidance, N-915-050 (March 19, 1990), reprinted in CCH Emp-Prac. (New Developments), § 5258.
46 Id.
The Massachusetts Condominium Act (M.G.L.c. 183A) was enacted in 1963 and the statute did not experience significant amendment until 1992. The Massachusetts legislature adopted Chapter 400 of the Acts of 1992 in response to concerns expressed by condominium associations resulting from the failure of numerous condominium unit owners to honor their financial obligations to the associations. The statutory revisions affect every condominium in the Commonwealth and impose substantial new obligations primarily on unit owners and first mortgagees, as well as condominium boards and management companies.

Chapter 400 contains a so-called “super lien” provision. Pursuant to this provision, a condominium association will have lien priority over first mortgages of record to the amount of six months of unpaid common area expenses. The superiority of the association’s lien will force first mortgagees to decide between satisfying a unit’s unpaid common area expenses or face a foreclosure procedure initiated by the association, which will extinguish the first mortgagee’s security interest in the unit. It is assumed that most lenders will choose to pay the outstanding common area expenses rather than lose the security offered by their first mortgage. Alternatively, the first mortgagee may prod the unit owner to satisfy the unpaid amount. In this manner, the Massachusetts legislature is attempting to assist financially-strained condominium associations.

Chapter 400 also imposes a variety of notification requirements upon the affected parties.

In 1985, Suffolk University Law School Professors Barry Brown and Bernard Keenan authored Massachusetts Condominium Law. A published review of the text noted that it “provides an A to Z approach to the condominium process starting from the point of creating a condominium in Massachusetts through the ongoing operation of the association after the developer has transferred control of the condominium to the organization of unit owners.” Professors Brown and Keenan have periodically supplemented the text and a two-volume second edition was published in 1992.

The recent and significant amendments to the Massachusetts Condominium Act, as noted above, are addressed in a detailed supplement to be published during the summer of 1993. The supplement will contain a comprehensive consideration of the statutory amendments and will also provide various suggested Forms designed to foster compliance with the statutory notification requirements. Massachusetts Condominium Law is published by Butterworth Legal Publishers. Professors Brown and Keenan have both taught courses in the area of property law for approximately twenty years.
A REVIEW OF THE REQUIRED CURRICULUM: A QUESTIONNAIRE FOR SUFFOLK LAW ALUMNI

The Curriculum Committee of Suffolk University Law School requests the comments and observations of law school alumni concerning the Committee's ongoing review of the law school's required upper-class curriculum. A Suffolk Law School student must presently complete 84 credit hours to satisfy the law school's degree requirements. The current Suffolk curriculum requires the completion of six courses during the upper-class years. These six courses represent a total of 26 credit hours. The 26 credit hour upper-class requirement, coupled with the 30 hours of required courses in the first year, results in 56 hours (66%) of required courses in relation to the 84 credits needed for graduation.

The law school faculty, at the suggestion of the Curriculum Committee, has manifested significant interest in fashioning a required upper-class curriculum based upon a "menu concept" of curriculum planning. The menu concept, in this context, represents a curriculum designed to offer upper-class students greater flexibility in course selection while also reflecting the faculty's decision that upper-class students be provided with a sense of direction in relation to course selection.

Pursuant to a menu approach to curriculum planning, a student selects courses from a menu of specific courses adopted by the faculty. Numerous variations of curriculum menus are available. For example, a menu might consist of a simple requirement that students, during their upper-class years, select a certain number of courses or credits from a list of courses approved by the faculty. An alternative and more detailed approach would require that students select a certain number of courses chosen from several groupings of designated courses. As an example, the current menu groupings at the University of Miami Law School are: Personal and Business Transactions — including course selections such as Business Associations, Commercial Law, Taxation and Domestic Relations; Public Law and Process — including course selections such as Administrative Law and Labor Law; Perspectives — including courses such as American Legal History and Jurisprudence, and; Legal Profession — including courses such as Legal Ethics, Professional Management and Professional Responsibility.

Suffolk's existing upper-class required curriculum consists of a cluster of traditional courses that all students must complete. Although the law school's upper-class required curriculum may still represent a valid selection of subject matter, formidable arguments can be raised that various other course offerings and subject matter are equally essential to or advisable for a well structured legal education. The faculty has concluded that a menu approach provides a method of addressing this issue while still providing an upper-class student with an opportunity for well-advised course selection.

The faculty believes that a successful menu design must be consistent with a realistic understanding of our institution and its constituencies. Moreover, the menu should be designed such that the intellectual rigor of the law school's educational program is enhanced. The faculty has not yet adopted a specific curriculum "menu" to replace the existing upper-class course requirements.

The Curriculum Committee members would truly appreciate your comments concerning the law school's future curriculum structure. You are requested to reflect upon both your law school years and the years following graduation. Your experience and observations will provide valuable commentary and suggestions. The following questionnaire, with directions, is designed to provide a convenient method for transmitting this information. We look forward to reviewing your submissions. Thank you for your assistance.

ENDNOTES


2. Following the first year of legal study, a student must complete the following two semester courses: Business Associations (6 credits); Commercial Law (6 credits); Wills & Trusts (5 credits), and; Evidence (4 credits). Students must also complete one semester courses in Equitable Remedies (3 credits) and Professional Responsibility (2 credits).

3. The first year curriculum consists of the following courses: Civil Procedure (4 credits); Constitutional Law (4 credits — Day Division and 5 credits — Evening Division); Contracts (6 credits); Legal Practice Skills (3 credits); Property (5 credits — Day Division and 4 credits — Evening Division), and; Torts (5 credits). (Evening Division students enroll in the Constitutional Law and Property courses during their second year of legal study).
SUFFOLK UNIVERSITY LAW SCHOOL
ALUMNI CURRICULUM SURVEY

DIRECTIONS:
1) Your responses and comments may be typewritten or handwritten.
2) You are requested to attach additional pages if the questionnaire does not provide adequate space for your responses.
3) The questionnaire does not require that you provide your name. This information is omitted in order that you may be candid in your responses. You are requested to provide your year of graduation and whether you matriculated in the Day or Evening Division. By providing this information, we can ascertain, compare and contrast between the comments of recent and more senior graduates as well as graduates of the Day and Evening Divisions.
4) If possible, please complete and submit the questionnaire no later than August 1, 1993.
5) You may photocopy the questionnaire and return the completed photocopy or detach the questionnaire. Please mail or telefax the completed questionnaire to:

Prof. Bernard V. Keenan
Suffolk University Law School
41 Temple Street
Boston, MA 02114
Telefax No. (617) 573-8143

I. BACKGROUND INFORMATION

Year of Law School Graduation
Day or Evening Division
Year of Birth
Activities and Honors (e.g., Dean's List, Law Review, Moot Court, Research Assistant, Student Bar Association, Team Competitions, etc.)

II. LIFE AFTER LAW SCHOOL

A. If you have practiced law, please describe the nature of your practice (e.g., number of years in practice, area(s) of practice, solo practitioner or member of firm, size of firm, etc.)

B. If you have not practiced law, please describe the nature of your post-law school employment.
III. STRUCTURED QUESTIONS CONCERNING THE CURRICULUM

Directions: The following list of sentences is designed to focus your attention upon specific statements relating to the law school. If you strongly approve of the statement as it stands, circle the words “strongly agree,” and so on, with regard to the other attitudes (i.e., Agree, Uncertain, Disagree, Strongly Disagree).

1. My law school education at Suffolk provided sufficient and effective training.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

2. The law school provided sufficient training in statutory and regulatory interpretation while I was a student.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

3. The law school should not require students to complete specific courses or subject matter after the first year.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

4. Suffolk University Law School prepared me well for my present practice.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

5. The upper-class required curriculum would be improved by an approach which permits students to select from a menu of specific courses, rather than the present required curriculum.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

6. The law school should require all students to enroll in a basic course in Taxation.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

7. The law school should require all students to enroll in a full year course in Commercial Law.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

8. The law school should retain its upper-class required curriculum.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

9. The law school should offer some required training in Accounting for Lawyers.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

10. The law school should offer some required training in Economics and the Law.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree

11. The law school should replace the required upper-class curriculum with a “menu approach” which allows students choices within clusters of courses.

   Strongly Agree   Agree   Uncertain   Disagree   Strongly Disagree
IV. UNSTRUCTURED QUESTIONS CONCERNING THE CURRICULUM

A. Which skills are most important to your legal practice? Why?

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

B. Do you believe that your law school education at Suffolk provided sufficient and effective training in such skills areas? How may the law school improve training in these areas?

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

C. Should the law school require students to complete specific courses or subject matter after the first year? If so, which courses/subject matter? Why?

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

D. Which, if any, of the currently required upper-class courses should continue to be required? Explain.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

E. What is your assessment of the Suffolk upper-class required curriculum?

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________

F. What do you consider to be the strengths and weaknesses of the existing upper-class required curriculum? Explain.

________________________________________________________________________

________________________________________________________________________

________________________________________________________________________
G. Did your legal education offer sufficient training in statutory and regulatory interpretation? If not, how would you improve training in these skills?

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

H. Do you believe that each student should be required to complete writing projects supervised by law faculty members? If so, please indicate your thoughts concerning your methodology or approach to strengthening student writing skills.

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

I. (i) Do you believe that the law school should offer some training in accounting and economics to all students? Please explain your response.

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

(ii) Same question as above concerning Law Office Management skills training.

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

(iii) Same question as above concerning Trial Advocacy skills training.

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________

(iv) Same question as above concerning training in Legal History and Legal Philosophy.

_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
_____________________________________________________________________
POWER OF ATTORNEY:
LEGAL WRITING FOR THE PRACTITIONER

Dr. Martha Siegel

Words are to the lawyer what a scalpel is to the surgeon: precision instruments for professional use. Although no one would advise a surgeon to select a dull or blunt scalpel, some circumstances exist in which an attorney should purposefully select a linguistic structure generally regarded as weak, indefinite, and ambiguous: the passive voice. Despite all exhortations in the fall 1992 issue of The Advocate to avoid the passive voice, at least five situations exist to use it — but only sparingly.

In general, the active voice serves the dramatic purposes of persuasive legal writing because it highlights the actor, rather than the object receiving the action. In contrast, the passive voice elegantly and deftly obscures the actor, the subject of the sentence, and any sense of agency. The passive voice has concrete applications in several contexts.

First, the passive voice applies when the attorney does not know the identity of the party involved in the featured action.

Active voice: Robert Wheeler left the bomb in the store at approximately four o'clock.
Passive voice: The bomb was left in the store at approximately four o'clock.

Although the active voice sentence contains more drama and focus, if the attorney does not know the agent, that attorney must use the passive voice.

Second, even if the attorney knows the actor, the attorney may have reasons to obscure the identity of the actor, particularly if that actor happens to be the attorney's client! Consider these examples.

Active voice: On the night of August 12, Sherlock Holmes murdered Dr. Watson.
Passive voice: On the night of August 12, Dr. Watson was murdered.

While the first and active voice example is known as the "prosecutor's delight," the second and passive example is favored by the criminal defense bar. In fact, writers properly refer to the second example as the "abridged passive" because it entirely omits any reference to the accused. The full version is "On the night of August 12, Dr. Watson was murdered by the defendant." Abridging excises even the identity-obscured term "the defendant," a useful technique for either criminal or certain kinds of tort defense.

Third, an attorney may selectively feature the passive voice when the attorney needs to focus on the effect, result, or outcome — rather than the cause.

Active: Someone broke my window.
Passive: My window was broken.

The passive example speaks to whether the window was merely cracked or chipped — or was, in fact, "broken."

Fourth, the attorney may decide to use the passive voice to minimize the act and exaggerate the client's lack of motivation.

Active: He did not know why he pointed the loaded gun at the grocer.
Passive: The loaded gun was pointed at the grocer, but he does not know why.

The passive voice has the effect of hiding the agent of the action and portraying events as if spontaneously occurring, with little or no human intervention.

Fifth, the passive voice emphasizes the powerlessness of the actor, stressing his or her lack of efficacy — and competence.

Active: The defendant's flawed reasoning leads him to an irrational result.
Passive: The defendant is led to by his flawed reasoning to an irrational result.

Though both assertions are potent persuasive statements, the second creates a visual picture of the defendant

1Martha Siegel, "Power of Attorney: Legal Writing for the Practitioner," 23 Advocate 71 (Fall 1992)(explaining why the active voice should dominate persuasive legal writing that relies on drama and action).
tethered by ball and chain to a barren and empty proposition.

Sixth, and finally, attorneys rely on a form termed the "generic passive" when they wish to credit and elevate a proposition without citing specifics. Two common examples include: "It is well-established" and "It is beyond dispute." Attorneys should use the generic passive with caution because the whole proposition falls when opposing counsel produces a single, clear exception to the rule proposed.

Through each of these examples, the attorney seeks the same goals: to de-emphasize the actor, highlight the action, and create ambiguity.

Overuse of the passive voice deadens legal writing, but failure to harness its distinctive strengths when appropriate deprives the attorney of a valuable stylistic tool. The key is to use the passive voice by intent, not by default.

© 1993 Dr. Martha Siegel, Esquire, Director, Legal Practice Skills Program
SUFFOLK UNIVERSITY LAW LIBRARIANS

By Michael J. Slinger, Law Library Director

Suffolk University Law School's professional librarians play a role that is integral to the educational mission of the law school by providing services that support faculty teaching and research, assist students in their educational endeavors, and provide assistance to our alumni. Our Public Services Department, headed by Susan D. Sweetgall, and our Technical Services Department, overseen by Cecelia M. Tavares are important in providing services to the Suffolk University Law School community.

Our professional librarians all have advanced degrees in librarianship and several have law degrees. The following brief descriptions will introduce the Law Library's professional staff.

Michael J. Slinger

Michael J. Slinger has been Suffolk’s Law Library Director for the past three years. Previously he served for six years on the Faculty of the University of Notre Dame School of Law. Professor Slinger holds a B.A. from the University of Pittsburgh, an M.L.S. from the University of South Carolina, and a J.D. from Duquesne University. He teaches a seminar on Advanced Legal Research at the Law School. Professor Slinger currently serves on the Executive Board of the American Association of Law Schools (AALS) Committee on Law Libraries, and is Treasurer of the New England Law Library Consortium (NELLCO). On the job his long range goal is to develop the Suffolk Law Library into the finest service-oriented library in New England.

Professor Slinger and his wife, Cheryl, are the parents of two daughters, Becky and Sarah. In his spare time he enjoys reading history, watching sporting events (particularly the Pittsburgh Pirates), and spending time with his children.

Ellen Beckworth

Ellen Beckworth has been a Reference Librarian at Suffolk University Law Library since 1991. She is from Jacksonville, Florida, and graduated from the University of North Florida located there. Ms. Beckworth received her library science degree from the University of North Carolina at Chapel Hill and her law degree from Boston College Law School. International, environmental and civil rights law are her major areas of interest.

Sonia C. Ensins

Sonia C. Ensins joined Suffolk University Law Library as a Reference Librarian in April 1992. Her previous experience includes working in the Government Documents Division of Widener Library at Harvard University and at
Tufts University's Arts & Sciences Library. She received her masters degree in library science from Simmons College and her undergraduate degree from the University of Massachusetts.

Elizabeth Gemellaro

Elizabeth Gemellaro, Reference Librarian, has been employed at Suffolk University Law Library for three and a half years. She received her B.A. from the State University of New York at Stony Brook and her M.L.S. from the State University of New York at Albany. Prior to her employment at Suffolk University, she worked in a school library, a public library, a junior college library and at Touro Law School Library in New York.

Ms. Gemellaro has published articles in the *Bimonthly Review of Law Books* and compiled bibliographies for the *Suffolk Advocate*. She is the Law Library liaison to the Suffolk University Law Review.

Edward Huff assumed the duties of Cataloging Librarian at Suffolk University Law School in August of 1992. He was previously a member of the cataloging staff at the University of Notre Dame, serving there for over four years. Mr. Huff received both his B.S. and M.L.S. from Indiana University, Bloomington, and also holds an Indiana teaching license in secondary English.

Edward Huff

John B. Nann

John B. Nann has been a Reference Librarian at the Suffolk University Law Library since the Fall of 1988. He received a B.A. from the University of Chicago and a M.S.L.S. from Simmons College. Mr. Nann is currently enrolled in the law school's evening division. He plans to continue his career in academic law librarianship after he completes law school. His areas of interest include international and foreign law, computer assisted legal research, and the use of computers in both research and communication.

John B. Nann

Susan D. Sweetgall
Susan D. Sweetgall, Assistant Director for Public Services, received her J.D. from Suffolk University Law Library, her M.S.L.S. from Syracuse University and her B.A. from Syracuse University. Before becoming Assistant Director for Public Services, she was a Reference Librarian and the Senior Reference Librarian at Suffolk Law School Library. Before coming to Suffolk, Ms. Sweetgall was Reference Librarian at Roxbury Community College and Garland Junior College.

Cecelia M. Tavares, Assistant Director for Technical Services, earned her M.L.S. from Southern Connecticut State University and her B.S. in Education from Bridgewater State College. Prior to coming to Suffolk, Ms. Tavares worked at SOLINET (a library network in Atlanta with over 700 member libraries) as a Technical Consultant where she aided libraries with automation plans. Her past law library experience includes working for both the Social Law Library and the New England School of Law.

Madeleine Wright, Pallot Librarian, received her B.A. from Northeastern University and her M.L.S. from Simmons College. She started at Suffolk Law Library in 1987 as a Reference Librarian and was promoted to Pallot Librarian in 1989. As Pallot Librarian, Ms. Wright oversees the overall operation of the Pallot Library which contains the Government Documents Collection, the Microform Collection, and the Audiovisual Collection. She provides specialized reference services in the areas of federal legislative information, federal administrative agency information, general federal document information as well as general reference services.

Ms. Wright is the Treasurer for the Government Documents Group of New England and is serving on the Exhibit Committee for the 1993 American Association of Law Libraries Conference.

Ms. Wright's father, Leo A. Gosselin, graduated from Suffolk Law School in 1935.
SUFFOLK UNIVERSITY LAW LIBRARY
RECENT PRACTICE ORIENTED ACQUISITIONS

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

The titles 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 “Reference”, “L-Leaf”, “Reference Desk” or “ 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. Also, “Pallot Library Videos” may not be checked out, however, they may be viewed any time in the Pallot Library on one of the Pallot Library video monitors.

These are only a selection of the practice oriented materials 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

ABORTION


ANTITRUST LAW


APPPELATE PROCEDURE


ARTIFICAL INSEMINATION, HUMAN


ASYLUM, RIGHT OF


ATLASES


ATTORNEY AND CLIENT


AUTHORS

CIVIL RIGHTS
KF 4754.5 Z9 R5 1992

COMPETITION, UNFAIR
RESERVE KF 3195 .R47 1981

COMPUTERS
REFERENCE KF 390.5.C6 C66

CONFLICT MANAGEMENT
HD 42 .S87 1987

CONGRESS
PALLOT LIBRARY REFERENCE JK 1067 .Z65 1988
TRUSTS AND TRUSTEES  
REFERENCE KF 730 .R472S 1991

VETERANS  
KF 770S .V38 1991

WATER RIGHTS  
TS 1323.15 .S74 1991

WOMEN  
RESERVE KF 478 .B68 1992

CONNECTICUT  
PERSONAL INJURIES  
RESERVE KF 1256 .A75 M37

EVIDENCE  
KFM 540 .A54 F5 1992

MASSACHUSETTS  
BUILDING LAWS  
THE MASSACHUSETTS STATE BUILDING CODE. Boston: Massachusetts Secretary of State. (looseleaf). 780-CMR.  
RESERVE KFM 2859 .A1 A29

CONDOMINIUMS  
MASSACHUSETTS CONDOMINIUM LAW. Edited by Robert I. Calvin; contributing authors, John Achatz . . . et al. Boston: Massachusetts Continuing Legal Education, c1988 (looseleaf); forms.  
RESERVE KFM 2914 .C6 M37 1988

CORPORATION LAW  
RESERVE KFM 2613 .A65 C34 1992

CRIMINAL LAW  
RESERVE KFM 2961 .A29 M37

CRIMINAL PROCEDURE  
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DISCRIMINATION  
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