President Clinton and a running mate, Bill Moran, (L) Suffolk, J.D., 1975
ABOUT THE COVER

PRESIDENT CLINTON AND A RUNNING MATE

William B. Moran, J.D., class of 1975. Bill began running as part of his total bar review preparation and has continued it as an avocation, along with Alpine skiing and scuba diving. Running with the President was happenstance; they both enjoy early morning runs. Bill found the President to be very unpretentious. Their conversations related primarily to running. “The President is a solid runner,” says Bill, “and he increases his pace with each mile, finishing his runs with a sprint.”

Bill also has an article in this issue of the Advocate, Life in the Misdemeanor Lane, concerning his experience for several months prosecuting misdemeanors in the Superior Court for the District of Columbia.
Table of Contents:

Letters ............................................................................................................................... 3

A Conversation with Chief Justice Fenton
Gerard J. Clark ................................................................................................................. 6

Life in the Misdemeanor Lane
by William B. Moran................................................................................................... 13

An (Adequate) Education for All
by Victoria J. Dodd ..................................................................................................... 20

A Conversation with R. Nelson Griebel
Charles E. Rounds, Jr. .................................................................................................. 25

Enforcing Human Rights
by Valerie Epps ........................................................................................................... 28

The Supreme Court and Religion
by Joseph D. Cronin .................................................................................................... 31

NAFTA and Development Funding
by Jeffery Atik ............................................................................................................. 46

Impoundment of Search Warrants
by Terrence B. Downes ............................................................................................... 51

Cocaine
by T.B. Downes .......................................................................................................... 54

News From the Law Library
by Michael J. Slinger ................................................................................................... 55

Bimonthly Review of Law Books ................................................................................ 57

New Faculty ................................................................................................................... 58

Power of Attorney
by Martha Siegel .......................................................................................................... 61

Recent Law Library Acquisitions .................................................................................. 63

Note From the Advocate

THE ADVOCATE WELCOMES COMPLETED MANUSCRIPTS AND IDEAS FOR ARTICLES THAT WOULD BE OF INTEREST TO OUR READERSHIP.

THE ADVOCATE IS A PUBLICATION OF SUFFOLK UNIVERSITY LAW SCHOOL AND IS PUBLISHED TWICE DURING EACH ACADEMIC YEAR. IT HAS A CIRCULATION OF 15,000. ALL ARTICLES AND NOTES REFLECT THE PERSONAL VIEWS OF THE AUTHORS AND DO NOT NECESSARILY REFLECT THE INSTITUTIONAL VIEWS OF SUFFOLK UNIVERSITY.

CHANGE OF ADDRESS FOR THE MAILING LIST SHOULD BE ADDRESSED TO THE ALUMNI/DEVELOPMENT OFFICE AT SUFFOLK UNIVERSITY, 8 ASHBURTON PLACE, BOSTON, MA 02108.

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To The Advocate:

Yesterday, the Advocate, Vol. 23 No. 2, spring 1993 arrived and the centerpiece drawing of Suffolk Law School evoked many memories.

The boy running across the street reminded me of the many times from 1935 to 1939, with tuition ticket in hand, that I ran up the hill from Congress street where I worked, to be on time for six o'clock evening classes.

Apparently the exercise was good for me as I'm still hanging on, though not practicing at age 83.

Thanks for the memories!

Sincerely,

John G. Burke
Plymouth, Mass.

To the Advocate:

As the director of the University of California excavations at Tel Dor I was most pleased to see Professor Rounds' article in last spring's issue of the Advocate. All archaeologists like to make converts, but an entire family is quite a catch!

Since your spring issue came out, we have completed our eighth season at Dor and are beginning to recruit for 1994. We invite your readers to join us: the only qualifications we demand are congeniality, enthusiasm, and average physical fitness. This summer's digging not only produced more evidence that a hitherto unrecorded, catastrophic earthquake devastated Dor and perhaps other sites in Northern Israel at about the time of King David, facilitating the Israelite occupation of the region, but also revealed a major Hellenistic building under our Roman temple. Next season, we shall be looking for more evidence of both, and given the site's richness to date, fully expect to find it.

We offer U.C. Berkeley summer school credit and a full program of lectures and practical instruction in field techniques. Volunteers may also join us on a five-day tour of Jerusalem, Masada, and Qumran before the excavation and two one-day tours of northern Israel and the Galilee during it. In the past eight years, over three hundred people have passed through our program, and some just keep coming back for more. Students apart, our volunteers have included teachers, nurses, doctors, homemakers, pastors, and even (yes!) a law professor; our youngest were his 9-year old son Mark and my own daughter, Caroline (now a four year veteran); our oldest has not missed a season since 1985, and is now approaching her seventies.

In the foreground of this 1899 photograph, we see the old Tremont Street "Studio Building," so called because it served as the headquarters of the artists of Boston and contained the studios of such 19th century artists as Copeland, Griggs, Ordway, Shapleigh and others. In the early part of the century the building was demolished. In 1922 the "New Studio Building" was erected in its place. The trustees of Suffolk University have expressed an interest in relocating the Law School to the site.
Any of your readers who are interested in volunteering or in receiving further information about us should write to me at the Department of History of Art, University of California at Berkeley, Berkeley, CA 94720, or telephone (510)643-9040. Carpe diem: since I will be on sabbatical, we will not be digging in 1995.

Sincerely,
Andrew Stewart
Professor of Greek and Roman Art
Director, U.C. Berkeley Tel Dor Expedition

To The Advocate:

As someone who has been a student for the past four decades, I have followed with interest the recent debate over the future of legal education. Inclusion of an alumni curriculum survey in the Spring 1993 issue of The Advocate suggests that Suffolk University Law School is facing these issues as it grows to national prominence. As a recent alumna I would like to applaud Suffolk University for its fine educational program, and to suggest a balanced approach to growth which would emphasize both traditional legal concepts and more "modern" theoretical scholarship.

The focus of the debate seems to be the continued inclusion of required courses in the upper-class curriculum. If changes are made, some classes such as Wills, Trusts and Business Associations (which includes agency concepts) will face an uncertain future. Presumably these will be replaced with more electives, allowing students to specialize in certain areas of the law. Based on my educational background I would suggest that any changes be made cautiously, with an eye toward remembering the value of the basics.

During my elementary and high school years I was the subject of numerous experimental curriculums. I went to a "school without walls," several schools without grades and one in which all classes were conducted by the students. Fortunately my parents realized that I had seen enough of the modern trend and insisted I attend a very traditional liberal arts college. I spent four years being drilled on the basics; the school I attended had an approximately 75% required curriculum. In the years since I have not regretted a minute of it. While many of my contemporaries were taking "The 1970's as Expressed in Film" I was taking European Literature. In a recent conversation with one of them I realized that, while certainly knowing his actors, he had never heard of Tolstoy.

For many of the same reasons that I value my liberal arts education I also value my Suffolk University Law School education. I have an incredible amount to learn about my profession, yet I feel comfortable with the basics. Although I am now in a litigation practice, I still find that concepts such as trust and agency are an integral part of the lexicon and I am glad I have been introduced to them.

Change can be constructive and growth producing but I urge Suffolk Law School to remember its roots as it approaches this crossroads. Suffolk has traditionally prepared its students for the
“frontlines” of legal practice. Clients are sometimes impressed by publications and theory, but in the end there is no greater service that any of us can do for them than to know and understand law.

Sincerely,
Kimberly Ellen Nelson Winter
J.D., Suffolk, 1993

To The Advocate:

In the fall 1992 edition of The Advocate, Professor Rounds’ “In the Matter of Trusts” makes the point that the needs of the disabled may be well served by a trust, and in a manner with more dignity, cost effectiveness and creativity than can be provided by the state. I wish to underscore the notion that a competent individual or the guardian of an individual with disabilities who has any other options never places himself or his ward in a position of dependency on government. In my practice, which focuses on providing legal representation to individuals with disabilities and not-for-profit organizations which provide special education and human services, the importance of trusts and fiduciary relationships cannot be underestimated.

For those families of individuals with disabilities who have private resources to dedicate to providing a quality of life for the family member with disabilities, trusts provide a creative legal mechanism to collect, preserve and control private resources according to the values and standards of the family.

Planning is the key to maintaining a family member with disabilities in a position of as much independence as that individual can manage and private resources allow. Trusts are one of the most useful planning devices to help the family confronted with a situation requiring long term care. Trusts, if sufficiently funded, can provide for the care required by an individual with disabilities, thus minimizing dependency on the state system with its uncertainties and limitations. If less funds exist, trusts can still be used to supplement the care provided by government in a manner injecting family standards and resources into the ongoing care of the disabled family member. Such care is managed by individuals (trustees) who provide independent perspective and judgment, and are subject to strict fiduciary standards.

Professor Rounds and others writing in response to him have identified numerous ways in which trust law is interwoven into other areas of the law, and how the power of trusts as a vehicle of independence impacts “real problems of life.” It is difficult for me to imagine that a practicing attorney could provide appropriate judgment and advice to clients with disabilities or their families without substantial knowledge of trust law. Obviously knowledge of administrative and regulatory law is also critical in representing individuals attempting to obtain services from government, but everyone confronted with the lifelong dilemma of how best to provide for a family member with disabilities ought also to consider the possibility of that individual living as independent of government as possible.

It portends a profound loss to such clients and to practitioners if the law of trusts becomes relegated to less than priority status in the law school curriculum. This would be particularly ironic at a time when law schools, including, Suffolk, are placing more emphasis on “disability law.” Trust law provides a private solution to many of the problems confronted by the attorney advising clients with a disability-related matter. Suffolk Law School would be ill advised, in my opinion, to eliminate the requirement that students have fundamental familiarity with trust law, given the value of trusts in aiding the private resolution of perplexing problems.

Very truly yours,
Henry W. Clark
McNamara & Clark, P.C.

Daytime bustle on the street and sidewalk in front of the old Tremont Street Studio Building. Can any of our readers determine from the dress of the pedestrians and the street vehicles when this photograph was taken?
A CONVERSATION WITH CHIEF JUSTICE JOHN E. FENTON, JR.

BY PROFESSOR GERARD J. CLARK

ADVOCATE: Judge, what title do you hold now under the Court Reform Act?

FENTON: Under the 1992 Court Reform Act, the title of my position was changed to Chief Justice for Administration and Management for the Massachusetts Trial Court. It used to be Chief Administrative Justice.

ADVOCATE: What's the function of the position?

FENTON: The function of the position is general supervision over all aspects of Trial Court administration. The Trial Court is made up of seven departments, each having a Chief Justice. The function of my position is to supervise all of the departments and to provide the chief justices, judges and personnel of the Courts with adequate resources and personnel to make the system work. I also supervise the offices of the Commissioner of Probation and Jury Commissioner.

ADVOCATE: Does this make you the overall supervisor of all of the judges in the system?

FENTON: In one sense, yes, I work very closely and collegially with the Chief Justices of the departments who have immediate supervisory responsibility over the judges in their departments. In that sense I do have general supervisory authority over all of the Judges.

ADVOCATE: Do you have the right to make personnel assignments? To transfer people from one Court to another?

FENTON: I do have that right as do the Chief Justices of their departments. However, while we have that right under the court reform legislation, the transfer of personnel continues to be subject to rights that are set forth in existing collective bargaining agreements. In other words, if personnel are going to be transferred we must confer with them, their supervisors and also with their duly elected bargaining representatives. Frequently, the seniority of an employee within a bargaining unit will prevail. At this time, I am actively engaged in transferring court officers throughout the system.

ADVOCATE: Which workers under your supervision are unionized?

FENTON: Most employees of the Trial Court belong to one of four unions: Local 6 of the Office and Professional Employees Union (O.P.E.I.U.) represents most support staff and a number of professional employees; all line probation officers and most court officers belong to Local 254 of the Service International Employees Union (S.E.I.U.); court officers assigned to the Suffolk and Middlesex Superior Courts are represented by the Suffolk County Court Officers Association and Middlesex County Court Officers Association, respectively.

ADVOCATE: Do you also have the right to transfer judges?

FENTON: Yes, absolutely. Under the Court Reform Act I can transfer judges from one department to another or to divisions within the same department. We have done that. I can design...
CHIEF JUSTICE JOHN E. FENTON, JR.
Our objective is to fully automate the Trial Court in the next five years, a plan which might cost as much as $50 million.

Land and Housing Court Departments have made significant progress and the Superior Court has a good system in place in three counties. The District Court has a pilot project operating in two locations. Both the Probate and Family Court Department and Boston Municipal Court Department have begun to automate. Despite these strides, we certainly do not have the sophisticated computer capabilities we would like to have. Our objective is to fully automate the Trial Court in the next five years, a plan which might cost as much as $50 million. To accomplish this we need to obtain the necessary funding and we are working with the Executive Branch to develop a plan that will enable us to convince the Legislature that the judicial branch is willing and able to achieve full automation.

Advocate: When you say automate, do you mean simply that the docket and docket entries in each case would be entered into a computer terminal upon filing?

Fenton: That among other things. We’d like to have open information systems which permit vertical and horizontal computerization tied into a central office where necessary. For example, one system would give us a day-to-day indication of how many employees are in each department, the number of people who are out because of illness or on leave, that is, a solid human resources system. A fully automated infrastructure would help us manage our budget better. Case flow management would become much easier in such an environment. Docketing, scheduling and judicial calendaring are, of course, important but there are so many things we could do with automation. We just don’t have that capability now but I am very optimistic about our plans in this area.

One of the problems which I observed when I took this office, was the lack of security in the court system. There was no comprehensive plan to secure the courthouses of the Commonwealth. One of the first things I did was to request the Legislature to provide for a new position, Director of Security for all of the courthouses in this state. The Legislature responded and that position was created. About a year ago we engaged the services of a man who had considerable security experience in the United States Army. He, with his staff, is now in the process of developing a security plan for all of the courthouses of the Commonwealth. It is, of course, fundamental to the establishment of a security plan that my office know how many employees are in each department and the number of people working in the system. Case flow management would become much easier in such an environment. We just don’t have that capability now but I am very optimistic about our plans in this area.

Advocate: Judge, the popular press frequently portrays the courts as inefficient, and badly in need of radical reform, what’s your view on this subject? In the ideal world, how might we improve the administration of justice?

Fenton: It is true that citizens and very often the media indicate that the courts could improve their management capability. I agree with that. That’s one of the objectives that the Legislature had in mind when it enacted the Court Reform Legislation. Money is not everything, but it certainly helps. For several years the courts were badly understaffed because of a hiring freeze that was imposed three or four years ago. People retired in the Clerks’ offices and managers in those offices were unable to fill the resulting vacancies. Cases backed up, staff was demoralized; they had had no economic enhancement for three years. Even though the overall state budget was increasing each year, the amount of resources allocated to the Judicial Branch was decreasing. Five years ago the percentage of the budget allocated to the Judicial Branch was approximately 2.5%. Five years later, that total had decreased to 1.78%.

Five years ago the percentage of the budget allocated to the Judicial Branch was approximately 2.5%. Five years later, that total had decreased to 1.78%.

As the caseload rose, resources to cope with the increased responsibilities diminished. If you put all of those things together, the freeze on hiring, fewer people to do more work, no salary increases for personnel in the system for three or four years, the result might be characterized as stagnation, if not bitterness.

Small claims cases were not being heard at all in some locations. Civil cases were not being heard in as timely a manner as they should have been because more and more judicial time was put into criminal sessions. In the last year, much of that has changed. Working together with Chief Justice Liacos of the Supreme Judicial Court, the leadership in the Legislature and with the help of Governor William Weld, I was able to obtain additional resources for the Judicial Branch.
During the last fiscal year we were able to fill nearly 1,000 vacancies in the Trial Court, unionized employees received a 13% pay increase, non-union staff received a 6% raise in pay, and many deserving employees were reclassified. That’s helped a great deal because the local courts are now staffed more appropriately, and many of them have improved their ability to provide services expected of them. We continue to try to make the system more efficient but my view is that radical reform is not required to accomplish this goal.

ADVOCATE: You mentioned an increase in case load. Has the case load been increasing constantly over the past ten, fifteen years? And if so, can you be a little more specific? Is it just the criminal docket that is increasing or is it domestic or all civil cases as well?

FENTON: The criminal docket has certainly been increasing, but the civil docket also has been increasing in virtually every county and every court department. In the last five or six years there has been a deluge of domestic violence cases. In the last year alone 51,000 domestic violence restraining orders were issued in the various courts of this Commonwealth. These cases are given priority and judges are spending a considerable amount of their time in dealing with them. The kinds of cases in which we see an increase are reflective of societal and economic changes: increases in serious juvenile matters, increased numbers of mortgage foreclosures, evictions and, of course, domestic abuse cases. We have a Judicial Response System. All Trial Judges must serve on the Judicial Response System. Before the Court Reform Act was enacted participation was voluntary. At that time we had about 70% of our judges volunteering, now all trial judges, except those very few that are excused because of some type of illness, must participate after hours in this emergency response system.

ADVOCATE: What exactly is the Judicial Response System?

FENTON: For one week, each trial judge must be available after 4:30 until court opens the next morning to receive telephone calls where emergency judicial intervention is needed. Examples include domestic violence, search warrants, medical intervention. Many of these judges serving on the Response System are actually up most of the night during the week that they are serving on the system. I myself have received 70 or 80 calls when I was on the system. Particularly on the weekends, you’re up most of the night. We have given our judges electronic beepers so they can be paged while they are serving. People who need their services call a local police department, the police department calls a dispatcher at headquarters of the state police, the state police have the judge’s home telephone number, the state police dispatcher will call the home of the judge who is serving on the Response System and will indicate that judicial intervention is needed at a particular police department. The judge will call and take appropriate action. In some cases, judges have to leave their homes in the middle of the night to go to hospitals in their region where they have to hear and take action if emergency medical intervention procedures are required and require judicial oversight.

ADVOCATE: Judge, could you comment on the enactment of time standards, which I guess have been in effect about six or seven years now?

FENTON: Time standards have been in effect now in Superior Court and in the other departments as well. Since they have been in effect, cases are moving quicker through the system. Each case is assigned to a particular track, depending upon the nature of the case. Judges monitor the progress of each case; time limits are imposed for completion of discovery, cases are assigned for trial and are disposed of more rapidly. The considerable backlog, particularly in the Superior Court Department, has been reduced substantially as a result of the application of time standards. Cases which were entered into the system before time standards became effective, have been substantially reduced also.

ADVOCATE: There’s certainly a lot of interest these days in the subject of alternative dispute resolution. Do you see that as part of the mix of solutions to assist the courts in the backlog?

FENTON: There’s no question about the fact that alternative dispute resolution services can assist the courts in resolving some of the problems we’ve been experiencing. The Multi-Door Courthouse program in Cambridge, which was established a few years ago, is doing excellent work in this regard. They have a process where cases are referred out for a case screening, case evaluation, case mediation. Community mediation services at the District Court level in several of the counties have been very successful in mediating many disputes which have been entered in the district court department. The Court Reform Act required me to establish a pilot program implementing alternative dispute resolution services in three counties: Bristol, Worcester and Suffolk. I should also add that the Commonwealth of Massachusetts has an Executive Office of Dispute Resolution which has also been very helpful in resolving many cases outside of the traditional adversary type format. Also, private services exist and many litigants and counsel representing them are resorting to them as well.

The Supreme Judicial Court has been very much concerned about the fact that there’s no comprehensive plan in the Commonwealth for alternative dispute resolution services and that insufficient resources are allocated to these types of services. About a year ago, the Supreme Judicial Court asked...
For one week, each trial judge must be available after 4:30 until court opens the next morning to receive telephone calls where emergency judicial intervention is needed. Examples include domestic violence, search warrants, medical intervention. Many of these judges serving on the Response System are actually up most of the night during the week that they are serving on the system.

Supreme Judicial Court with respect to such services. I expect that in a very short time (certainly by the time this is published) the Supreme Judicial Court will be promulgating those policies, providing for alternative dispute resolution services in the Commonwealth.

ADVOCATE: Continuing our thoughts for court reform and the backlog and the difficulties of managing all of this, do you feel that the Bar has a role to play here or do lawyers in general assist or frustrate the court in their goal to adjudicate cases?

FENTON: I think that the Bar has been very helpful. I know that they've been very helpful to me. I've worked very closely with the leadership of the Massachusetts Bar Association and the Boston Bar Association and many of the county Bar Presidents. They're very much concerned with proper judicial administration in the Commonwealth. Both the Massachusetts Bar and the Boston Bar made recommendations to the Legislature with respect to the Court Reform legislation, which was enacted. I get letters from lawyers frequently offering suggestions about how things might be done differently. Many of the suggestions are excellent. I think the leadership of the Bar has been very responsible for taking the lead, certainly improving the distribution of legal services throughout the Commonwealth.

ADVOCATE: Do you have any comment on the roles of the Clerks in the various counties? As we know they are elected, does your role as Manager mesh with the Clerks?

FENTON: The Clerks in the Superior Court Department are elected as are the Registers in the Probate and Family Court Department. Clerk Magistrates in the District Court Department are appointed for life by the Governor and confirmed by the Council, as are the Clerks of the Juvenile, Boston Municipal, and Housing Court Departments and the Recorder of the Land Court Department. I meet with the leadership of the Clerks' Associations from time to time. We discuss their needs, their staffing requirements and they offer very constructive suggestions about how things might be done differently to move cases through the system. Until recently their biggest problem was that their offices were badly understaffed. As I mentioned before, in the last year we've been able to fill many of the vacancies because of the increased resources that we've received.

ADVOCATE: Judge, I guess in kind of summary of this discussion about your position as the head for Administration and Management, what accomplishment are you most proud of over the past couple of years?

FENTON: I think I'd have to say that working very closely with Chief Justice Liacos, the Legislative leadership and the Bar Association Presidents, to convince the Legislature that increased funding for the judiciary has been essential in enabling the courts to deliver the services that the public requires is the most important goal I have achieved. The Legislature and the Governor now have responded, not in the amount that we would have liked to have had, but they have voted in the last two years, more resources to the Judicial Branch. That's made my job much easier.

Secondly, we have tried to make the central office more responsive to the needs and expectations of our employees and the public. We have revamped our Human Resources Department; revised our affirmative action plan, reactivated a sexual harassment task force, initiated training for hiring authorities to instill sensitivity to issues of gender, racial and cultural diversity in our workplace. Our Planning and Development office oversees court annexed child care services. I have already mentioned our information technology plans. We are working to make our courthouses and our services accessible to persons with disabilities. Our new Office of Court Capital Projects enables us to take a proactive role in the very ambitious capital program in which we are involved to construct new court buildings and renovate our older facilities which are in terrible condition.

Third, I think we've done a great deal to improve the security of courthouses in the Commonwealth. We did something that had never been done before; we hired approximately 105 new Court Officers at one time. When we advertised for those positions we had about 1,600 timely applications.

We did something that had never been done before; we hired approximately 105 new Court Officers at one time.

That number ultimately reached several thousand. We had a job requirement that we preferred persons who had at least two years of experience in security work, police work or correctional work. We had screening panels and we interviewed over 400 of the people who applied. Once we selected the individuals who were recommended to us by screening panels, we ran criminal record background checks on them. We required all of those selected to undergo a very comprehensive medical examination and then we required all of those selected to attend a very intensive educational program. A substantial number of women and minorities were hired. That is not to say that we had not had many good, experienced Court Officers in the system over the years, because we have. However, many of them had not received any training and we
introduced the training concept to the Court Officer Security Program.

Another thing that I'm very proud of, as an educator, is that we've established a very active Judicial Institute which is the Trial Court's training vehicle. The Institute provides training programs for personnel, for judges, and for managers in the system.

We've done a lot in a relatively short period of time, but there's an awful lot more to do. The staff of this office continues to work to try to improve the delivery of services, to provide adequate resources and personnel to do the job that they have to do. And I also say that I'm very proud of the very collegial working relationship that I have had with the Chiefs of the Trial Court Departments; they've been very helpful to me. I'm very proud of the excellent working relationship that I and the staff of this office have with Chief Justice Liacos and the Justices and staff of the Supreme Judicial Court. We're all in this together. My objective, and I know the objective of Chief Justice Liacos, is to do all that we can working together to make the system a better system than the one we entered many years ago.

ADVOCATE: Have you encountered any frustrations in your position?

FENTON: Oh sure, I encounter frustrations everyday. As I mentioned, several weeks ago I asked people in this office to log the number of telephone calls that were coming in. In one day, I received 246 phone calls. The frustration you have is not being able to respond immediately to all of the needs from the people out in the field. Some of these things take time. You run into situations where appointing authorities would like to fill vacancies immediately. We check their accounts and there are insufficient funds to permit hiring. Although we realize that they have needs, we can't always respond as we would like. So there are frustrations on a daily basis. We have to overcome them and balance the frustrations against the rewards. We do the best that we can every day.

ADVOCATE: Judge, your current position makes you pretty much an Administrator. You sat on the Land Court for 17 years. Do you miss "Judging", trying cases, the courtroom?

FENTON: I certainly do. I miss it very much. I was asked to do this job by the Supreme Judicial Court and I agreed to do it. There's no question about it, there are many days where I wish very much that I would have more opportunity to go back and sit as a trial judge. I can't do it because there's no opportunity to do that now in the position that I have.

ADVOCATE: Judge, if we could just shift gears for a moment, you've also been on the faculty at Suffolk Law School for 36 years and there is a lot of recent movement in legal education. Just recently the MacCrate Commission of the American Bar Association has called for reform of legal education in the nature of increased instruction in skills and in values. Do you have any thoughts on that subject?

FENTON: Certainly. My background in legal education has largely been in the areas of teaching the law of evidence at Suffolk Law School. I also have been on the faculty of the National Judicial College in Reno, where I used to go at least twice a year to give lectures on the law of evidence to trial judges of other states. I think that legal skills training is very important. I've thought that over the years that Suffolk Law School has been one of the leaders in recognizing the importance of legal skills training. There are many clinical programs at Suffolk Law School. Suffolk Law School has always had a wide variety of elective courses that are practice based. Our students serve as interns in various Prosecutors' Offices, District Attorneys' Offices, the Attorney General's Office. We've had them in this office.

When you talk about values, and the responsibility of lawyers to measure up to appropriate ethical standards, there's no question in my mind that law schools ought to place increasing attention in that area. Over the years, as a Trial Judge, I have noticed and I believe other judges will concur, that there has been an increasing lack of civility among members of the Bar, particularly in the trial of cases. I've seen things go on in courtrooms among lawyers that would never have gone on ten, fifteen, twenty years ago. Aggressiveness and zealousness in representing one's client is certainly desirable, but outbreaks, name calling, the lack of appropriate decorum,

It just seems to me that there's been an increasing lack of civility and courteousness among members of the bar and I think that the law school ought to place more attention on teaching the ethics and the traditions of the profession, so that law students will become responsible members of the bar and understand the appropriate relationship that should exist between themselves, their colleagues, and the members of the Judicial Branch.

apparent lack of respect of one lawyer for another, are things that many judges never experienced years ago. I've seen situations where lawyers have attempted to call the opposing lawyer as a witness and that presents terrible problems for the court and the progress of the case. It just seems to me that there's been an increasing lack of civility and courteousness among members of the bar and I think that the law school
ought to place more attention on teaching the ethics and the traditions of the profession, so that law students will become responsible members of the bar and understand the appropriate relationship that should exist between themselves, their colleagues, and the members of the Judicial Branch.

ADVOCATE: Judge, perhaps the last thing which might be of interest to our readers, is the position that you held about ten years ago, as Chairman of the committee that was to draft Massachusetts Rules of Evidence. What happened with those rules?

FENTON: Yes, I served as Chairman of the Advisory Committee after United States District Court Judge David Mazzone, who was the first Chairman, assumed his District Court position. I'm very proud to say that Professor Charles Burnim of Suffolk Law School was selected, on my recommendation, to be the Reporter for that Advisory Committee. After working for more than three years the committee recommended to the Supreme Judicial Court that Rules of Evidence be codified in Massachusetts. The recommendations of that Committee largely tracked the Federal Rules of Evidence which had been in effect since 1975. We felt that certain of the recommendations we had made, actually improved upon certain provisions of the Federal Rules. However, the Supreme Judicial Court had those proposed rules under consideration for a lengthy period of time. The Supreme Judicial Court ultimately issued an order indicating that they were not disposed to codify evidence law in Massachusetts. They felt that the Federal Rules had not brought about the consistency of interpretation among the various Federal Circuits, and the Court concluded that it would be better to modernize evidence law in this Commonwealth on an incremental, case by case, decisional basis. The Court encouraged advocates and trial judges to cite the proposed Massachusetts Rules of Evidence and they would evaluate issues of evidence law within the context of a particular case. They have done that many, many times in the last several years. Read the decisions of the Appeals Court and the Supreme Judicial Court and you will find those decisions replete with citations to the proposed Massachusetts Rules of Evidence. But there's no codification yet; more than thirty of the states have codified their evidence law - we have not done that. However, improvement has been made and we have updated our evidence law by the decisional process. I want to applaud the considerable contribution that Professor Burnim made to that massive effort. He guided the Advisory Committee with great skill and distinction.

ADVOCATE: Judge, as we've said, you've been at Suffolk almost thirty-seven years, what do you think of the Law School?

FENTON: I think it's a great law school. It certainly is quite different from when I started there back in 1957 shortly after I came out of the Judge Advocate General Corps of the Army. The faculty has been enlarged. The law school has a substantial number of extraordinarily capable men and women on the faculty. The number of elective courses has expanded tremendously. The student body is outstanding. The admissions process has been improved. An increasing number of minorities attend the law school. It's great to see the number of women that are now law students. Certainly the School's facilities have been dramatically improved. There are many excellent publications including the Law Review of which I was the first faculty advisor. I think the Moot Court Programs are outstanding with many of the teams having gone on to win national recognition. I hear judges and lawyers talking about the excellence of the publications that are coming out of Suffolk Law School. It's a great school. Certainly its Administration has been improved. My good friend who started at Suffolk Law School about a year before I did, David Sargent, is now the President of the University. I think he gave great leadership to the school in the years that he was Dean. He has been succeeded by another good friend, Paul Sugarman, with whom I served in the Judge Advocate General's Department of the United States Army. Dean Sugarman has continued the standard of excellence that Dean Sargent began. Suffolk Law School graduates over the years have made tremendous contributions to the bench and the bar of this Commonwealth and to the legal profession and the judiciary in a number of states. Take a look at the Massachusetts department Chiefs now. Chief Justice Zoll of the District Court Department is a graduate of Suffolk Law School; Chief Justice Daher of the Housing Court Department is a graduate of Suffolk Law School; Chief Justice Steadman of the Superior Court Department is a graduate of Suffolk Law School; Chief Justice Tierney of the Boston Municipal Court Department is a graduate of Suffolk Law School; and Chief Justice Cauchon of the Land Court Department is a graduate of Suffolk Law School. On the Appeals Court Judge Charlotte Peretta is a graduate of Suffolk Law School. Many of our graduates also serve with distinction as trial judges in courts of this state and those of many other states. If you examine the District Attorney's offices, the leadership of the Bar, the Legislature in this and other states, you will find that there are many graduates who are in leadership positions. For example, in Massachusetts, Representative Salvatore DiMasi is the Chairman of the House Judiciary Committee and Senator Cheryl Jacques is the Chair of the Senate Judiciary Committee. We've turned out people who have made tremendous contributions at the local, state and the federal level. While I think Suffolk Law School has made tremendous improvements through the years, I hope it never forgets its roots. I think it has an excellent faculty and that it continues to turn out very well qualified graduates. I am exceedingly proud of my long association with Suffolk Law School and I hope it continues. It is an honor and privilege to serve as a member of the faculty and have the opportunity to teach so many fine men and women.
s the government ready?,” asked the judge.

Well hardly, I thought to myself, but the words came out, “Yes, your honor,” anyway. My first trial was underway. Less than a week before I had completed a two week intensive training program for a group of new Assistant United States Attorneys (AUSAs). I was a “Special Assistant,” one of ten in our class of thirty attorneys. We “Specials” were on temporary leave from our respective government agencies, there to serve for several months prosecuting misdemeanor crimes in the Superior Court for the District of Columbia. The remaining members of the class were permanent new U.S. Attorneys. At 41 years old this was indeed a very big change from a law career which had consisted entirely of administrative law.

I was by far the oldest trainee in my group. Though I had prosecuted administrative trials for the Department of Labor, the atmosphere, rules of evidence, and pace in that setting were of a very different and less demanding order. And there was the jury. On many occasions I had mused over what it would be like. Once, in an empty courtroom, I had stood in front of the jurors’ chairs to imagine the experience. For me there was an analogy between doctors and lawyers. Doctors who never do surgery are plainly still doctors, but let’s face it, it’s the surgeons who face the real stress, whose metal is tested. So too, as I saw it, for those doing jury trials, even misdemeanor trials. This story is about my experience.

Though I had watched a trial a day earlier, “second chaired” as it is called, watching never amounts to doing. “What one has not experienced, one will never understand in print.” Isadora Duncan. I had read several texts on jury trial practice over the years but now the reading and the watching were over. Instead of Jeans, Keeton and Mauer on voir dire, it was Moran doing it. In the District of Columbia Superior Court the prosecutor and defense attorney get to participate in voir dire. The judge first asks some general questions of the entire juror pool. For those who respond affirmatively to these, individual questioning follows at the bench. After the judge posed some additional questions to the potential juror, the defense counsel and I had our turns. Now a peremptory challenge and one for cause were tangible to me. More than any other impression, the questioning during voir dire brought home to me the impact of the amount of crime in the District and its effect on lives, in a way no newspaper recounting could. “Have any of you ever been the victim of a crime or had a relative who was?,” the judge would ask. Many hands from the juror pool would shoot up. “Do any of you know someone who is now or has served time in prison?” Again, a significant number of hands would be raised.

This first trial of mine was a drug case, involving crack
victim worked showed that her husband had arrived at the pregnant woman's place of work on the day of the assault. Yet the building entry records where the defendant took the stand, he admitted visiting her office on the day of the assault and his frequent telephone calls to the victim's office, and the police officer who arrived at the scene after the assault. There were no eyewitnesses to the assault, though several witnesses placed the defendant at the scene. The victim ended up needing emergency room treatment. The defendant didn't deny that the woman was pregnant by him, but his version was that it was the woman who was unwilling to end the relationship. Yet, taking the stand, he admitted visiting her office on the day of the assault. Though much larger than the woman, he claimed that in fact she had attacked him, jumping cat-like on his back, and hurt herself falling off his back, striking her head against her desk as she landed. Inconsistent with this claim, he left the office without summoning help for her. He could offer no reason for leaving without getting help.

The defendant's wife also took the stand in support of her husband's claim that it was the victim who was the harasser. Making matters more interesting, his wife was a police officer in the District. Though aware that her husband had fathered the victim's child, she too claimed it was the pregnant woman who was unwilling to end the relationship, not her husband. In trying to show that the pregnant woman was the harasser, the officer claimed that the woman called their house and spoke to her husband at 8:50 A.M. on the day of the assault. Yet the building entry records where the victim worked showed that her husband had arrived at the pregnant woman's place of work at 9:00 A.M. Since the defendant's home was over ten miles from the pregnant woman's work, the officer could not have been telling the truth. Her husband could not be in two places simultaneously.

Even the defendant's mother took the stand. Though she could offer nothing about the events on the day of the assault, her crying performance, which began right after she stated her name, was sufficient to cause the judge to excuse the jury while she regained her composure. Remarkably, she was completely composed after that. With no firsthand knowledge about the assault, she claimed that the victim had been the harasser. Given her crying jag, her advanced age, and her total lack of knowledge about the day of the assault, I asked her just one question: "You're the defendant's mother, aren't you? Then I said: "I have no questions for you."

I was very satisfied with my closing argument; it lasted nearly an hour and I hammered away at the many inconsistencies in the defendant's story and the unbelievability of his wife's testimony. While I only noted that a mother has to try to help her son any way she can, I took aim at the story of the defendant's wife. A lifelong District resident, a police officer there for years, she was unable, during my cross-examination, to give any estimate of the distance between her home and the pregnant woman's place of work on Constitution Avenue, one of the most well-known streets in the District. This was significant because of her adamant claim that the victim had telephoned their home at exactly 8:50 a.m., harassing her husband on the day of the assault.

After the closing I was pumped with adrenaline and confident that I would get a conviction, but the jury returned a verdict of not guilty. I could not believe it. Even the judge looked dismayed.

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Upon announcing their verdict, no one on the jury would look at me, and this was significant. In the Superior Court, unlike the neighboring Federal District Court, jurors may, if they wish, talk to the prosecutor and defense attorney after their duties are completed. I waited patiently outside the courtroom to hear why they acquitted, but as they entered the corridor not one would acknowledge my presence, let alone talk to me. I was baffled. That defendant had been exposed, yet not convicted. Rather than feeling deflated, as I was with my first trial, this time I felt aggrieved. The jury having departed I then returned to the courtroom and tried to explain to the victim, as best I could, that juries are unpredictable and that now it was in her interest to put this behind her, move on with her life and continue to avoid the defendant. Back at the office, a supervisor with long experience told me that boyfriend assaults like these, especially those involving wives and girlfriends, often resulted in no conviction. Despite the judge's instructions to the jurors that they were to determine only whether the defendant assaulted the woman, they mete out their own sense of moral justice. The defendant had endured enough, the pregnant woman shouldn't have been involved with a married man, the wife and mother did not need additional grief...all issues outside of their province.

The trial had lasted three days and after that plus the mistrial I was ready for a respite. Fortunately one was at hand. U.S. Attorneys in the misdemeanor section have a rotation of two weeks
on jury trial duty, then two weeks "off." The "off" refers only to being off from jury trials. The pace when not on jury trial duty never lessens, only the settings. With rare exceptions, my work involving administrative law was a 9 to 5 existence. Now it was not less than 7 to 7 and at least 8 hours on the weekend. With this schedule I was sure that my basal metabolism had been altered. Yet, once I got used to the schedule I was generally less tired than before. To appreciate the pace you need to know that each attorney

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in misdemeanors has a caseload upwards of 125 cases. In the District nearly 16,000 misdemeanor cases were filed in 1991. Twice a week a total of approximately a dozen new cases would be added to your files. Hopefully you end up disposing of about the same number that week so that no more ground is lost.

You also need to know that a misdemeanor assistant is a one-man band. You do everything by yourself, except type. The hours remain the same during non-trial weeks, but the time is spent trying to catch up on some of the paperwork you could not get to while on jury trial duty, and on other duties, as assigned. For each case added to your personal docket the AUSA must study the new file to see what needs to be done. The Assistant who first set up the file when the charge was originally made may have been thorough....or not. Some files are very sketchy about the alleged events and others, being handwritten, are partly illegible, meaning in either event that witnesses will have to be reached right away before any further steps can be taken. Fortunately most of the time the file is in decent shape and the other steps can be initiated. The things that typically need to be done to prepare each case for trial are numerous: drug analyses must be ordered, and results sent to defense counsel within a certain time frame to avoid having the chemist appear at trial; arrangements must be made for defense counsel to have informal discovery; responses need to be drafted for all motions; "radio runs," that is to say, tape recordings of any police conversations made on their radios which pertain to the defendant must be ordered and the tape copy provided to defense counsel for review; all subpoenas must be sent out to witnesses, including the police; witnesses must be contacted to review their testimony when there are questions prompted by the file; and all property pertaining to the crime and held by the police must be ordered in a timely fashion or it will not be present on the day of trial.

In the meantime the AUSA is taking about fifteen telephone calls per day from defense counsel, the court, the police and other witnesses, as well as from supervisors and colleagues in the office. "Thanks" to technology each message gets stored, on a centrally operated computerized telephone system. Though you would like to avoid returning some calls, at least for a few days, the system makes it difficult to do that. The old paper memo system seemed less insistent about making the return call. Each time you check, the computer reminds you how many messages have gone unreturned so there's an incentive not to let the backlog grow too much. It's not that you don't want to return the calls, it's just that there is always a shortage of time and more often than not making the calls doesn't end up reducing your workload, it adds to it. On a typical morning you arrive to find that a half dozen new messages came in overnight. These get added to those you have left in storage from yesterday, unresolved because the persons you called back were not in when you tried to reach them. When you return to your desk at lunch time, you find that at least six more calls have been logged. You listen to them all in case one needs to be returned right away.

In addition to preparing assigned cases for trial, an Assistant is given other duties during the "off" weeks from jury trials. One of these is "misdemeanor papering." That is the term applied to the preparation of everything necessary to assemble the file so that it may be sent upstairs to the AUSA who is in the arraignment courtroom dealing with those defendants who have recently been arrested, as the issue of probable cause is determined and bail, and a status hearing date are initially set. Papering begins at 8 a.m. Occasionally you also get a Saturday papering assignment. When you arrive there are a number of police officers waiting for you. They've just finished the night shift in which the arrests were made. Tired from being up all night most still maintain their composure but some are impatient or agitated as you write down the facts surrounding their arrests and assemble the appropriate forms for the file. By the time the previous night's "lock-ups" have been papered it's after 3 p.m. That can only mean it is time to get back to the office and get your primary work done. The Chief of Misdemeanors

"Success in this job is determined by your ability to properly determine which things to let slide."

had told us, amicably, in our training session: "By the time you finish misdemeanors your head will be spinning!" Now I knew what he meant. It was not complexity but the sheer number of things that had to be done. As another AUSA put it: "Success in this job is determined by your ability to properly determine which things to let slide."

Another "off week" duty is the "witness room." This is the communications post for your colleagues who are on jury trial duty that week. Each morning the Assistants in each of the six misdemeanor courtrooms call down from a telephone located on the prosecutor's table. The calls come in a whispered tone, sometimes with an edge of panic or agitation, as the Assistant in the courtroom tries to find out from the two Assistants on duty in the witness room which cases on the trial calendar for that day have the witnesses needed for trial, the "essential" witnesses. It's the norm for at least some witnesses not to show up, even, at times, police witnesses. The attorneys on assignment in the witness room tell the trial attorneys upstairs which witnesses are missing, then they try to telephone those witnesses and get them to the courtroom as fast as possible to avoid dismissal of the case. For a few hours, with the telephones constantly ringing, the witness room resembles a public television fundraiser. Each day many cases get dismissed because essential witnesses don't show up on the day of trial. In 1991, 2121 misdemeanor cases were dismissed, a figure representing over ten
In misdemeanors you’ve got about thirty minutes from the time the case is called to the time when jury selection begins. This is panic time as you try to get the names and facts straight.

percent of the total number of cases up for disposition.

Meanwhile, in the courtroom, defense counsels try to get a glance at the prosecutor’s witness list to see or sense whether the government can go to trial. If they detect that there’s a witness problem for the prosecutor, some defense counsel will then announce that they are ready for trial, insisting that the trial go forward that day, knowing that the government is scrambling to find an errant witness. The personality of the judge plays a role but typically the government will be given ten minutes or so to try to collect their witnesses. After that time elapses the case gets dismissed if the government is not ready. If the government’s witnesses do show up, without a blink defense counsel will frequently turn around and agree to a plea. Part of the game. There is a downside to this defense maneuver however. Some AUSA’s would offer an attractive plea to settle the case early on, but stick to their admonition that delay in accepting a plea means it is withdrawn if not accepted within a few weeks of completing the informal discovery session and a less favorable one put in place. Although the government is free to bring a dismissed case again, as a practical matter a dismissal means the case is over. There are just too many others in the hopper to be processed. An exception to this rule is a case which has some unusually repugnant aspect to it. However, in all instances the Assistant must get a supervisor’s approval to refile a case.

Still another assignment given to Assistants while off jury trial duty is non-jury trials. Actually this is a welcome assignment. It is also a confidence booster for newcomers because, unlike misdemeanor jury trials, the non-jury trial win rate is very high and the trials very brief, usually less then an hour. Yet you do get to practice direct and cross-examination skills. Heard before commissioners or magistrates, these cases principally involve prostitution or petty theft. The thefts evoked sympathy from me because typically they involved some hapless soul who has tried to steal some food from a grocery store, and then got nabbed by a security guard. Usually the store’s security takes a Polaroid of the accused who is made to pose holding on to the items claimed to have been stolen. There sits the defendant, in color, with five packages of meat on a table in front of him. Security guards are reliable witnesses. Unfailingly they show up for trial. Defense counsel attempts at defense are pretty lame because the cases are so strong. Usually there’s an effort to show that the defendant had not actually left the store. Security guards know their business; the defendants are always apprehended just after the shoplifters leave the store.

The prostitutes fare no better. All the arrests are by undercover vice officers, always working in teams of two so they can corroborate each other. Corroboration is not essential but it does strengthen the government’s case. The testimony is a retelling of a conversation which cannot be misunderstood: sex for money. The details of the services to be provided and some haggling over the price are elements of the prosecution’s case. Sometimes the case is bolstered by a colorful, incriminating remark made by the accused after being arrested. A few AUSA’s, feeling that prostitution should not be considered a crime, would fail to do the paperwork after being assigned such cases and thereby cause a dismissal. On the other side, a small number of Assistants recoiled at prostitutes.

For the most part the women seemed to take the arrests in stride; arrests and the fine which accompanies a conviction are accepted as part of the cost of the business they’re in and some of them even accept it with humor or with chagrin for not having their instincts alert them to the fact that the “customer” was actually the police. Usually the police make these arrests by walking into a known “red light” district but occasionally they make it a little more dramatic, by borrowing a taxi cab. In this uncomplicated “sting” type operation there are two officers in the cab, one driving and the other posing as the customer. The women walk right up to cars that drive in the zone so arrests are not difficult to achieve. At other times a female officer will dress the part and nab the customer instead. Sometimes no arrest is made. Stories abound. One officer told me that he once found a male customer in a car in the act of being serviced by a prostitute. In the back seat, asleep, was an infant. The prostitute was told to scam, while the customer was given a lecture, a warning, and a well deserved kick to the buttocks, while the infant slept through it all.

Fresh from a string of convictions in the non-jury arena, I was ready for my second stint in jury trials. There’s a bit more you need to know about misdemeanor jury trials. Each morning as you face

![Image]


16 theAdvocate Volume 24 No. 1 Fall 1993
but as the officer who watched the events walked over to the bush met at the fence, then approached the group, telling the defendant to retrieve the plastic bag the defendant took flight, emptying his place, the stash site as it is called. After observing this, the officer provided the week before by the team member who prepared the night in an alley of an area that was a predominantly black neighbor- hood. The officer explained that the woman was a heroin addict never left the drug use scene. This was brought home to me when, for AUSA's, I observed a white woman walking alone after mid-

night in an alley of an area that was a predominantly black neigh-
borhood. As part of a police ride-along program in misdemeanors you've got about thirty minutes from the time the case is called to the time when jury selection begins. This is panic time as you try to get the names and facts straight. In about an hour, with a jury selected, you'll be delivering an opening statement, trying to sound as if this case is one you've been preparing for weeks.

The subject of my next trial intrigued me. The defendant was charged with possession of heroin. I had thought from reading the newspapers that drug use today was primarily limited to cocaine, marijuana and some hallucinogenics, but I learned that heroin had never left the drug use scene. This was brought home to me when, during an evening of riding in the back seat of a police cruiser in a dangerous part of the city, as part of a police ride-along program for AUSA's, I observed a white woman walking alone after midnight in an alley of an area that was a predominantly black neighbor- hood. The officer explained that the woman was a heroin addict in search of a "fix," which outweighed all concern for risks to her safety. Now here I was in court holding a small bag of the heroin that I would be introducing into evidence shortly. In my trial two officers were patrolling a tenement area known for drug use. After observing a group of people milling about a courtyard, one of the officers left the patrol car and hid behind a fence. There he watched the defendant leave a group of people and saunter over to a bush where he pulled out a plastic bag. The defendant then brought it over to the group, displayed it and then returned it to the hiding place, the stash site as it is called. After observing this, the officer then radioed for his partner to join him to make an arrest. The two met at the fence, then approached the group, telling the defendant and the rest of the group not to move. All did as they were ordered but as the officer who watched the events walked over to the bush to retrieve the plastic bag the defendant took flight, emptying his conduct. However, the judge would not allow the officer to testify about the defendant's unloading his money as he ran. In the judge's view it was not relevant to the charge since the defendant was only charged with possession of heroin, not its sale. The decision of the charges to be filed against a defendant was made at the time of arrest. In retrospect, ironically, a felony charge might have been easier to prove because the jury would have heard about the dumping of the money. However, had it been admissible another problem still loomed because the police did not have the money at trial anyway. The money had not been ordered from the police department's property room by the Assistant who prepared the file. That adverse ruling was to become significant because when the defendant, who was black, took the stand he claimed that he ran because he was afraid of police brutality at the hands of the two black officers who were making the arrest.

After deliberating for several hours, the jurors came back with another "not guilty." At least this time they were willing to talk to me in the hall after being released from their duties by the judge. I had heard from other Assistants that the thought processes of jurors could defy all reason, but now I was experiencing it firsthand. Several jurors explained that they thought the defendant was guilty but since only one of the two officers saw the defendant handle the drugs (the other was in the squad car until his partner radioed him) they decided not to convict. Somehow they had, on their own, imposed a requirement that two officers had to witness the event. The trial game is interesting. The jury had just admitted to acting inconsistently with its belief.

I also met with the defense counsel and his client. Now the defendant, a man in his early twenties, who had just taken the stand and sworn that he had nothing to do with drugs and ran only out of fear of being beaten by the police was effectively admitting that he was indeed guilty. As he stood next to his defense counsel, he nodded with agreement that he was fortunate not to have been convicted and, having learned his lesson, now he was definitely going to stay out of trouble. Strange reaction from a man who had just claimed his innocence on the stand. As odd as it may seem to say about a heroin seller, except for his occupation, he was in fact a likeable fellow. Diminutive, at about 5'5", with a skinny frame, he had a friendly, innocent looking face. There was no hardened crimi-


criminal, dangerous demeanor about him. I had seen a lot of unsavory types about the courthouse so I had a frame of reference. I felt I was looking at someone who, perhaps because of growing up in a tough neighborhood, had taken a wrong turn in life. No doubt this innocence about him worked in his favor with the jury when he took the witness stand. Maybe something positive resulted from the trial after all, I thought to myself. A little over a year later I learned otherwise. The defendant had made the Metro section of The Washington Post, dead from gunshot wounds in another of the continuing battles among the city's drug dealers over sales territory disputes.

My next jury trial finally brought a guilty verdict. To say this...
was a relief is an understate-
m ent. Some AUSA's serve their
entire stint in misdemeanors
without a jury trial win, but
obviously no one wants that
kind of distinction. This is not
to say that winning is all that
matters. Our training program
included discussion about the
ethical responsibilities of prosecutors. The Chief of the
Misdemeanor Section took this responsibility seriously. He always
listened when AUSAs advocated dropping a case. In one of my
cases, involving a physician charged with improperly writing pre-
scriptions for controlled substances, the chief agreed with me that
in light of additional evidence presented by defense counsel, the
case should be nolle prossed. In this trial the defendant was
charged with the possession and sale of marijuana. Electing to take
the stand, he offered a curious defense: smoking marijuana was
part of his religion and while he admitted using the product fre-
quently, he wouldn't be caught dead with the marijuana I had
introduced into evidence... it was of inferior quality, far below his
standards. He could tell this by its color, and after examining the
marijuana I had introduced into evidence, with the care of a jewel-
er evaluating the value of a gem, he was sure it wasn't his. He also
maintained that, while he was a regular user of marijuana, he pur-
chased only enough for one smoke each time, not the large bag
that had been introduced. Later I argued that the claim made
about the one smoke purchase made about as much sense as a tea
drinker going to the store and buying only a single tea bag each
time. The defendant was convicted. The wireless curse was lifted.

During my next break from jury trials I was assigned some
duty time with the Citizens Complaint Center, another AUSA
misdemeanor responsibility. The Center deals with conflicts
which have not yet escalated to the point that a criminal com-
plaint or indictment is warranted. The concept behind the Center
is that perhaps criminal conduct can be avoided through timely
civil intervention and informal counseling. Chiefly involving
domestic conflicts between couples of all different kinds of sexual
orientation, the center mediates the disputes. AUSAs hear each
case's story, separately, then try to resolve the matter. In this set-
ting the U.S Attorney acts as a de facto judge. Typically a stem
lecture to one side, and at times to both sides, solves the matter.

The potential for matters getting out of hand is taken seriously.
Parties to disputes pass through an airport-style metal detector
prior to entering the Center and a gun-toting officer stands ready
outside the conference room door should the need arise. If the sto-
ries presented to the Assistant clearly amount to criminal conduct,
an arrest warrant must be obtained. In one instance before me, a
woman related, with great detail, about her boyfriend chasing her
around her apartment with a large kitchen knife, and then corner-
ing her on the unit's balcony. With the knife blade pressed against
the woman's throat, he threatened to kill her. According to her
story he then became momentarily distracted and she escaped,
going directly to the police, who referred her to the Complaint
Center. After retelling her story to me and then having a girlfriend
who witnessed the event confirm the complainant's story, I was
convinced that she was in genuine danger. I knew it was also possi-
ble that the couple could reconcile, but I kept thinking that I
could be reading about a stab-
b in the next day's newspa-
per, so I took action.

In these situations a crim-
nal charge is decided upon and
then the AUSA guides the com-
plainant through the steps need-
ed to have the judge determine the existence of probable cause and
issue an arrest warrant. I did that and a plan was established for the
woman to stay at a friend's apartment until the boyfriend was
arrested. We had been warned in our training that it was common-
place for a woman to relate such an attack or beating, seek his
arrest, then promptly make up with the boyfriend. At that point
the woman is equally adamant that she wants her man back and
that their domestic discord problems have been solved. The attacks
have usually occurred, but the reconciliation puts that all in the past
for the victim... until the next time. When I served in the
office, it had recently instituted a "get tough" policy on these mat-
ters. We would no longer drop the prosecution simply because the
complainant no longer wished to pursue the matter. The truth of
the matter was, however, no matter what the policy, the case was
dead once the complainant had a change of heart. The best we
could do then was inconvenience the couple by making them show
up for the misdemeanor trial. My case turned out to fit this pattern.
Within a few days of the arrest I was getting two to three calls a day
from the woman. She wanted the matter dropped, she and her
boyfriend were very happy together now. I could not oblige how-
ever, thereby instantly transforming myself from the role of rescuer
and "do-gooder" to the thorn and current source of their relation-
ship problems.

In another instance of problems between couples a husband
explained to me, in response to his wife's complaint that he had
struck her, that indeed he had done so but only because she would
not quit her crack cocaine habit and because she was having sex
with another man, her boss. He delivered his side of the story
earnestly and I thought believably. The admonition that there are
two sides to every story was brought home to me frequently at the
Citizens Center. When it was the wife's turn to tell her side of the
story privately, she admitted that, yes, she was using drugs, but she
added that both she and her husband had a drug habit for crack.
To that she also added that indeed she was having sex with her
boss. However, this too had another side: she was prostituting her-
self as the means of supporting both her drug habit and her hus-
band's. Thinking to myself that now I had heard it all, the woman
added an assertion that was completely unexpected: her husband
was sleeping with the boss too! Stories like this are not unusual at
the Complaint Center, and you realize that problems of this magni-
dude are not about to get resolved in that forum. You apply the
Band-Aid: recommend sources for drug and family counseling,
warn the husband that he could face assault charges, and call in the
next case.

After nearly five months my stint as a Special Assistant U.S.
Attorney was completed; it was time to return to administrative
law. I maintained no illusions that my brief experience with crimi-
nal trials had transformed me into a savvy prosecutor. On the con-
trary, I recognized that I had barely gotten my feet wet. Still the
experience I did get was intensive and worthwhile. I would not
have to spend the rest of my career speculating about my ability to handle jury trials. The mystique associated with them was behind me. Although I had adapted to the six days a week schedule, the pace left almost no time for any other activities in my life. Even Sundays, a day which I usually did not work, were left for resting up for the week ahead. It is no exaggeration to say that the AUSA job consumes your life. Although I would miss the excitement, for the time being I looked forward to resuming the non-work aspects of my life but did not rule out returning to criminal trial work.

Associate Dean Charles Kindrejan lectures to the adjunct faculty on October 7, 1993. Suffolk is the first law school to provide an annual orientation course for its adjunct faculty.
On June 15, 1993, the Supreme Judicial Court of the Commonwealth of Massachusetts ruled in *McDuffy v. Secretary of Education* that the Commonwealth had breached its state constitutional duty to provide an education for all of its youth. In a fascinating, eighty-page opinion written by Chief Justice Liacos tracing the commitment of the Commonwealth to education since the early seventeenth century, the Court declared:

＞The Commonwealth has a duty to provide an education for all of its children, rich and poor, in every city and town of the Commonwealth at the public school level... designed not only to serve the interests of the children, but, more fundamentally, to prepare them to participate as free citizens of a free state to meet the needs and interests of a republican government, namely the Commonwealth of Massachusetts.

In so ruling, Massachusetts joins the ranks of at least ten other states which have established some state constitutional protection in the area of public education.

1. HISTORY OF THE McDUFFY LITIGATION

The *McDuffy* litigation has pursued a somewhat labyrinthine path. The original lawsuit challenging the unequal financing of public schools in Massachusetts was filed in 1978 as *Webby vs. Dukakis*. Styled as a complaint, and request for class certification before the Supreme Judicial Court, *Webby* was halted when the Legislature amended Chapter 70 of the General Laws a few months later to provide some funds for special educational needs and partial equalization of school expenditures throughout the state. *Webby* then remained dormant until 1983, when discovery commenced. Again stopped by state legislative action to equalize funding, this time the passage of Chapter 188 in 1985 as trial was about to begin, the case was inactive for five more years, when it was refiled in 1990. According to the plaintiffs, the expectation of equalized funding envisioned by Chapter 188 did not materialize, leading to the reactivation of the case (Brief of the Plaintiffs at 5).

This 1990 action, now called *Murdock v. Dukakis*, was brought on behalf of sixteen students who claimed that the state school financing system violated the Massachusetts Constitution; that they received an inadequate education in each of their respective school districts; and that the financing provided to their schools was also below an acceptable level. (It might be noted here that in 1990, Massachusetts was forty-fifth in the nation in the provision of state-supplied school funding.) The plaintiffs' sixteen districts included the very low-funded districts of Brockton, Leicester, Lowell, and Winchendon. The plaintiffs sought not to have funding equalized, but a declaratory judgment that their state constitutional right to an adequate education had been violated by the overall state financing scheme for public education.
Meanwhile, another somewhat similar suit on behalf of students in the western part of the state had been filed in 1989. Aspects of this suit, Levy v. Dubakis, were transferred to the Supreme Judicial Court for Suffolk County in 1990. In 1991, plaintiffs in the principal case filed a Second Amended Complaint, renamed McDuffy v. Robertson. The common defendants in McDuffy and Levy were the Board of Education, the Commissioner of Education, the Treasurer and Receiver General, and the Governor.

"[T]he Commonwealth has a duty to provide an education for all of its children, rich and poor, in every city and town of the Commonwealth at the public school level...."

The McDuffy plaintiffs also named the Secretary of the Executive Office of Education, while the Levy plaintiffs sued the Department of Education. The Governor was dismissed from both actions because of a lack of jurisdiction.

Before a single justice, Justice Abrams, the parties filed exhaustive stipulations of fact in 1991 and 1992 and both cases were reported on the stipulated record to the full Court in December of 1992. The Levy plaintiffs agreed to adhere to the record and briefs of the principal case and to be governed by its outcome. The stipulations included statements from former state education officials and facts concerning funding, staffing, curriculum, facilities, etc. in the plaintiffs’ districts and in the three high-wealth “comparison” districts of Concord, Brookline, and Wellesley. The parties agreed that the facts concerning the four districts of Brockton, Leicester, Lowell, and Winchendon could be surrogates for all of the plaintiffs’ sixteen districts, while the three comparison districts would be deemed typical of those Massachusetts school districts in the top quartile of school spending. The differences revealed in the record between the education offered in the plaintiffs’ districts and in the high-wealth comparison districts were striking. At least forty groups weighed in as amici, ranging from Jonathan Kozol to the Trustees of Boston University on behalf of the Chelsea public schools. The scene was set for a major legal ruling.

II. OVERVIEW OF NATIONWIDE SCHOOL FINANCING LITIGATION PRIOR TO McDUFFY

Any discussion of state school financing challenges must begin with San Antonio Independent School District v. Rodriguez, the 1973 U.S. Supreme Court case which both ended and began this movement.

In San Antonio, students from public school districts in Texas with very low per-pupil expenditures challenged the constitutionality of the state’s school financing scheme, which was based on the traditional local property tax model. Their challenge succeeded at the lower court level. Notwithstanding great disparities in inter-district expenditures, the scheme was found by the United States Supreme Court not to violate equal protection. The Supreme Court ruled emphatically that there is no fundamental right to an education nor is wealth (i.e., poverty) a suspect class. Accordingly, the Court applied only a rational basis test to the property tax scheme, rather than a compelling state interest test, finding that the permissible state interest of “local control” was rationally related to the means used of local funding. Some of the dissenting Justices queried whether even a rational basis standard was met, although their analysis would have led them to apply “careful judicial scrutiny” and find violations of equal protection.

The Rodriguez case was the death knell for what had been an inceptive movement to reform state educational financing schemes. According to one commentator, “the general consensus was that the United States Supreme Court would uphold the Rodriguez decision.” At least partially in light of this fear, eleven states had modified their school financing programs during 1972-1973.

Amazingly, prior to this time, states had increased their share of local schooling expenses by only twenty percent during the entire twentieth century.

Since relief at the federal level was not to be found, the attention of law reformers naturally turned to the only available avenue of redress: protection for public education found within state constitutions.

A variety of legal approaches developed within the context of these state constitutional challenges to public school financing systems. An earlier model successfully used was frequently the state analogue of the federal arguments struck down in the Rodriguez case: wildly unequal funding for schools within a single state violated state equal protection guarantees. An example of this approach is found in Serrano v. Priest, a California case which was being tried on both federal and state equal protection grounds when the United States Supreme Court ruled in Rodriguez. Ultimately, the California Supreme Court utilized only the California Constitution to decide that “district wealth” was a suspect classification and that education was a fundamental right. In essence agreeing with the dissenting Supreme Court Justices in Rodriguez, the California Justices applied strict scrutiny and deemed the state’s interest not compelling. The original Massachusetts Webby litigation was filed when this litigation paradigm (violation of state equal protection guarantees) was dominant, in 1978.

An alternative national legal theory to state equal protection notions was one which found a state constitutional duty to educate in the language of the state’s constitution, frequently within an “education article.” This strategy was used successfully, for example, in West Virginia in Pauley v. Kelly, 255 S.E.2d 859 (1979), and in Kentucky in Rose v. Council for Better Educ., Inc., 790 S.W.2d 186 (1989). It is within this latter legal context (a state-based right to an education) that the Massachusetts McDuffy case was re-filed in 1990 and ultimately ruled upon in 1993 by the Supreme Judicial Court.

III. THE McDUFFY OPINION

The plaintiffs in McDuffy contended that the Massachusetts state financing system caused them to receive an education which was not “adequate.” The Commonwealth of Massachusetts was mandated, they argued, to provide them with an “adequate” education pursuant to a provision in the State Constitution, Part II, c. 5, § 2. In making this argument for a state-based right to an education, the plaintiffs allied themselves with the later line of “education article” cases discussed above. The earlier Serrano the-
At least forty groups weighed in as amici, ranging from Jonathan Kozol to the Trustees of Boston University on behalf of the Chelsea Public Schools.

state education article argument sufficiently persuasive and declined in footnote 15 of the opinion to rule on the state equal protection issues. The Court also declined to be drawn into a discussion of whether the Constitution mandates an “adequate education,” rather than merely an “education,” finding the former phrase to be a redundant one.

The focus of the McDuffy opinion, then, is on construing the education article of the State Constitution, through an examination of colonial history, the views of the drafters of the State Constitution, earlier Massachusetts cases, and lexical issues, to determine if a state duty to educate exists and had been violated. Any student of law, history, language, or literature will find the opinion very absorbing.

The education article of the Massachusetts Constitution, Part II, c. 5, § 2, provides as follows:

Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns ... (emphasis added).

A fundamental conflict between the parties was that the defendants viewed this language as exhortatory in nature, while the plaintiffs contended that it defined a mandatory state duty to provide an adequate education for all children.

THE MEANING OF THE EDUCATION ARTICLE

Chief Justice Liacos begins the Court’s discussion of this issue of duty by analyzing the purpose of the education article and by explicating specific words in the provision as they were understood in 1780. The Court concluded that:

The duty [of education] is established so that the rights and liberties of the people will be preserved. The immediate purpose of the duty is the spreading of the opportunities and advantages of education throughout the people; the ultimate end is the preservation of rights and liberties. Put otherwise, an educated people is viewed as essential to the preservation of the entire constitutional plan: a free, sovereign constitutional democratic State.

Turning to semantics, the Court examines the words “duty” and “cherish,” the latter word being viewed quite differently by the parties, as revealed in their briefs. The word “duty” was found by the Court to mean in 1780 “an obligation,” comparable to its current meaning. “Cherish,” however, in contrast to its modern meaning of “to be fond of,” meant in the eighteenth century “to support, to shelter, to nurse up.” The Court goes on to quote John Hancock in 1789, for example, proclaiming that new federal laws must “cherish commerce.” Adding that the education article in the Constitution states that this duty to cherish education “shall” continue “in all future periods,” the Court finds strong linguistic support for a state constitutional obligation to provide an adequate public education for all.

In the next, extensive section of the opinion, the Court details the history of public education in Massachusetts, in colonial times, and in 1780 when the Constitution was ratified. Both the plaintiffs’ and defendants’ briefs discuss these issues at length as well. This section of the opinion, which provides weighty historical support for a right to an education, should be required reading for any state or local official involved in education.

THE HISTORY OF EDUCATION IN MASSACHUSETTS

As the Court explains, after establishing schools in Boston in 1635 and helping to found and fund Harvard College in 1636, the General Court (the state legislature) drafted in 1647 the first statewide statute in the United States requiring a system of public education. This Act mandated that every town consisting of more than fifty families support a teacher, and that towns of more than one hundred families establish a grammar school. Various subsequent enactments in 1671, 1692, 1701, and 1718 prescribed town penalties of up to forty pounds, a very significant sum, for failing to comply with these educational requirements. Other legislative support for public education was evident from the fact that portions of fines for certain unlawful acts, for instance failure to pay taxes, were allo-
There was a strong and vibrant tradition of state support for public education at the time the education article was drafted in 1780.

The writings of John Adams, discussed next by the Court, provide even stronger support for the existence of a state constitutional duty to educate. The Court quotes many instances of Adams's strong reverence for education and his belief that universal education was essential to freedom: “[L]iberty cannot be preserved without a general knowledge among the people... [therefore] the preservation of the means of knowledge among the lowest ranks, is of more importance to the public than all of the property of all the rich men in the country.” The Court concludes that “[t]his examination of the views of those who framed and those who adopted our Constitution provides compelling support for the argument that Part II, c.5, §2, was intended to impose on Legislatures and magistrates [the executive branch] the duty to provide for the education of the people.”

The Court then continues its historical analysis of this state duty to educate, quoting Governors John Hancock, Samuel Adams, Caleb Strong, and John Brooks on the importance of public education. Typical are the words of Governor Hancock to the General Court in 1793:

Amongst the means by which our government has been raised to its present height of prosperity, that of education has been the most efficient; you will therefore encourage and support our Colleges and Academies; and more watchfully the Grammar and other town schools. These offer equal advantages to poor and rich; should the support of such institutions be neglected, the kind of education which a free government requires to maintain its force, would soon be forgotten.

Lest there be any doubt that the framers of the education article intended a mandatory state duty, the Court turns to the history of education in the Commonwealth in the nineteenth century, summarizing all of the significant educational legislation and finding it reflective of the framers’ original views. The Court concludes its analysis of a mandatory state duty to educate by discussing and decisively distinguishing several Massachusetts cases which had been urged by the defendants as being dispositive. Having spent the vast bulk of the opinion (sixty-five pages) proving the existence of a state duty to provide an education, the Court rather tersely examines whether that duty has been breached by the then-existing state financing and administrative structure for public education in Massachusetts.

HAS MASSACHUSETTS VIOLATED ITS CONSTITUTIONAL DUTY TO EDUCATE

The defendants contended that any state constitutional duty to educate had been fulfilled by their very extensive efforts to oversee and improve education through the actions of the State Department of Education, the passage of various state statutes governing curriculum, special education, etc., and by the operation of various funding and taxing mechanisms.

For the Court, the stipulated record was ample evidence of a constitutional violation. Pointing to agreed-upon descriptions of the plaintiffs’ schools as having inexperienced teachers, unsafe buildings, outdated textbooks, and overcrowded classrooms, the Court did not hesitate to find that a state constitutional duty had been breached: “The bleak portrait of the plaintiffs’ schools and those they typify, painted in large part by the defendants’ own statements and about which no lack of consensus has been shown, leads us to conclude that the Commonwealth has failed to fulfill its obligation.”

Stressing that exactly equivalent expenditures for all children were not demanded by the Constitution, the Court instead emphasized the nature of the education which must be provided. As guidelines, the Court found the seven factors stated in the Kentucky case of Rose v. Council of Better Education, Inc. to be instructive:

An educated child must possess “at least the seven following capabilities: (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable students to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient level of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.”

“[L]iberty cannot be preserved without a general knowledge among the people... The preservation of the means of knowledge among the lowest ranks, is of more importance to the public than all of the property of all the rich men in the country.” - John Adams.

Declaring that it is the Commonwealth’s duty “to devise a plan and sources of funds sufficient to meet the constitutional mandate,” the Court remanded the case for entry of judgment while allowing the single justice to retain jurisdiction to rule “whether, within a reasonable time, appropriate legislative action has been taken.” A quiet revolution had occurred.

IV. THE LEGISLATIVE RESPONSE

Three days later, on June 18, 1993, Governor Weld of Massachusetts signed the Education Reform Act of 1993. This
Act provides 175 million dollars in additional state assistance to schools immediately and 1.3 billion dollars in new aid by the year 2000. The City of Leicester, for instance, one of the McDuffy plaintiffs, will receive an additional $300,000 in fiscal year 1993. Ultimately, each district in the Commonwealth will be spending at least $5,500 per pupil annually. The legislation has the most positive impact on very low-income districts in the Commonwealth, such as those represented in the McDuffy litigation.

Through a series of amendments to Chapter 71, the Act revolutionizes not only the financial organization of public education in Massachusetts, but also its educational structure and theory. Among other changes, the Act provides for advisory councils to the State Board of Education; establishes a committee on educational policy to set “goals for accountability and high standards of quality”; requires the development of an educational technology plan; allows qualified high school students to enroll in public colleges; encourages master and regional planning; develops a plan of competency certificates; abolishes tenure for teachers; establishes charter schools; and proposes early childhood education for low-income children.

The scheme is a visionary one, and if realized, would seemingly more than fulfill the seven indices of education as required by the Supreme Judicial Court in McDuffy. Time will tell.

V. THE FUTURE OF PUBLIC EDUCATION AFTER McDUFFY

The pessimist will point to other states, such as Texas and New Jersey, where state supreme court rulings establishing a right to an education have led to almost never-ending court challenges to each reform enacted by the state legislature. The optimist will remember John Adams, Samuel Adams, and Horace Mann.

* * * * *

On September 16, 1993, the Supreme Court of the State of New Hampshire heard oral arguments concerning the education article of the New Hampshire Constitution, a clause derived from the education article of the Constitution of the Commonwealth of Massachusetts . . .

ENDNOTES

I wish to thank the research staff of the Suffolk University Law School Law Library for their assistance in performing background research for this article.

1 The ten states are Arkansas, California, Connecticut, Kentucky, Montana, New Jersey, Texas, Washington, West Virginia, and Wyoming.
4 Id.
5 Id. at 470.
6 75 Virg. L. Rev. 1639, 1646 n. 30 (1989).
7 Incidentally, as discussed in Pauley v. Kelly, the education article of the Minnesota State Constitution, drafted in 1857, is explicitly based on Part II, c.5 §2 of the Massachusetts Constitution and shares much of its language.
CONVERSATION WITH R. NELSON ("Oz") GRIEBEL, SUFFOLK J.D., '77

BY PROFESSOR CHARLES E. ROUNDS, JR.
SEPTEMBER 11, 1993

ADVOCATE: Congratulations on your appointment to Chairman, President and CEO of Bank of Boston Connecticut. Tell us a little about your new responsibilities.

GRIEBEL: Thank you. The Bank is $4.8 billion in assets, 1,400 employees and 59 retail branches. By assets, the Bank is the fourth largest banking institution in Connecticut. We recently relocated our headquarters to Hartford in conjunction with our recent acquisition of Society for Savings. We also have regional offices in Waterbury, New Haven and Stamford. My primary responsibilities are to assist the senior managers and the rest of our team in aggressively pursuing all profitable banking opportunities by leveraging our talent and products effectively.

ADVOCATE: Tell us, if you would, your connection with Suffolk Law School.

GRIEBEL: I'm a 1977 graduate of Suffolk Law School. I started at the Oklahoma University Law School in the fall of 1973, completed one year there, and then transferred into Suffolk's evening program in 1974.

ADVOCATE: Why did you transfer?

GRIEBEL: In the early 70's I had been an athletic coach and teacher at Worcester Academy. After my first year at Oklahoma, the school asked me to rejoin its coaching staff and transfer to a local law school with a night program. And that is what I ended up doing.

ADVOCATE: So you coached at Worcester Academy in the day and went to Suffolk Law School nights?

GRIEBEL: For two years, I coached football, basketball, and baseball at Worcester Academy in the afternoons and went to Suffolk nights. During the day I also clerked for a criminal defense lawyer in Worcester. During my last year at Suffolk, I accepted an opportunity to work for the General Counsel at Bank of Boston as a law clerk.

ADVOCATE: How about a quick summary of your post-Suffolk professional career.

GRIEBEL: I joined Bank of Boston in 1976 at a time when the General Counsel's office was expanding. It had five or so lawyers, and was looking to add three or four more. After graduation, they offered me one of those slots, which I accepted. I had a variety of experiences during my nine years there before moving on to other assignments at the Bank.

ADVOCATE: After you left the law office what did you do?

GRIEBEL: In 1985 I was asked to form a unit to coordinate corporate-wide regulatory compliance and reporting. I headed up that Compliance Group from 1985 until about 1988 when I went to the Group which manages our retail banking business
as its financial officer. After about a year and a half in that role I worked with a team on a series of systems conversion projects until 1990 when I was asked to move to the Bank's core domestic banking operations. Until this July I worked with over 1600 operations professionals who are located at five principal sites across the region.

ADVOCATE: What about your life before Suffolk Law School?
GRIEBEL: I was born in Camden New Jersey. As a result of my father's jobs, we lived in Fort Wayne, Indiana for about five years, in Barrington, Rhode Island for two, and in a suburb just outside of Chicago for three. In the early 60's, we moved to northern New Jersey where I attended high school. I graduated from Dartmouth College in 1971 and then I joined the Worcester Academy faculty. My wife, Kirsten, and I married after I joined the Bank. She grew up in Swampscott, Massachusetts where many members of her family still live.

ADVOCATE: I recall that Kirsten is an occupational therapist.
GRIEBEL: That's right.

ADVOCATE: How many kids are in the picture now?
GRIEBEL: We have three—two boys who are 9 and 6 and a girl who is 3.

ADVOCATE: I know our readers would be interested in your professional baseball career.
GRIEBEL: "Career" is somewhat of an overstatement; fling would be a better description. In the summer of 1972 I played for the St. Louis Cardinals Rookie League team which was based in Florida. I was invited to spring training the following year, but was released before the season began.

ADVOCATE: And your position?
GRIEBEL: Allegedly, a pitcher.

ADVOCATE: That was after Dartmouth?
GRIEBEL: Yes. The Rookie League has a relatively short season, about 60 games. That was the summer after my first year teaching at Worcester Academy. I left Worcester Academy in February of 1973 to report for Spring Training.

ADVOCATE: As a practical matter, can the law be learned at night?
GRIEBEL: A lot of successful lawyers have proven that it can. It is certainly easier if your employment is law-related so that you can apply and refine what you learn in the classroom. For me, clerking was probably the thing that enabled me to get through relatively unscathed. I have always admired anyone, particularly those with children, who have completed Suffolk's, or some other school's, evening program because I understand the challenges that must be faced.

ADVOCATE: Any thoughts on Suffolk's curriculum?
GRIEBEL: I'm hardly an expert on curriculum development, but I believe that there is a strong role for required courses at all levels of education. The reason I say that with respect to law school is that most students, myself included, tend to select courses that will further what they perceive at the time to be career goals. For example, if you think that you want to be a criminal lawyer, you're more likely to load up on trial-related courses at the expense of other offerings. That can turn out to be an unfortunate set of choices if you eventually decide to forgo trial work. As importantly, even if you pursue a litigation career, you are likely to be a more well-rounded practitioner if you are exposed to a sufficient number of other aspects of the discipline.

My point is that the law is no more a vertical discipline than most other professions, and the more we understand about its breadth, the better we are as professionals. This approach also keeps alive more employment opportunities.

ADVOCATE: Some on the faculty—and it seems from what you have been saying that you would share this concern—say that the Suffolk Law School curriculum does not adequately prepare its students for a business practice, that the School should require some exposure to finance, tax, accounting, statistics, and securities regulation. Are Suffolk Law School students disadvantaged in the long term if they graduate without a grounding in corporate finance?

GRIEBEL: Yes. To a large degree, I concur. One is disadvantaged in this increasingly complex and truly international economy if one fails to take advantage of business-related courses.

ADVOCATE: Should law schools do more to train students in the collection and assimilation of data, financial and otherwise?
GRIEBEL: Yes. Data gathering and analysis has become an important part of all aspects of the public and private sectors. It is important to understand how statistical and other data help in deciding courses of action.

ADVOCATE: It has been suggested that students are coming to law school inadequately prepared to study law; that is to say without a core understanding of economics, English and American political history, and without a grounding in English language and literature. Do you have any thoughts on the matter? After all you are now managing personnel who for the most part do not have advanced degrees.

GRIEBEL: We all recognize that too many people pursue educational or employment opportunities without a thorough grounding in certain areas. These voids can be as fundamental as the absence of elementary mathematical and literary skills for entry-level jobs or the absence of a reasonably comprehensive understanding of our political and cultural heritage necessary to make a constructive contribution to society. Certainly, there are diverse approaches as to how the educational system should address these voids, but I tend to err on the side of having more "core" courses at all appropriate levels.

ADVOCATE: If there is any universal criticism of the American law school, it is that its graduates, for whatever reason, cannot write well. Do you agree, and if so, can the problem as a practical matter be remedied at the law school level?
GRIEBEL: Harkening back to the last question, people who come to high school or college, never mind law school, without a grounding in basic syntax and composition skills, will always find it extraordinarily difficult to succeed. On the other hand, for those who come to law school with those fundamentals, a
course in legal writing and drafting is a very helpful start. Legal writing must be more analytical and tighter than other forms of composition. Like all forms of writing, however, you only achieve proficiency in the skill by doing it.

ADVOCATE: It is the perception of some of my faculty colleagues that, while there has been an increase in enrollment of African Americans, and other minorities, in law schools over the years, those minorities are not being encouraged to enroll in tax and business-related courses. Only one African American, for example, has ever signed up for my course on the drafting of trusts in the 10 years that I have taught it. I know Professor Thompson over the years has had a similar experience with his tax courses. What are your thoughts on the matter?

GRIEBEL: While there may be a set of societal expectations or biases about what type of law a particular group should practice, I doubt that African Americans, or any other minorities, are overly discouraged from enrolling in business-related law courses. To repeat my theme of earlier answers, I believe that all students should receive sufficient exposure to all key areas of what we call the study of the law. Such an approach increases the likelihood that students won't be pigeon-holed either intellectually or from a career standpoint. Let's face it, as a practical matter, law schools don't turn out lawyers. Rather, they graduate people who should be prepared to become lawyers through their initial practice of it in firms, agencies, or as solo practitioners.

ADVOCATE: Any words of advice for the students currently enrolled at the Law School?

GRIEBEL: When I'm asked for advice, I urge students to include finance, tax and other business-related courses in their course selections and to expand their general knowledge of domestic and international issues, especially in economic and legal realms. I also encourage them to understand how all levels of government effect our lives today.

ADVOCATE: In your opinion what courses would best prepare a student for a career in international banking? Are specific courses in international business transactions and banking law critical, or should the student stick to the basics in law school and specialize later?

GRIEBEL: In addition to my prior comments on core courses, I might suggest that law schools include business school-type studies for third year students. For example, it would be interesting to take a comprehensive look at how a McDonalds replicates its image and product in virtually every country in the world, many of which have very different legal and political environments.

ADVOCATE: Any regrets?

GRIEBEL: I have the normal regrets of not having contributed enough to my communities, church, and other organizations that are important to all of us. But I also hope that my prior experiences and current opportunities will enable me to rectify that in the years ahead. On the other hand, my years at Suffolk are years that I have never regretted. The education I received there has been of great help to me over the last 17 years.

ADVOCATE: Now that Bank of Boston Connecticut has merged with Society for Savings and become the fourth largest bank in Connecticut, our readers would be interested in where your team intends to take the Bank in the years to come.

GRIEBEL: We want to strengthen our position in the Waterbury and New Haven regions and build on the strong tradition that Society for Savings established in Hartford. We certainly will be looking to expand our franchise into Fairfield County—Greenwich, Darien, Westport, and so forth. At the moment, we have only one Fairfield County branch.

ADVOCATE: But you do have a small team of banking professionals in Stamford.

GRIEBEL: Yes, but without a branch system, you cannot be as significant a player in the corporate market, and we are extremely limited in the private, retail and small business banking markets in Fairfield County.

ADVOCATE: The Bank of Boston is a $37 billion institution that is well situated globally. That should help you with the local competition.

GRIEBEL: Yes, we are the region's only global bank that can provide Connecticut companies with a broad range of import and export financing and other trade services. We also believe that our combined Connecticut talent and products sets can make us the bank of choice by an ever growing number of corporate and individual customers.

ADVOCATE: Oz, I cannot thank you enough for taking time out of your busy schedule, particularly while you are settling down in Connecticut, to return to 41 Temple Street and be interviewed by the Advocate. I am sure the entire school joins me in wishing you continued success in the years ahead.

GRIEBEL: It has been a pleasure. Thanks for taking the time to talk with me.
his article was adapted from an introduction to a panel discussion on the available mechanisms for enforcing human rights, at which Professor Epps served as moderator. The event was sponsored by the Massachusetts Chapter of the Lawyers’ Alliance for World Security, held on Wednesday, December 2, 1992, from 5 p.m.-7 p.m. at the law firm of Ropes and Gray, One International Place, Boston, Massachusetts. Co-sponsoring organizations: Amnesty International Legal Support Network; Boston Bar Association: Committee on Public International Law; Lawyers’ Committee for Human Rights; United Nations Association of Greater Boston.

It is amazing, in one sense, that the phrase “Human Rights” runs so smoothly off our tongues. Amazing because it was not until after World War II that there was any agreement that such rights existed. International law had developed a body of rules to deal with the minimum standards that must be applied by a government towards aliens within their territories but the general view was that the way governments treated their own citizens was simply not governed by international law.

The atrocities of World War II persuaded the international community that the promotion of human rights should be one of the principal purposes of the United Nations. The United Nations Charter (1945) established obligations on the part of member states to respect human rights and the Human Rights Commission was created to protect and promote those rights.

The first thrust of the international community in the human rights arena was to work hard at establishing human rights standards. The main vehicle for establishing standards was through treaties and other declaratory documents. There are now numerous documents and multilateral conventions that establish human rights standards, first between the states who are parties to the documents and then later, once the standard has become widely accepted, between states generally through the application of customary international law. Mention of a few of the major treaties will give a flavor to the breadth of the types of state behaviors that are now governed by human rights standards or norms. The conventions encompass such topics as genocide, slavery, political rights of women, treatment of prisoners, racial discrimination, civil and political rights generally, economic, social and cultural rights, general rights of refugees, discrimination against women, torture and other cruel, inhuman or degrading treatment or punishment, children’s rights, labor rights, migrant workers rights and so on. The movement to establish norms has been dynamic in its growth and is beginning to be comprehensive in its breadth, although there is much work yet to be done.
At the same time that human rights standards were being developed, it was clearly understood that creative innovation would have to be brought to bear on the issue of enforcement,

It is amazing, in one sense, that the phrase “Human Rights” runs so smoothly off our tongues.

because it was also apparent that the international system did not have either a well developed court system or a broadly empowered legislative or executive arm. Indeed one of the brickbats thrown at the whole subject of international law was that because there was no generally available enforcement mechanism, the whole subject matter could not properly be referred to as law at all, and without law, the argument went, there were no rights, only hopes and wishes on the part of partisans of a particular moral persuasion. The task of human rights lawyers was therefore to create new enforcement systems, expand the availability of existing enforcement mechanisms and enlarge the notion of what was meant by enforcement.

A variety of, what may broadly be termed, enforcement mechanisms have been developed or are in the process of development. The available mechanisms can be put into four general categories:

1. Treaty enforcement mechanisms both those outside treaties, such as courts, or those created within the four corners of the treaty, such as Committees set up to hear complaints under particular treaties.

Treaty drafters have become adept at writing enforcement mechanisms into treaties so that when a state becomes a party to a treaty it also becomes subject to the enforcement mechanism. The treaty may contain a clause stating that any party to the treaty who has a dispute with any other party, concerning the interpretation or fulfillment of the treaty, is entitled to bring the dispute before a designated tribunal. Alternatively, the treaty may itself create a body with a variety of powers ranging from investigatory to adjudicative. Sometimes these bodies can only hear complaints from other states but sometimes individuals are also given complaint powers. Treaty parties become subject to the newly created enforcement body by virtue of becoming a party to the treaty.

2. The use of courts or other quasi-judicial bodies, where available, at the national, regional or international level.

In recent years there has been a considerable increase in the number of possible fora available and some regional systems, such as the European system, have granted comprehensive powers to human rights courts. National courts have sometimes been ready to enforce human rights norms either because the norm is considered part of the national law generally or because the state accused of violating the norm has obligated itself to live up to a particular standard by becoming a party to a human rights treaty. There are, however, a variety of legal doctrines that have considerably reduced the availability of national courts as enforcers of human rights. The doctrine of non self-execution of treaties and the doctrine of no individual remedies arising under treaties are two of the more common doctrinal obstacles that have made the courts of the United States and other nations largely inhospitable to human rights claims. There have been some celebrated cases where national courts have rendered decisions on the merits of a human rights claim but those cases have been the exception not the rule. The development of regional courts with specific jurisdiction over human rights claims may provide the best avenue for court enforced remedies.

3. Education, publicity and sunlight.

A good number of national and international non-governmental organizations (NGOs) work from the premise that the more that is known about human rights abuses the less they are likely to occur. They engage in extensive fact gathering and dissemination of information and sometimes their success in ensuring compliance with human rights standards is nothing short of spectacular. Many of the NGOs have operated as a powerful force in defining rights as well as ensuring their protection, and many have persuaded their own governments to take seriously human rights compliance as part of domestic foreign policy.


There are a variety of mechanisms in place ranging from quasi-judicial bodies such as the Human Rights Committee to non-compliance mechanisms, such as the Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities. These entities have broad investigatory powers and can recommend resolutions for action. The Commission has also established certain working groups or rapporteurs on specific topics such as Involuntary Disappearances or Religious Intolerance. The working groups study the topic and offer recommendations for action. The International Labour Organization, which broadly oversees conditions of labor, also has its own well developed enforcement mechanisms.

Lastly, in the United Nations context, there are mechanisms to control armed conflict, principally through the Security Council, which has recently been expanding the role of its peacekeeping forces. Indeed the whole mandate of the Security Council is currently undergoing much discussion and suggested reformulation.
both with respect to its membership and with respect to its overall mission.

All of these four broad categories of enforcement mechanisms have seen rapid growth particularly in the last two decades and human rights activists have become adept at using a variety of mechanisms simultaneously to achieve the maximum effect.

It is salutary for lawyers to contemplate the variety of enforcement mechanisms recently developed and currently expanding in the human rights arena. Lawyers tend to want a backdrop of enacted legislation and definitive court jurisdiction before they will enter a field. The creative innovation of legal, quasi-legal and non-legal enforcement mechanisms in the human rights sphere has lessons for all of us who see injustice and yearn for change.
THE SUPREME COURT AND RELIGION: A NEW DIRECTION?

BY PROFESSOR JOSEPH D. CRONIN

During its most recent term concluding in June the United States Supreme Court decided three important religion cases and passed on an opportunity to revisit the prayer at graduation issue. The three cases involved a sign language interpreter at a church related school; after school hours use of school property for lectures with a religious content; and, animal sacrifice as part of a religious rite. In all three cases the religious claimant prevailed.

For this reason the first "this means" interpretation tended to be that the Court had moved to a more "pro-religion" stance than in the past. As the discussion below will indicate any such shift is incremental rather than seismic. The Court essentially reaffirmed its understanding of the Free Exercise Clause and in regard to establishment of religion its ambivalence toward the much criticized Lemon test continues.

I. ZOBREST V. CATALINA FOOTHILLS SCHOOL DISTRICT, 113 S.CT. 2462 (1993)

A deaf student enrolled at a Roman Catholic high school desired a sign-language interpreter. He requested that the local public school district in Tucson, Arizona provide one under the Individuals with Disabilities Education Act (IDEA). Relying on opinions from the County Attorney and the Attorney General of Arizona that complying with the request would violate the Establishment Clause the school district denied the student's request. When the matter went to litigation the district court and a divided panel of the Ninth Circuit also concluded that public provision of the sign interpreter would violate the Establishment Clause.

The Supreme Court, in an opinion by Chief Justice Rehnquist, reversed by a vote of five to four. Justice White, who left the Court at the end of the term, was part of the majority. There was, however, an important division among the dissenters. All of the dissenters—Justices Blackmun, Souter, Stevens and O'Connor—would have remanded the case for consideration of statutory and administrative issues that would perhaps have mooted the constitutional question. Justices O'Connor and Stevens left it at that and did not express any view on the merits of the Establishment Clause dispute. Justice Blackmun, however, joined by Justice Souter, also dissented on the merits. Thus, on the Establishment Clause issue this was a five to two case rather than five to four.

The crucial issue arose from the fact that the public employee would enter the sectarian school and convey admittedly religious material to the student. The majority, in concluding that there was no constitutional violation, emphasized the following points: this case concerns "a general government program that distributes benefits neutrally" regardless of the type of school the child attends. Further, the student benefits, not the school. The school wasn't going to pay for the interpreter anyway. The school district conceded that there would be no constitutional violation if the money...
Marshall wrote a narrow opinion in Washington Supreme Court that there was an Establishment under the state program would go to sectarian schools. They sought funds under a vocational rehabilitation statute to train at aVideo screen attached to a machine that received what was said in the classroom and automatically translated it into sign-language on the video screen. Is the constitutional vice perceived by the dissenters the participation of a government employee in the classroom in conveying the religious message or government payment for the transmission of the message regardless of how it is accomplished? In terms of economic reality or the perception by others of governmental sponsorship it seems that it wouldn't make any difference whether the interpreting was done by a public employee or a machine in the classroom.

The case of Witters v. Washington Department of Services for Blind, 474 U.S. 481 (1986), is instructive for the conflicting teachings drawn from the case in Zobrest. In Witters a blind student sought funds under a vocational rehabilitation statute to train at a bible school “for a career as a pastor, missionary, or youth director.” A unanimous Supreme Court reversed the judgment of the Washington Supreme Court that there was an Establishment Clause violation. Strictly speaking, the Court only determined that the “secular legislative purpose” and the “primary effect” prongs of the famous three-part Lemon test were not violated since it concluded that the “entanglement” issue was not properly raised. The opinion of the Court by Justice Marshall stressed that under the program the state assistance goes directly to the student who gives it to the school. Thus the school receives the money “only as a result of the genuinely independent and private choices of aid recipients.” Also, the Court noted that only a small part of the aid under the state program would go to sectarian schools.

This latter point raises an oddity about Witters. Justice Marshall wrote a narrow opinion in Witters, an opinion that was evidently meant to discourage the notion that broad based aid to sectarian schools would satisfy constitutional norms as long as students or parents serve as conduits for the passing of the money from the state to the school. The problem is that while Justice Marshall’s opinion in Witters is denominated an opinion of the Court, a total of five Justices joined concurring opinions stressing that under Mueller v. Allen, 463 U.S. 388 (1993), a case involving income tax deductions that was virtually ignored in Justice Marshall’s opinion, the validity of the rehabilitation program in Witters does not turn on how much aid in fact goes to sectarian schools as long as the program is neutral in design. One of the five concurring Justices in Witters was then Justice, now Chief Justice, Rehnquist, who as the author of the opinion of the Court in Zobrest stressed Mueller at least as much as Witters. Thus, not only did the Court reaffirm Witters but Mueller as well. Since Mueller was a broad based program but involved a tax deduction rather than an affirmative grant whereas Witters involved an affirmative grant but in a very narrow program Zobrest by relying on both Mueller and Witters provides encouragement for those who would like to see voucher programs that include sectarian schools. These combine the features of affirmative and indirect grants.

The dissent in Zobrest had to confront the fact that in some ways Witters was a harder case. In Witters the student was training to be a pastor, missionary, etc. In Zobrest the student was simply enrolled in a sectarian high school. It was a church related school but not a seminary. In Witters the school would receive funds that came from the government, whereas in Zobrest the sectarian school never receives any money. Justice Blackmun’s dissent answers this as follows: Witters and Mueller “are not to the contrary. Those cases dealt with the payment of cash or a tax deduction, where governmental involvement ended with the disbursement of funds or lessening of tax. This case, on the other hand, involves ongoing, daily, and intimate governmental participation in the teaching and propagation of religious doctrine.”

Note that Mueller, the 1983 tax deduction case, was a five to four decision with now Chief Justice Rehnquist writing for the Court. Justice Marshall, who ignored Mueller in his Witters opinion was one of the Mueller dissenters and Justice Blackmun who attempted to distinguish Mueller in his Zobrest dissent was also one of the Mueller dissenters. Of course, much of this was acted out sub silentio in the opinions in Zobrest. Nevertheless, an overall impression emerges. In Zobrest, the Rehnquist “accommodationist” view of the Establishment Clause seemed clearly ascendent over the “separationist” viewpoint. See generally Derek Davis, Original Intent (1991). Zobrest contains a robust reaffirmation of Mueller and thus by implication a broad reading of Witters.

The crucial issue arose from the fact that the public employee would enter the sectarian school and convey admittedly religious material to the student.

Does it make any difference for Establishment Clause purposes that the signer is a public employee who is physically in the classroom? Suppose the state were able to provide the student with a video screen attached to a machine that received what was said in the classroom and automatically translated it into sign-language on the video screen.
There may be a temptation to think that whatever the Court wrote in Witters and Zobrest the real meaning of those cases is that a narrow program of aid to the handicapped was the key. Political correctness trumps the Lemon test. That may well have explained Justice Marshall's position in Witters but a look at the breakdown of the Justices suggests that it is not the case in Zobrest. The four Justices who joined Chief Justice Rehnquist's opinion in Zobrest were White, Scalia, Kennedy and Thomas. Last term in Lee v. Weisman, the prayer at graduation case, Justice Kennedy wrote for the Court in finding a constitutional violation. The four dissenters were Justice Scalia, joined by the Chief Justice, Justice White and Justice Thomas. Therefore, the difference between Lee and Zobrest is that Justice Kennedy voted differently in the two cases. The Zobrest majority consists of the Lee dissenters plus Justice Kennedy. Nevertheless, Justice Kennedy's vote in Zobrest cannot plausibly be written off as a sympathy vote for the handicapped. Before Lee Justice Kennedy had already established himself as firmly committed to an accommodationist rather than separationist view of the Establishment Clause. He objects not to aid to religion but coercion of individuals. See Review of Turning Right, 23 The Advocate (Fall, 1992 at 13, 21-22). Justice Kennedy found subtle coercion in Lee where others perhaps would not have but his Lee opinion, as distinct from the opinions of the concurring Justices, did not represent a repudiation of his earlier views on the Establishment Clause.

The early "read" on the Lee case has been that it is further proof that Justice Kennedy has joined a centrist block on the Court that also includes Justices O'Connor and Souter. Time will tell whether that is true but at least as to the Establishment Clause Zobrest may be a better indicator of his views than Lee.

On the prayer at graduation issue the Court recently attracted further widespread attention by nonaction. On June 7, 1993 the Court denied certiorari in Jones v. Clear Creek Independent School District. In Clear Creek the Fifth Circuit ruled that invocations at public high school graduations do not violate the Establishment Clause where the School District Resolution provided that "The use of an invocation...shall rest with the discretion of the graduating senior class...shall be given by a student volunteer...shall be non-sectarian and nonproselytizing in nature." The Fifth Circuit first decided this case before Lee v. Weisman. After Lee the Supreme Court granted certiorari and remanded for reconsideration in light of Lee. On remand the Circuit once again found no violation and this time the Supreme Court denied certiorari.

Lawyers understand that a denial of certiorari is without precedential effect, however great the temptation may be to read tea leaves, a temptation that is especially strong in this case because of the post-Lee remand. Thus, Clear Creek is binding law in the Fifth Circuit only. The popular press always fudges the issue with phrases such as "clears the way," "let stand," "declined to hear," which are more or less accurate but leave the public in the dark as to the precise impact of a denial of certiorari.

At any rate the Fifth Circuit saw a distinction between the traditional clergyman invocation in Lee and the Program permitted in Clear Creek. The court first noted with considerable justification that the Supreme Court's Establishment Clause jurisprudence is not exactly free of ambiguity. Distilling this prior law, the Fifth Circuit concluded that there would be no constitutional violation because none of the prongs of the three-part Lemon Test were violated (purpose; effect; entanglement); a reasonable person would not perceive the invocation as state endorsement of religion and participation was not coerced. The court addressed the coercion issue in some detail because coercion was the crux of Justice Kennedy's opinion of the Court in Lee. The Fifth Circuit concluded that Clear Creek was different in essence because a Clear Creek invocation is decided upon and controlled by students.

Whatever the theoretical impact of the denial of certiorari in Clear Creek that case may become a de facto gloss on the Establishment Clause if the lower courts agree with the Fifth Circuit and the Supreme Court continues to deny certiorari. The school superintendent in the District of Columbia has issued a directive permitting student led prayer at graduations and in Loudon County, Virginia litigation on the same issue is already pending. See Washington Post, June 17, 1993, page D1. The American Center for Law and Justice, Virginia Beach, Virginia has sent 15,000 letters to public school districts, informing them of the

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Clear Creek decision and offering assistance in devising programs along the lines of the Clear Creek resolution. See Reske, 79 A.B.A. Journal 14-15 (July 1993); Sekulow, Prayer in Peace, the Wall Street Journal, June 9, 1993, page A 13. Presumably, we have not heard the last of the issue of prayer at graduation.

One slightly cranky postscript on this issue may be in order. There seems to be a belief that the danger is that invocations will be "too religious." The real danger is that they will not be religious enough. We are moving to a situation where political or social messages, usually lengthy and with a thin veneer of archaic language evocative of traditional translations of the Bible, masquerade as prayers. Before long we may hear something like the following: "Oh, Almighty, vouchsafe your children the wisdom not to build any more long range bombers, except the kind whose electronic guidance systems are manufactured in this congressional district. Amen." Is this a prayer or can we sit down now?

To the extent that the prayer at graduation issue is a social rather than purely legal question, it is straightforward. One view is that there is a widespread consensus favoring denominational (Continued on page 36)
neutral invocations, designed mainly to solemnize the occasion, with those who wish not to participate free to act in accordance with their wishes. The other view is that with the diversity of

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believers and nonbelievers in our society no prayer worth saying will be neutral, there will be at least subtle coercion of objectors and in principle government has no business being in the prayer business anyway.

Roughly, these are the choices. They share the common premise that the invocation would actually qualify as a prayer. The worst possibility would be to have a politico-social statement, even a garble of words designedly devoid of content masquerading as a prayer. The choice is whether to permit “ceremonial deism,” as it is sometimes called, or not. We should confront the choice clearly, not attempt to dodge it. Amen.

II. LAMB’S CHAPEL V. CENTER MORICHES UNION FREE SCHOOL DISTRICT, 113 S. Ct. 2141 (1993)

On the surface this is a free speech case that the Supreme Court decided crisply and unanimously. Lurking in the background, however, was an establishment of religion issue that shows that the Court’s methodology in that area is still a source of bitter dispute on the Court.

In Lamb’s Chapel a pastor of an evangelical church desired to use public school property after school hours for a lecture series about family values from a religious standpoint. The lectures would be open to the public.

Much about this case was clear. The school district did not have to open its property for non-school uses nor was it obliged to open it for all uses. State law did permit school property to be available for certain uses, religious purposes not included, and the school district chose to open the schools for certain of these purposes. In the constitutional jargon of this area of the law there was a “limited public forum” as opposed to a “traditional public forum” or a “designated public forum.” It was common ground that any governmental limitation on use of the school property had to be viewpoint neutral.

This last issue – viewpoint neutrality – is what presented the problem, such as it was, in Lamb’s Chapel. The district court and the court of appeals had recognized that restrictions had to be viewpoint neutral but those courts ruled that criterion was satisfied. The Supreme Court unanimously concluded otherwise. “The film involved here no doubt dealt with a subject otherwise permissible under Rule 10, and its exhibition was denied solely because the film dealt with the subject from a religious standpoint. The principle that has emerged from our cases “is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.”

If matters had rested there Lamb’s Chapel would have been a free speech case, and a simple one at that. When the state opens up a forum for discussion of a topic it cannot discriminate on the basis of viewpoint. The complication arose from the school district’s claim that permitting a religious use of its property would violate the Establishment Clause. The district argued that complying with the apparent requirement of viewpoint neutrality would constitute an establishment of religion. Justice White’s opinion of the Court dismissed this argument briskly, concluding that opening the school for this sort of use would not violate the Establishment Clause. Such a use would not constitute governmental endorsement of religion. Nor would it violate the Lemon test. “The challenged governmental action has a secular purpose, does not have the principal or primary effect of advancing or inhibiting religion and does not foster an excessive entanglement.”

This Establishment Clause discussion triggered two concurring opinions, one paragraph from Justice Kennedy that was moderate in tone, as well as a longer opinion, less moderate in tone from Justice Scalia with whom Justice Thomas joined.

The three concurring Justices had no problem with the conclusion that there was a violation of the Speech Clause’s requirement of viewpoint neutrality nor did they quarrel with the conclusion that permitting the desired use of school property would not violate the Establishment Clause. They very much disagreed with the use of the standards used to reach that conclusion, namely the Court’s inquiry whether the use constituted governmental endorsement of religion and whether there was a violation of any of the prongs of the Lemon test.

Regarding the Establishment Clause Justice Kennedy simply wrote that the Court’s citation of the Lemon case was “unsettling and unnecessary” and that the same was true of the endorsement of religion standard. Justice Scalia’s concurrence was relatively brief but shrill in tone. He denounced the Lemon test, observing that “no
fewer than five of the currently sitting Justices have, in their own
opinions, personally repudiated Lemon “and a sixth has joined on
opinion doing so.” He criticized the Court for using Lemon when it
pleased and ignoring it when convenient. Justice Scalia further
rejected the theory that endorsement of religion in general violates
the Establishment Clause.

Justice Scalia seems to have a legitimate complaint, even if his
manner of expression often takes inadequate account of the sensi-

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abilities of those who disagree with him.1 In Zobrest, Chief Justice
Rehnquist wrote an opinion of the Court, joined by Justice Scalia,
that rejected an Establishment Clause claim without relying on
Lemon. Yet only eleven days earlier in Lamb's Chapel the Court had
the latest of its disputes about the status of Lemon.

Part of the problem came from the peculiar division of the
Court in Lee v. Weisman, the prayer at graduation case. Justice
Kennedy, writing for the Court, found implied coercion on the
graduates, emphasizing the state sponsorship and control over the
event, a practical obligation on the part of the graduates to attend,
in addition to the fact that the graduates are not mature adults. The
four other Justices in the majority, Blackmun Stevens, O'Connor
and Souter all joined Justice Kennedy's opinion. In addition, how-
ever, Justices Blackmun and Souter wrote concurring opinions
each of which was joined by Justices Stevens and O'Connor. The
general message of those opinions was a reaffirmation of the
Establishment Clause and rejection of the notion that compulsion is necessary and
not merely sufficient for a violation of the Establishment Clause.

Justice Souter made the telling point that if compulsion were
necessary for finding an Establishment Clause violation the
Establishment Clause would be redundant because when there is
compulsion the Free Exercise Clause is violated. Justice Scalia, writ-
ing for the four dissenters, sharply disagreed on the nonpreferen-
tialism and coercion issues as well as the legitimacy of the Lemon
test.

Therefore, although the public perceived Lee as an important
case because of the result, the case was doctrinally ambiguous.
Essentially eight of the Justices divided four to four and the ninth,
Justice Kennedy, wrote a narrow opinion so that he could write an
opinion of the Court. Doctrinally the case didn't resolve anything
and the effects of that continue to be felt in Zobrest and Lamb's
Chapel.

The paradox, and this is the essence of Justice Scalia's point, is
that a majority of the Justices individually seem willing to denounce the
Lemon test and its associated theoretical baggage but are unwilling to join together in any particular case to give effect to
that view. Conversely, Justice Thomas appeared to embrace the
Lemon test during his confirmation hearings that are so well
remembered for other reasons but promptly joined Justice Scalia in
seeking to abandon Lemon once he was on the Court. See Appendix to this article. Perhaps it is hard for Justices to pull the trigger once they find they are in the majority. Roe was strongly
criticized by a majority of the Court but then not overruled. A simi-
lar process seems to have occurred with Lemon. Dissenters, in a
way, have a freedom from responsibility.

The popular press favors big picture meta-interpretations of
where the Court is going. Perhaps this is a useful antidote to the
excessive textual parsing that sometimes goes on within the profes-
sion. A current favorite is that the recently perceived controlling
center (O'Connor - Kennedy - Souter) has dissolved, with Justice
Souter drifting to the left and Justice Kennedy safely back on con-
servative territory.2 In regard to religion there is the suggestion that
the Court this term adopted a posture that is more favorable to reli-
gion. David G. Savage, the Supreme Court correspondent for the
Los Angeles Times, whose book on the Court Turning Right, was
reviewed in the fall 1992 issue of the Advocate, remarks on a shift
away from separationist principles discernible in this term's cases.

"Under the non-discriminatory approach, the justices are likely
to uphold state-sponsored vouchers for children enrolled in parochial
schools, child-care programs that operate through churches and
school ceremonies in which students invoke God . . . . While none
of this term's rulings mark dramatic departures, even advocates of
strict separation say the court's position has evolved." Los Angeles


The paradox, and this is the essence of Justice Scalia's point, is that a majority of the Justices individually seem willing to denounce the Lemon test and its associated theoretical baggage but are unwilling to join together in any particular case to give effect to that view.


This may well be an overstatement. At least as to the
Establishment Clause the Court appears to be treading doctrinal
water since Lee v. Weisman. In the end a majority may find it as
hard to inter Lemon as it did Roe. In addition, one must take
account of the fact that Justice White, who was a harsh critic of
Lemon (and Roe) has now left the Court.

III. CHURCH OF THE LUKUMI BABALU AYE, INC. V.
 CITY OF HIALEAH, 113 S. Ct. 2217 (1993)

In 1990 the Court decided a case that has triggered continuing
controversy, Employment Division v. Smith, 494 U.S. 872. Smith
concerned whether the Free Exercise Clause of the First
Amendment requires an exemption from neutral criminal laws of
general applicability for religious use of the drug peyote. The Court
held that it did not. The particularly controversial part of Smith
was not the result so much as the Court's failure to apply strict scrutiny.
Thus, although the government may provide exemptions to accom-
modate religion, refusal to accommodate will not trigger the com-
pelling interest test.
The stakes in Smith were large because it makes a vast difference whether there is an affirmative obligation to accommodate religion or merely an obligation not to discriminate against religion. Also, as a practical matter minority religions have special concerns. Well organized and highly visible mainstream religions, even if technically minority, will usually be able to protect themselves in the legislative process. There was, for example, an exception for

wine at mass during prohibition. If an obscure religion with few members teaches that drivers' licenses should not have photographs because photos are graven images they may have problems. A large, mainstream religion will have a better chance of receiving accommodation in the legislative process, thus mooting any constitutional claims.

Few if any will maintain that religious claims should always prevail. The state will not tolerate human sacrifice even if there is a bona fide claim of religious mandate. The issue, however, is whether the government must accommodate religion when it can do so without sacrificing (literally or figuratively) overriding values or whether it can choose to legislate neutrally without providing religious exemptions and simply let the chips fall where they may. The Smith case held the latter, that accommodating religion with exemptions from laws of general applicability is permitted but not required, although the Court engaged in deft footwork as it danced around some earlier cases with imaginative distinctions.

Smith resulted in widespread criticism and demand for a statue from Congress that would have the practical effect of overturning it. This atmosphere provided the backdrop for the Court's decision in Hialeah in 1993. There was anticipation that Hialeah might be the occasion for overruling Smith or at least some backing off from the generalization that the Free Exercise Clause does not require exemptions from neutral laws of general applicability. When the Court unanimously upheld the free exercise claim in Hialeah this fueled the perception that the Court had indeed shifted once again.

In fact, nothing of the sort occurred. Hialeah simply involved a different principle as even those Justices who continue to be dissatisfied with Smith emphasized. In fact, the Court reaffirmed Smith in Hialeah even though it did not need to do so in order to decide Hialeah. Hialeah implicated the uncontroversial principle that government cannot discriminate against religion. This explains why the Court was unanimous as to the result in Hialeah, albeit with three concurring opinions. The issue whether government must affirmatively accommodate religion and not merely be facially neutral towards it was not presented. The discussion of Smith in the various opinions in Hialeah, however, made it plain that Smith still has majority support in the Supreme Court.

Hialeah concerned the Santeria religion, a mixture of African

religion with Roman Catholicism that came from Africa to Florida via Cuba. Its rites include animal sacrifice. The impending opening of a Santeria church in Hialeah met with less than universal enthusiasm and approbation in the community. In response the City Council in Hialeah adopted a complicated series of ordinances forbidding animal sacrifice. In this case the Supreme Court unanimously concluded that the ordinances violated the Free Exercise Clause. Justice Kennedy wrote an opinion that had varying numbers of Justices joining different sections. Apart from one section, however, it was an opinion of the Court.

The opinion of the Court and the concurring opinions make plain that this case does not concern the Smith issue of making an exception for religion from a neutral law of general applicability. Rather the problem is precisely that the law is not neutral and not of general applicability. Instead religion is targeted in a discriminatory way. Therefore, what is involved in Hialeah is not the Smith issue of whether preferential exceptions must be allowed as a religious accommodation but the more fundamental, settled and non-controversial “nonpersecution principle” that religious conduct must not be targeted.

Justice Kennedy's opinion notes that Santeria concededly is a religion and its adherents' sincerity has not been questioned. The problem was that the ordinances constituted a “religious gerrymander.” "It is a necessary conclusion that almost the only conduct subject to Ordinances . . . is the religious exercises of Santeria members." The ordinances were both overinclusive and underinclusive with reference to their declared secular objective. Thus, "religious practice is being singled out for discriminatory treatment.”

While Hialeah involved the “nonpersecution principle” rather than the Smith rule the Court carefully reassessed the vitality of Smith. “In addressing the constitutional protection for free exercise of religion, our cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” Justice Souter in his concurring opinion describes these references to Smith as dicta. Technically, dicta they may be but Smith is a recent majority decision by the Supreme Court and it has been given considered reaffirmation by the Court in Hialeah.

Therefore, the significance of Hialeah may be quite the opposite of what was the first public impression. The free exercise claimants prevailed but only based on the nonpersecution principle, which in the abstract is not controversial. It was the reaffirmation of Smith that was significant, dicta or not. Once the Court interpreted the Ordinances in context as singling out religion, indeed, one religion, as a target the result was foreordained. The Court could have reached the result it did without treating Smith as settled law. The importance of Hialeah is that the Court chose not to do so.

There were three concurring opinions in Hialeah. Justice Scalia, joined by the Chief Justice, principally objected to the section of the opinion of the Court that relied on evidence of the subjective motivation of the City Councillors in finding a constitutional violation. This is an important issue that pervades Constitutional Law but it is collateral to the Smith - Hialeah dichotomy. Justice Blackmun, joined by Justice O'Connor, wrote an opinion concurring in the judgment. Justice Blackmun reaffirmed what he had written in dissent in Smith. The fact that Justice O'Connor joined Justice Blackmun's Hialeah opinion recalls the unusual division of
the Court in Smith. In Smith five Justices held that strict scrutiny was inapplicable and rejected the constitutional claim. Three Justices in a dissenting opinion by Justice Blackmun concluded that strict scrutiny was applicable and they would have upheld the free exercise claim. Justice O'Connor alone among the Justices concluded that strict scrutiny was applicable but that the constitutional claim should still be rejected. Thus Smith was six to three for the result but a narrower five to four on the level of scrutiny. In the meanwhile, Justices Brennan and Marshall, the two Justices who joined Justice Blackmun's Smith dissent, have left the Court.

Justice Brennan's replacement, Justice David Souter, wrote the principal concurring opinion in Hialeah. It was an impressive, scholarly opinion. Justice Souter calls for reconsideration of Smith in a case in which the Smith issue is squarely joined and it takes very little reading between the lines to conclude that Justice Souter is poised to overrule Smith after such reconsideration. Stare decisis seems to be of particular interest to Justice Souter but after detailed consideration he concludes that finality interests should not preclude reexamination of Smith. He also makes a powerful case that the Court in Smith did a poor job of distinguishing earlier free exercise cases in which the Court had applied strict scrutiny. Perhaps the problem was that the Court didn't distinguish them because they were not distinguishable. Yet the Court did not purport to overrule them and therefore Justice Souter may eventually get his wish that the Court choose between two conflicting lines of cases. The basic issue really is whether the free exercise right means more than just the right to be free from discrimination against religious practices, a facially even playing field. As Justice Blackmun put it in

Zobrest, it is true, provides encouragement for those who favor voucher systems for schools, including church related schools. Yet it is hard to see how such a program could be upheld unless the Court openly dismantles half a century of Establishment Clause jurisprudence. This it does not seem willing to do. Are we really to be told—after decades of hair splitting about bus rides to school versus field-trip bus rides, released time on premises versus off premises, books versus audio and videotapes, etc., that the state can effectively fund church related schools entirely through a voucher program? A voucher plan faces a practical dilemma. If church related schools are included there is an Establishment Clause problem. If they are not there is a political problem. Such a program would devastate church related schools. Generally these schools are perceived as functioning with fewer of the problems afflicting public schools and doing so more cost effectively. A program seen as leading to the demise of such schools could be expected to incite stout resistance.

Justice Scalia made a statement in Lamb's Chapel that may highlight an anomaly in the interpretation of the religion clauses. "I cannot join for yet another reason: the Court's statement that the proposed use of the school's facilities is constitutional because (among other things) it would not signal endorsement of religion in general . . . . What a strange notion, that a constitution which itself gives 'religion in general' preferential treatment (I refer to the Free Exercise Clause) forbids endorsement of religion in general." It seems that those Justices who argue for preference for religion under free exercise are the quickest to find establishment violations in other cases whereas those Justices who are less likely to find establishment violations do not seem to believe that the Free Exercise Clause requires preference for religion.

CONCLUSION

To the extent that the Court is moving towards any universal interpretation of the religion clauses of the First Amendment it is that government may, but is not obliged to, accommodate religion in a nondiscriminatory way. If religious objectors are excused from neutral laws of general application the Establishment Clause is not violated but the Free Exercise Clause is not violated if they are not excused. This is the teaching of Smith and apparently is still the view of the Court after Hialeah. As to the Establishment Clause the status of the Lemon formula is still up in the air. If it endures it may be as a set of guidelines that are part of the analysis rather than a result controlling test.

Zobrest, it is true, provides encouragement for those who favor voucher systems for schools, including church related schools. Yet it is hard to see how such a program could be upheld unless the

Hialeah: "I continue to believe that Smith was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty and treated the Free Exercise Clause as no more than an antidiscrimination principle."

The stakes obviously are large but for now the Court seems to have chosen. The majority in favor of Smith seems solid. If Justice Souter's view that there are really two discordant lines of free exercise cases that need to be reconciled should prevail Justice Souter might not like the ultimate result. The present Court would be much more likely to extend Smith than to overrule it.

It seems that those Justices who argue for preference for religion under free exercise are the quickest to find establishment violations in other cases whereas those Justices who are less likely to find establishment violations do not seem to believe that the Free Exercise Clause requires preference for religion. For example, Justice Scalia, in the quote above, claims that the First Amendment gives religion preferred status. Why then is it true, provides encouragement for those who favor voucher systems for schools, including church related schools. Yet it is hard to see how such a program could be upheld unless the
accommodationist position has the virtue of supplying such a comprehensive theory – government may but is not obliged to accommodate religion in general. The defect of this position is that, apart from the “nonpersecution principle” reaffirmed in Hialeah, religious claims will be subject to the vagaries of the political process. This will inevitably work to the disadvantage of religious minorities and in any event presumably was what giving religion constitutional status was designed to avoid.

Justice White has now left the Court and the effect of a new member is notoriously unpredictable. For example, in the hearings on his nomination to succeed Justice Marshall, Justice Thomas appeared to endorse the Lemon test for Establishment Clause cases and expressed sympathy for the minority position in Smith in regard to the level of scrutiny in free exercise cases. Yet in the cases discussed in this article Justice Thomas repudiated both of those positions. Relevant excerpts from the Thomas Hearings follow in the Appendix.

ENDNOTES

1For an enthusiastic essay concerning the writing style of Justice Scalia, see Fried, Manners Makyth Man: The Prose Style of Justice Scalia, 16 Harv. J. of Law & Public Policy 529 (1993).

2See The Washington Post National Weekly Edition, Page 8, July 19, 1993. “The big question that hung over the 1992-93 term when it began last October was whether Rehnquist conservatism was on the decline, in favor of a moderate center. In the most closely decided cases from the previous term, Rehnquist lost often and a trio of justices—Sandra Day O’Connor, Anthony M. Kennedy and David H. Souter—held the balance of power.

But in the term completed June 28, the center fizzled. The last centrist left standing is Souter.”

3This matter has been under consideration by Congress since the Smith case in 1990. On May 11, 1993 the House of Representatives passed the Religious Freedom Restoration Act of 1993, salient portions of which follow:

SECTION 1. SHORT TITLE.
This Act may be cited as the “Religious Freedom Restoration Act of 1993”.
SEC. 2. CONGRESSIONAL FINDINGS AND DECLARATION OF PURPOSES.
(a) Findings.—The Congress finds—
(1) the framers of the American Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;
(2) laws “neutral” toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

Professor Robert Wasson of the law faculty conducts a discussion of American civil rights law for visiting educators and lawyers from Asia.
(3) governments should not burden religious exercise without compelling justification;

(4) in Employment Division of Oregon v. Smith the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in Sherbert v. Verner and Wisconsin v. Yoder is a workable test for striking sensible balances between religious liberty and competing governmental interests.

(b) Purposes. — The purposes of this Act are —

(1) to restore the compelling interest test as set forth in Federal court cases before Employment Division of Oregon v. Smith and to guarantee its application in all cases where free exercise of religion is burdened; and

(2) to provide a claim or defense to persons whose religious exercise is burdened by government.

SEC. 3. FREE EXERCISE OF RELIGION PROTECTED.

(a) In General. — Government shall not burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception. — Government may burden a person’s exercise of religion only if it demonstrates that application of the burden to the person —

(1) furthers a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial Relief. — A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under III of the Constitution....

SEC. 5 DEFINITIONS.

As used in this Act —

(1) the term “government” includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, a “State” or a subdivision of a State;

(2) the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term “demonstrates” means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term “exercise of religion” means exercise of religion under the first article of amendment to the Constitution ....

As to the anticipated interpretation of this Act the Report of the House Committee On the Judiciary noted:

It is the Committees expectation that the courts will look to free exercise of religion cases decided prior to Smith for guidance in determining whether or not religious exercise has been burdened and the least restrictive means have been employed in furthering a compelling governmental interest. Furthermore, by enacting this legislation, the Committee neither approves nor disapproves of the result in any particular court decision involving the free exercise of religion, including those cited in this bill. This bill is not a codification of any prior free exercise decision but rather the restoration of the legal standard that was applied in those decisions. Therefore, the compelling governmental interest test should be applied to all cases where the exercise of religion is substantially burdened; however, the test generally should not be constructed more stringently or more leniently than it was prior to Smith.

As to the perceived evils that necessitate the legislation Congressman Hoyer of Maryland, speaking in support of the legislation, observed:

Since Smith, more than 50 cases have been decided against religious claimants. Amish farmers have been forced to affix garish warning signs to their buggies, despite expert testimony that more modest silver reflector tape would be sufficient. Orthodox Jews have been subjected to unnecessary autopsies in violation of their family's religious faith and one Catholic teaching hospital lost its accreditation for refusing to provide abortion services. Evangelical churches have been zoned out of commercial districts in some cities prompting a Minnesota trial judge to remark that churches have no more constitutional rights than adult movie theatres.

Senator Simon. Let me give you a very specific instance that you are not going to be confronted with, though the issue may be one that you will be confronted with. We have a House colleague by the name of Dan Glickman, a Congressman from Kansas. He told me the story, and I repeat it with his permission.

When he was in—I think it was the fourth grade, they had prayer in the schools in Wichita. He happens to be Jewish. A large majority of this population in Wichita is not. Every morning when he was in the fourth grade, he was excused while they had school prayer, and then he was brought back in. Every morning little Danny Glickman was being told, you are different, and all the other fourth graders were being told he was different.

Does this strike you as something that is offensive in terms of where we have been, and where we ought to go?

Judge Thomas. Senator, I think that when we engage in conduct such as that, when someone feels that he or she is excluded because of certain practices, such as those religious practices, I think we need to question whether or not government is involved. I think it is wrong.

You know, as you were talking, something came to mind. I remember being excluded from conversations about the war of Northern aggression, which for those who don't know about the war of Northern aggression, it is the Civil War. And it is refought, for those who think it ended at some point. But it is a sense of exclusion. And for those of us who have felt that sense of exclusion, I think that we have a strong sense that any policy that endorses that exclusion—and I think Justice O'Connor points that out—should be considered inappropriate.

My concern would be with someone like Danny Glickman that when we consider cases in a constitutional context that we understand the effects of government's perceived endorsement of one religion over another, and that we take that into consideration when we analyze those cases.

But the Court has had a great deal of difficulty, and there is some debate on the Court as to how far you should go; whether or not there should be this complete separation; whether or not there should be some accommodation and certain circumstances; or whether or not even there should be a movement as far as just simply to the position where the Government isn't establishing a religion or coercing individuals to be involved in a certain kind of activity.

But I think it is a vibrant debate. I have an open mind with respect to the debate over the application of the Lemon v. Kurtzman test, and I recognize that the Court has applied it with some degree of difficulty. But at the same time, I am sensitive to our desire in this country to keep government and religion separated, flawed as it may be by that Jeffersonian wall of separation.

APPENDIX
HEARINGS BEFORE THE COMMITTEE ON
THE JUDICIARY UNITED STATES SENATE
ONE HUNDRED SECOND CONGRESS
FIRST SESSION ON
THE NOMINATION OF CLARENCE
THOMAS TO BE ASSOCIATE JUSTICE OF
THE SUPREME COURT OF THE UNITED
STATES
SEPTEMBER 10, 11, 12, 13, AND 16, 1991
PART 1 OF 4 PARTS
PAGES 255-257

Senator Simon. Let me shift to another area, and that is the church-state area where you have not written very much. In fact, the only thing I have is in response to a question about religion in the schools in Policy Review magazine. You say:

My mother says that when they took God out of the schools, the schools went to hell. She may be right. Religion is certainly a source of positive values, and we need all the positive values in the schools that we can get.

It is the only thing I have found in this whole church-state area.

This is an area where, again and again, during your years on the Court you will be asked to make decisions. Since 1971, the Court has followed a three-part Lemon criteria that you may be familiar with. It is Jefferson's wall of separation. It is not quite that clear. When the Methodist church is on fire, you call the fire department. You don't say separation of church and state. We can't put out the fire because of a number of factors.

But the Lemon criteria are: No. 1, does it have a secular purpose? No. 2, is its effect to advance or inhibit religion? And, No. 3, does it excessively entangle government and religion?

That is what the Supreme Court has been using since 1971.

I guess I have a twofold question: No. 1, are you familiar with the Lemon criteria? And, No. 2, if you are, do you think they are reasonable criteria that should be used in the future?

Judge Thomas. Yes, Senator, I am aware of the tests enunciated in Lemon v. Kurtzman. The Court has applied the tests with some degree, I think, of difficulty over the years. I have no personal disagreement with the tests, but I say that recognizing how difficult it has been for the Court to address just the kind of problem that you have pointed out when the church is on fire or when there is this closeness between the activity of the Government and the activity of the church.

I think the wall of separation is an appropriate metaphor. I think we all believe that we would like to keep the Government out of our beliefs, and we would want to keep a separation between our religious lives and the Government.
took God out of the schools, the schools went to hell. She may be right. Religion certainly is a source of positive values, and we need to get as many positive values in schools as possible." You said that was your personal view, but of no consequence; that as an appellate judge, you would be bound to follow Supreme Court precedent.

Now, however, you are being considered for the Supreme Court and you will be in a position to set precedent. Your personal views are of great consequence, so I would like to ask you this: The Supreme Court has repeatedly ruled that prayer in the schools violates the first amendment. Given your statement in 1985, could you explain your views on prayer in school today?

Judge Thomas. Senator, as I indicated yesterday, my comments there were not taken in to any way reflect on the legal rulings on the establishment clause or the free exercise clause. As I indicated yesterday, that from my standpoint, as a citizen of this country and as a judge, that the metaphor of the Jeffersonian wall of separation is an important metaphor. The Court has established the Lemon test to analyze the establishment clause cases, and I have no quarrel with that test.

The Court, of course, has had difficulty in applying the Lemon test and is grappling with that as we sit here, I would assume, and over the past few years, but the concept itself, the Jeffersonian wall of separation, the Lemon test, neither of those do I quarrel with.

Senator Kohl. All right. In your view, Judge, what is the current state of the law with regards to the establishment clause of the first amendment?

Judge Thomas. The Court now, in the application of the Lemon test, that is that there be a secular purpose to the legislation or the action, that there be no primarily sectarian effect and there be no unnecessary entanglement of government in the affairs of religion. It has been difficult for the Court, as I noted, to apply. The Court has been split between I think those who feel that there should be some accommodation and those who think there should be an absolute separation.

Justice O'Connor, of course, has offered some movement in the area, as well as Justice Kennedy I think has applied a coercion test. I think the judges are grappling at, when church and the government are inexorably in contact with each other, how much separation can there be and how do you draw the line.

I think it is difficult. It has been difficult for the Court. We see it in the cases with the Christmas displays and the Court has not resolved it, but I think the analysis, the Lemon test, as well as the understanding that the separation must be there is important, but, in practice, it is difficult.

PAGE 292-293

Senator Kennedy. But your language will, I believe, state, at least, your position to the Cato Institute.

Let me go into a different area. I noted with interest that you were asked by Senator Simon yesterday about the constitutional issues involved in a case on freedom of religion and the so-called Lemon test used by the Supreme Court to decide cases involving the separation of church and state, and you answered, "I have no personal disagreement with the test," and you repeated that view this morning in response to a question from Senator Kohl. You said, as I recall, that you have no quarrel with the Lemon test.

Now, as a matter of fact, the Supreme Court is scheduled to hear a particular case this fall on the issue, the Lee v. Weisman case. The Supreme Court has been called upon to consider its earlier decisions, and the Justice Department has already filed a brief in that case calling for the Supreme Court to abandon the constitutional test it has been using, the Lemon test. I have the brief here: "The case offers the Court the opportunity to replace the Lemon test with the more general principle implicit in the traditions relied upon in Marsh and explicit in the history of the establishment clause."

So, if you are confirmed as Justice, you will be sitting on that case this fall as a member of the Court. Yet, you did not hesitate yesterday and today to tell us that you have no personal disagreement with the Lemon test now being used by the Supreme Court. My question is, do you have any personal disagreement with the test used by the Supreme Court in Roe v. Wade to decide the cases on abortion? That test requires the State to have a compelling State interest, if it is to justify an infringement on a woman's right to choose an abortion.

Judge Thomas. Senator, without commenting on Roe v. Wade, I think I have indicated here today and yesterday that there is a privacy interest in the Constitution, in the liberty component of the due process clause, and that marital privacy is a fundamental right, and marital privacy then can only be impinged on or only be regulated if there is a compelling State interest. That is the analysis that was used in Roe v. Wade, you are correct.

I would not apply the analysis to that case or can't do it in this setting, and I have declined from doing that in this setting, the analysis separate from that case, if that is the test, the compelling interest test. I don't have a problem with that particular separate analysis separate and apart from that case, but I think it is inappropriate for me to sit here as a judge and to say that I think that should be used in a case that could come before the Court, for the reasons that I have stated previously.

Senator Kennedy. Judge, you have indicated a willingness to comment on the constitutional cases affecting the establishment clause, the test which you would be willing and do support under the Lemon case. I am not asking you how you would rule in Roe v. Wade. All I am asking you is, since you have been willing to state your agreement with the current test in the Lemon case and you will be sitting on the Court in October on that case, if confirmed, and you have been willing to express your opinion here on the test that is used in terms of the establishment clause.

My question is, without getting into the outcome of Roe, whether you have any problem in the test, the compelling State interest test.

Judge Thomas. What I have said, Senator, is that the Lemon test I had no quarrel with, but the Court has had difficulty in its application. I think that was my complete statement.

PAGES 396-399

The Chairman. All right. Now, let me move to another area, if I may, and that is to the area we have touched on very briefly,
religion, if I may, not your religion or mine, how the court deals with religion.

Judge this is one area where the level of protection accorded fundamental rights is changing, and I do not think most of us even know it. You know it, and that is the right of free speech and the free exercise of religion. These rights, which, perhaps more than any other, are central to what most of us believe to be what it means to be an American.

In my view, these rights deserve the highest level of protection by the court, and I would like to start first with the Free Exercise Clause of the First Amendment, which provides, as you well know, "Congress shall make no law prohibiting the free exercise of religion."

Now, until last year, the Supreme Court applied the standard known as strict scrutiny, when reviewing legislation that restricted religious practice. Under the strict scrutiny standard we have discussed a number of times, but it bears repeating, the State first needed a compelling reason for restricting the religious practice, and, second, the State had to show that no other alternatives were available for it the State to achieve its goal. It has been a test now for about 40 years, 35 years, a two-prong test.

Under this doctrine, the Supreme Court held, for example, that the compulsory education law could not be used, for example, to require Amish children to attend school, when their parents believe that they have a religious duty to be educated at home, the Yoder case, Wisconsin v. Yoder.

The Court reasoned that, even though the State was not acting out of any hostility, and even though the State had a compelling reason for making children attend school, in general, in Yoder they held the State law could not constitutionally be applied to the Amish, because there was "no compelling reason for abridging the religious freedom to educate their children."

Then, last year, the Supreme Court decided the case of the Employment Division of Oregon v. Smith. In the Smith case, the Court held that the Free Exercise Clause permits the State to prohibit sacramental use of peyote. I think that is how it is pronounced, is that correct? Never having used it, I am not sure of the pronunciation. Peyote, it is a drug used in an Indian ceremony and it has been used historically by them. Thus, a State could deny unemployment benefits to those who were discharged from employment for such use.

Now, I do not want to discuss the specific case of the case nor the specific outcome. Instead, I want to ask you about your understanding of the reasoning the Court used in this case. Justice Scalia, writing for a 5-to-4 majority, concluded that, as long as the Government is not specifically trying to restrict religion or as long as it is not trying to discriminate against religion, it can apply a general law against a religious activity, and it doesn't matter what effect the law has on that religion, in a
sense striking down what historically—not historically, what the last several decades has been the second test needed to be passed, in order for the State to be able to take such action.

In other words, even if the law passed by the Government has a devastating impact upon a religious practice, the law is still constitutional, according to the majority, Scalia writing for them, is still constitutional, so long as the Government acted with a legitimate purpose when it passed the law.

Now, Justice O'Connor, on the other hand, said she would have upheld the ban on peyote, without changing the legal test that has historically been applied, without abandoning the strict scrutiny test. Now, Judge, which approach do you agree with, not whether or not it should be outlawed or not outlawed—that is not the issue as far as I am concerned. Do you agree with Scalia's approach, or do you agree with O'Connor's approach?

Judge Thomas. Senator, I think as I indicated in prior testimony here, when the Sherbet test was abandoned or moved away from in the Smith case, I think that any of us who were concerned about this area, because, as we indicate, I think we all value our religious freedoms, I think that there was an appropriate reason for concern, and I did note then that Justice O'Connor, in applying the traditional test, reached the same result.

The Chairman. Correct.

Judge Thomas. I cannot express as preference. I have not thought through those particular approaches, but I myself would be concerned that we did move away from an approach that has been used for the past I guess several decades.

The Chairman. Judge, I asked the same question of our most recent Justice and Justice Souter had no problem telling me that he agreed with the O'Connor approach. I do not care which approach which approach. You obviously know the area well. You obviously know the facts of the cases. You obviously have an intense and deep commitment to religion and your faith in God. Do you mean to tell me you have not thought, when this came out, which approach you thought was appropriate.

Judge Thomas. Let me restate my answer. My concern would be that, without being absolutist in my answer, my concern would be that the Scalia approach could lessen religious protections.

The Chairman. Judge, as a matter of fact it does. I mean it is not whether it could or should. I mean it does, it limits the protection, for example, in the case—I guess it was in New Mexico, where they passed a law saying minors cannot drink wine under any circumstances. As you know, in our church and in many churches, there is a sacramental taking of wine at communion, and in most churches that occurs in most Christian religions—I cannot speak for others—and it occurs when kids are 7 years old or 8 years old, and it impacts significantly.

You know, it was struck down, that restriction in New Mexico, it never got to the Supreme Court, to the best of my knowledge. But clearly, under the test applied by Scalia, such a law could be passed and it would be held constitutional. It has a big impact, it is a big deal, not a minor thing.

Judge Thomas. And I guess my point is our concerns are the same, that any test which lessens the protection I think is a matter of concern. The point that I am making, though, in not being absolutist is that I think it is best for me, as sitting Federal judge, to take more time and to think that through, but my concern about the approach taken by Justice Scalia is that it may have the potential and could have the potential of lessening protection, and I think the approach that we should take certainly is one that maximizes those protections.

The Chairman. Judge, you know, when your confirmation is over and if you are on the bench, you are on the bench and the next nominee comes up, we now talk about the Souter standard and how Souter did not answer questions that some suggest he should or shouldn't have, I am not making a judgment on that. We are going to have a new standard, the Thomas standard, which is you are answering even less than Souter.

Senator Hatch. First of all, Mr. Chairman, I do not think that is true. I think he has answered forthrightly and very straightforwardly all the way this thing. He may not give the answers you and I want—

The Chairman. No, I am not looking for an answer that I want, let me make it clear, Senator. I am just making a statement of fact. I asked the precise same question of Judge Souter. Just Souter, sitting not as a Federal Judge, sitting as a State court judge, said "I agree with O'Connor," no ifs, ands, or buts about it, just click, bang, I agree with O'Connor. That is the only point I am making.

Senator Hatch. But he has answered things that Justice Souter had not answered, so I am saying—
JEFFERY ATIK

In July, Suffolk Law School's Jeffery Atik attended the Second Joint Conference of the American (ASIL) and Dutch (NVIR) societies of international law at The Hague. Atik joined law professors and economists from the U.S., U.K., Netherlands and Germany in a panel discussion entitled Regional Development Assistance to Reduce Disparities Among Member Countries: Does the EC Experience Point the Way for NAFTA?

The North American Free Trade Agreement (NAFTA) has been a subject of considerable political debate in the U.S. in recent months. In his conference presentation, Atik argued that the powerful coalition between labor and environment groups now opposing NAFTA is likely to fragment once NAFTA's ratification seems assured and the debate proceeds to issues of funding infrastructure and economic development in Mexico.


I. INTRODUCTION AND PREMISES.

While the EC experience suggests a proper and useful role for regional development assistance within NAFTA, the declared position of the three NAFTA member states is clear: regional assistance is neither contemplated nor necessary. Even Mexico, the obvious beneficiary of any regional assistance program within NAFTA, currently disclaims any interest in receiving funds, arguing in the ratification debates that the economic benefits it will derive from free trade will be adequate to fund compliance with higher, NAFTA standards. NAFTA, it is emphasized, is not to be an economic union or a common market, but merely a free trade area, and as such does not comprehend inter-member assistance.

The proponents of NAFTA perceive, correctly, that talk of substantial regional assistance is likely to undercut public support for NAFTA, particularly in the United States, where NAFTA's ratification prospects are quite troubled. Thus, serious discourse about regional development funding will take place, if at all, in a post-ratification period. NAFTA's opponents, however, are pointedly arguing that development assistance is imperative from the start, and that NAFTA should not be ratified without its inclusion. It is not clear whether the passion for regional funding of certain NAFTA opponents runs deep; raising the specter of significant economic burdens is an effective oppositional strategy in its own right.

I will argue that an understanding of the existing (pre-ratifica-
Regional assistance has rarely been held in high repute within the United States.
the ratification of NAFTA. Organized labor represents only a portion of the entire U.S. workforce, and therefore its interests do not necessarily reflect those of most U.S. workers. Organized labor, with its higher than average wage structures, may be exceptionally vulnerable to the negative effects of NAFTA, such as plant closures and demands for worker concessions. U.S. organized labor fears that NAFTA will further stimulate the migration of U.S. production facilities to Mexico, thus substituting Mexican labor for more expensive U.S. organized labor.

A further fear shared by U.S. labor is that NAFTA will, despite its current provisions to the contrary, lead to an eventual free movement of persons, saturating the U.S. labor market with substantial additional numbers of immigrant workers. This would further tend to erode the influence of organized labor both with management and within U.S. politics.

U.S. negotiators have addressed these concerns in part, by expressly limiting movement of persons to upper-level managers on temporary assignment, by providing escape clause protection against import surges, and by programs of adjustment assistance, which are to ameliorate the hardships faced by those U.S. workers displaced as a result of NAFTA.

The concerns of the special interest internationalists, of course, differ from group to group. Green groups have asserted a concern for environmental quality both within the United States and within Mexico; NAFTA induced development within Mexico, many Greens believe, will bring inevitable degradation to the Mexican environment. Tax environmental enforcement in Mexico, the Greens assert, will induce polluting firms to migrate from the U.S. to Mexico, whence they will engage in unfair competition with cleaner U.S. production facilities. The Green groups, although largely based in the United States, advance a political campaign for environmental conditions outside the United States; they are "internationalists" in that the scope of their concerns and efforts extends beyond the national borders.

Similarly, certain social justice organizations based in the United States have expressed concerns about post-NAFTA working conditions in Mexico; they fear U.S.-managed industrial firms operating in Mexico will exploit their Mexican workers, applying standards that are humanly unacceptable. Again, these groups can be characterized as internationalist, in that they assert that certain levels of worker protection (including an adequate minimum wage) should prevail both within and without U.S. borders.

III. THE CROSS BORDER TRANSACTION TAX AND DEDICATED FUNDING.

There are serious concerns, seized on by NAFTA critics within the U.S., whether NAFTA can function as a "pay as you go" proposition; after all, the European experience argues that infrastructure and other forms of regional assistance are essential in successfully integrating lesser developed new members into an existing economic community. While Mexico has made repeated assurances about its support for high (i.e., U.S.) levels of environmental protection, Mexico's current ability to assure such protection absent significant financial assistance is in great doubt. For this reason, NAFTA opponents, including the Green groups, have insisted that NAFTA be rejected unless funding be provided to Mexico (and in U.S. border regions) to assure that adequate environmental standards are maintained.

Two prominent NAFTA skeptics in the U.S. Congress, Rep. Richard Gephardt and Sen. Max Baucus, have proposed that a "Cross Border Transactions Tax" be enacted to accompany NAFTA. Presently the idea of a Cross Border Transactions Tax exists virtually in name only. However, it appears that such a tax would have the following features:

- The tax would be collected on:
  (i) shipment of products and services provided across the U.S./Mexico border; and
  (ii) sums invested by U.S. firms in production facilities in Mexico.

- Proceeds would be dedicated to
  (i) infrastructure investment and environmental compliance in both U.S. and Mexican border areas; and
  (ii) adjustment assistance for displaced U.S. workers.

Both the tax and its spending are quite focused, effecting a very deliberate distribution of resources and introducing a number of discrete distortional effects. The proponents argue that revenues must be raised to fund adequate standards, and that the burden should fall on those firms most directly enjoying NAFTA's benefits.

From the perspective of NAFTA's expressed goals, a Cross Border Transactions Tax raises some severe problems. First and foremost, a tax on the value of goods shipped over a border is a tariff by another name. Even if the tax is nominally imposed only on U.S. importers, it has the effect of substituting the tariffs eliminated by NAFTA. It will have the resultant economic effect of depressing U.S./Mexican trade, and will function to protect existing U.S. production facilities (and their associated factor providers, i.e., U.S. labor.)

Organized labor represents only a portion of the entire U.S. workforce, and therefore its interests do not necessarily reflect those of most U.S. workers.

Second, a tax on cross border investment would depress the amount of U.S.-sourced investment in Mexico, further discouraging the migration of production. This, of course, is likely the point of the tax.

The expenditure side of the proposal introduces additional distortions. To the extent that the Cross Border Transactions Tax structure involves a U.S. tax (perhaps nominally applied only to U.S. persons), but is spent for environmental and other infrastructure improvements in Mexico, it is an inter-member transfer. The
provision of such funds, however, arguably benefits Mexican-based production facilities artificially, which will find their environmental compliance costs lowered, thus violating the "polluter pays" principle. To the extent the benefits to production exceed the burden of the tax, there may even be an artificial stimulant to investment.

Spending on U.S. worker adjustment assistance may introduce distortions as well. Adjustment assistance can be readily justified on redistributive grounds; affected workers bear an unjust portion of the costs of economic integration, while the benefits are much more widely diffused. Still, adjustment assistance may indirectly benefit U.S. firms, permitting them to close factories and migrate production more easily. Enhanced wage rates in the U.S. (taking the availability of adjustment assistance into account) directly increases the wage rate differential with Mexico, arguably stimulating additional migration of labor intensive operations to Mexico.

IV. POST-RATIFICATION COALITION DYNAMICS.

A review of the Cross Border Transaction Tax reveals how the existing coalitions aligned in support of and in opposition to NAFTA are fragile, and may dissolve in a post-ratification environment.

Current NAFTA opposition is formed by a coalition of U.S. organized labor together with various internationalist special interest groups, such as the Greens and certain social justice organizations. To some extent all these groups oppose the further economic development of Mexico which NAFTA promises. Their opposition stems from different sources, however. U.S. labor opposes NAFTA because it perceives that NAFTA will facilitate the movement of productive capacity from the U.S. to Mexico, with the loss of U.S. jobs. Greens oppose NAFTA because additional development in Mexico will necessarily degrade the environment and undercut U.S. standards. Social justice interests oppose NAFTA as industrialization will lead to exploitative wage and working conditions.

Once (that is, if) NAFTA is ratified, this oppositional coalition is likely to dissolve. The establishment of NAFTA will mean the continued development of Mexico. "Free traders," which support the ratification of NAFTA, are likely to be ambivalent about the introduction of regional assistance for Mexico. In its present form NAFTA, it must be said, is economic integration on the cheap; firms receive the benefit of a considerably larger trading area with little or no additional cost. If U.S. provision of regional assistance means higher levels of U.S. taxation, "free traders," especially large corporations, may resist. However, if the infrastructure improvements financed by regional assistance generally inure to the benefit of U.S. firms operating in Mexico, these "free traders" may reveal themselves to be not so "free," and will happily accept the U.S. largesse.

U.S. organized labor is likely to oppose development assistance unequivocally. First, to the extent that inter-member payments are funded from general U.S. resources, labor will be bearing a share of the additional tax burden. Further, high NAFTA-wide standards, be they environmental or worksite related, in the absence of funding are protectionist; with high standards alone it may be prohibitively costly to move production facilities from the U.S. and Mexico. With funding, however, firms may be more likely to migrate.

Once the development of Mexico is taken as inevitable, the Greens have a range of possible strategies. These include:

(i) Opposing development in Mexico. This strategy would appeal to the most ideologically committed. Greens will have to find new ways to oppose or contain development in Mexico; however, they will likely have to operate within the bounds of NAFTA's institutional mechanisms, where they may face problems of standing, or within the field of Mexican internal politics.

(ii) Supporting equilibration of environmental standards between Mexico and the United States by bringing Mexico's effective standards (including enforcement) to U.S. levels. If this formal requirement can simply be maintained, providing development assistance will only bring development that would not have otherwise taken place (i.e. development that would not be economical on an own-resources or polluter pays principle.) Thus, were high standards politically feasible and sustainable without development assistance, Greens would oppose assistance in order to contain development.

(iii) Were equilibrating standards only achievable (i.e. politically obtainable in Mexico) with development assistance, the second-best strategy for pragmatic Greens would be to secure for Mexico adequate funding for the highest possible level of environmental compliance. By funding environmental compliance costs from U.S. resources, however, an even greater amount of investment migration may follow, to the further disadvantage of U.S. organized labor.

By funding environmental compliance costs from U.S. resources, however, an even greater amount of investment migration may follow, to the further disadvantage of U.S. organized labor.

Similarly, once NAFTA is ratified, social justice organizations can be expected to focus on the establishment and maintenance of adequate Mexican working conditions within the operation of normal Mexican politics. Formal harmonization of standards for working conditions between Mexico and the U.S., taken alone, would depress the migration of production. Here again U.S.-sourced regional assistance funding would be welcomed by the special...
interest group, as it would lead to real world improvement to Mexican working conditions, but would be adverse to U.S. organized labor.

Thus, on the question of regional assistance in a post-ratification environment, the powerful existing coalition between organized labor and the internationalist special interest groups is likely to collapse, with labor resolutely in opposition and the interest groups potentially supportive of assistance.

Similarly, once NAFTA is ratified, social justice organizations can be expected to focus on the establishment and maintenance of adequate Mexican working conditions within the operation of normal Mexican politics.
requests for impoundment of search warrant related materials are rare, ordinarily occurring only when the prosecution fears great bodily harm may come to an unidentified informant or other person whose identity is not yet known to the defense, or where an on-going investigation of serious crime would be jeopardized by premature disclosure of warrant related information, or where a defendant's right to a fair trial might be endangered by public disclosure of the contents of the warrant or supporting affidavits.

The contents of search warrants and their supporting affidavits are always in effect impounded until the warrant has been executed and returned to the Clerk of the appropriate District Court (M.G.L. Ch. 276, § 2B & 3A). M.G.L. Ch. 276, § 2B provides that "... upon return of said warrant, the affidavit shall be attached to it and shall be filed therewith, and it shall not be a public document until the warrant is returned," (emphasis provided). That the affidavit is a public record or document is clear. See Newspapers of New England v. Clerk/Magistrate of Ware Division of District Court Department, 403 Mass. 628, 531 N.E.2d 1261 (1988). However, the affidavit must be retained by the Clerk/Magistrate, and it is not a public document until the warrant is returned. See Commonwealth v. Ruthkowski, 406 Mass. 673, 550 N.E.2d 362 (1990).

The real question that arises concerns appropriate procedures to be followed in cases where post-return impoundment is sought.

**Authority To Decide Impoundment Requests**

Given the absence of any specific statutory authorization for Clerk/Magistrates to rule on such motions, it would appear that those officers lack authority to consider such issues. Consequently, impoundment motions ought properly to be brought before, and heard by, a justice. In considering such motions, justices are relying upon the provisions of M.G.L., Ch. 22, § 2, which sets forth the "General Powers of Courts":

The courts of the commonwealth and the justices thereof shall have and exercise all the powers necessary for the performance of their duties. They may issue all writs, warrants and processes and make and award judgments, decrees, orders and injunctions necessary or proper to carry into effect the powers granted to them, and, if no form for such writ or process is prescribed by statute, they shall frame one in conformity with the principles of law.
and the usual course of proceedings in the courts of the commonwealth.

In Newspapers of N.E. v. Clerk/Magistrate, Ware Div., supra, the Supreme Judicial Court held that a district Court judge had the discretion to impound an affidavit in order to protect a defendant's right to a fair trial.

Motions seeking impoundment ought to be brought at the time of applying for the search warrant itself wherever possible, so that the entirety of the Commonwealth's requests can be brought before one judge who can consider them together, a procedure which simplifies the administrative aspects of the matters at issue. While there is no rule precluding one officer from ruling on the request for the issuance of the search warrant itself (including, of course, a Clerk/Magistrate) while another official (a Justice) rules on the motion for impoundment, such an approach is awkward and time consuming. With little to recommend it, it ought to be avoided, save in those rare cases where a genuine emergency exists necessitating the immediate consideration of an application for the issuance of a warrant, and where no Justice is available, but where a Clerk/Magistrate is available to consider the application. Where unusual circumstance results in a delay in the filing of an impoundment motion, the Commonwealth must act quickly.

Filing such a motion after the return of the warrant tends to be self defeating, since it can only be heard after the documents in question have already become public documents, and possibly have been inspected by the very persons from whom the Commonwealth seeks to withhold the information at issue.

PROCEDURE FOR CONSIDERING IMPOUNDMENT MOTIONS

Beyond the general authority set forth in M.G.L. Ch. 220, § 2, no statutes or court rules have been enacted or promulgated to address this question per se (at least in the specific context of criminal matters). However, within the Trial Court Rules are found the "Uniform Rules On Impoundment Procedure" ("U.R.I.P."). These rules govern impoundment in civil proceedings in every Department of the Trial Court. As the nearest and best available guide in the Commonwealth on the subject, it provides valuable instruction on the Supreme Judicial Court's approach to the topic of impoundment.

Without attempting to define specifically what content matter is or is not the proper subject matter for impoundment, the following procedural steps, modelled after the U.R.I.P., are strongly recommended when an impoundment order is sought.

A) - The Motion For Impoundment (See U.R.I.P., Rule 2)

Requests for impoundment must be made by written motion, accompanied by affidavit in support thereof.

The motion must set forth the grounds for impoundment, together with a clear statement setting forth specifically the factual reasons in support of the request in the case at hand. General drafting language ("boilerplate") is not sufficient. The motion must describe with particularity the material sought to be impounded and the period of time for which the order of impoundment is sought.

The affidavit in support of the motion must set forth specific, detailed information relative to the specific facts of the case at hand, such as will justify the granting of the motion from a factual point of view.

The motion, and the statement of reasons in support thereof, should be signed by and presented to the Court by the Attorney General or a District Attorney, or one of their Assistants. The affidavit in support thereof should be signed by a police officer having knowledge of the specifics of the case.

B) - Ex Parte Impoundment Motions (See U.R.I.P., Rule 3)

Like other aspects of search warrant application procedure, motions for impoundment will ordinarily be brought ex parte, and generally at the time of the application for the issuance of the warrant itself.

Such motions ought to be granted only upon a showing that immediate and irreparable harm may result (either to a specific person or persons, or to the progress of an on-going investigation into serious criminal activity) before a party or interested third person can be heard in opposition.

Such orders, when granted, should be signed by the issuing Justice, and endorsed with the date of issuance. The impounded materials should be placed in an opaque envelope (or other, suitable opaque container), sealed, and the signature of the issuing Justice should be placed across the seal itself.

An "Order of Impoundment," a draft of which should be presented to the issuing Justice by the moving prosecuting attorney, should be dated and signed by the issuing Justice, addressed to the Clerk of the court to which it is returnable, and the order itself affixed to the outside of the envelope. It should be given in hand to the executing law enforcement officer, with clear, written instructions requiring the filing of the impounded warrant, with supporting affidavit, after service thereof, with the Clerk of the appropriate district court, within the time period set forth by applicable statute (ordinarily M.G.L. Ch. 276). The order should plainly set forth the duties of the receiving Clerk of court, and should plainly set forth the date of the expiration of the order.

C) - Docketing Responsibilities

Upon receipt of such an order, the Clerk of court should number the warrant in the usual manner, and note in the "Search Warrant Docket" the number of the warrant, the date of its issuance, the name of the issuing Judge, the police department to whom it was issued, the location of the search and a general description of the items, etc., sought, unless the issuing Judge has specifically ordered, in writing, any of these elements of information impounded. The Clerk should also note in the docket the date of its "Return" to the district court, and whether or not a seizure resulted from the search. (Note that impoundment of such information itself will be quite rare, since it ordinarily will be the specific information set forth in the affidavit in support of the issuance of the search warrant that the government will seek to have impounded, not the fact of the search's having been conducted.)

All impounded material must be kept separate from other papers in the case, and wherever possible away from other search warrants in a separate, locked storage place within the Clerk's office dedicated exclusively to the storage of impounded materials, and access to which is limited to the Clerk of the Court and Assistant Clerks of the court.
D) - Opposition To Impoundment

Defendants and other persons having legal standing may move for the modification or dissolution of orders of impoundment pursuant to the usual procedures for the filing and hearing of motions in criminal matters as set forth in the Massachusetts Rules of Criminal Procedure. When a public hearing on such a motion may risk disclosure of the information sought to be impounded (or which is already the subject of an existing impoundment order) the court may close the hearing to the public. (U.R.I.P., Rule 7). The Clerk shall make appropriate entries in the Search Warrant Docket (and in the regular Criminal Docket as well, if criminal charges have come into existence related to the search warrant), noting the filing of the Motion In Opposition with affidavit in support thereof, the name of the moving party, the date of the hearing, the name of the hearing Judge, the identity of any stenographer or court reporter present, whether or not the hearing was open to the public, the tape number and footage of any court controlled tape recording machine in use, and the court's decision on the motion, rendered at or after the conclusion of the proceedings. Where proceedings are closed to the public, all persons with any records thereof (stenographic, electronic or otherwise) shall diligently safeguard those records, so as to observe the court order.

E) - The Court's Decision on Motions In Opposition (See U.R.I.P., Rule 7)

The findings and orders of the court, rendered at or after the conclusion of the hearing on the Motion In Opposition must be in writing, signed by the Judge who conducted the hearing. In reaching its conclusion, the court "should consider all relevant factors." In the criminal context, this would seem to indicate the nature of the information sought to be impounded, any legitimate state interest in keeping the information concerned secret, especially as that bears on the personal safety of informants or other persons referred to within the affidavit, preserving the integrity of an ongoing investigation into serious criminal activity, and/or the preservation and safeguarding of the right of the defendant to a fair trial, all as balanced against the presumption that all such documents ought to be public, open, and available for inspection upon the return of the warrant to the appropriate district court Clerk.

F) - The Order Of Impoundment (See U.R.I.P., Rules 8 & 9)

Impoundment Orders, whether ex parte or after notice and hearing, may be made only upon written findings. The Order should specifically state what material is to be impounded, and, where appropriate, may specify how the impoundment is to be implemented. An Impoundment Order shall be signed by the issuing Judge, endorsed with the date of issuance, and shall specify the date of the expiration of the Order.

The Clerk of the court to which the Order is returned shall make docket entries as set forth in “C” supra. Upon expiration or other termination of the Impoundment Order, the material in question should be placed in the regular files of the Clerk without any further order from the court. Parties seeking an extension of an Impoundment Order bear the burden of proceeding before the scheduled expiration of the Order.

No Impoundment Order may be modified or terminated, except upon order of the court and upon written findings in support thereof. Any modification, dissolution, or extension of an Impoundment Order shall be recorded by the Clerk as set forth above.

G) - Appellate Review (See U.R.I.P., Rule 12)

An order impounding, or refusing to impound material may be reviewed by a single Justice of an appellate court in accordance with the provisions of law and consistent with the procedures established in Rule 1:15 of the Rules of the Supreme Judicial Court ("Impoundment Procedure").

ENDNOTE

Terrence B. Downes, Esq, is a member of the Adjunct Faculty at Suffolk University Law School, leading a seminar entitled: "Alternative Dispute Resolution: Arbitration, Mediation and Negotiation." He previously taught Criminal Law. A graduate of Harvard and Suffolk University Law (J.D. '78), he is also a member of the Adjunct Faculty at the University of Massachusetts – Lowell. An official of the Massachusetts Trial Court, he lives in Andover with his wife, Ann O'Connor Downes, Esq. (J.D. '86).
COCAINÉ
T.B. Downes

In the tavern near the bar
The dealer quiet sat
They came to him by foot and car
And there to have a chat,
About the money that they’d need
Their habit to maintain
To strike the deal and get from him
The day’s fix of cocaine.

They weren’t the types you’d read about
Or see on TV news
The people who came him to see
And then to pay their dues,
Bankers, teachers, architects,
Plumbers and engineers,
All hooked and desperate to inhale
The stuff that kills careers.

It hadn’t started out that way
Or so they thought back then
A dare to try and satisfy
A deep and aching yen;
Their friends thought them sophisticate
And in the fastest lane
To snort the coke, to do the hne
The sweet rush to obtain.

They loved it so they wanted more
They craved it over life
How it consumed their every hour
And sunk them into strife.
The dealer higher costs imposed
Demanding more and more
From addicts who could not resist
The powder they adore.

No matter frightful though it be
The charge they had to bear
Or face alone and terrified
Withdrawal’s sweaty stare.
So fruits of labor disappeared
The dealer much did reap
In supplication they gave up
Life savings him to keep.

With all about them tumbling down
With families writhed in pain
They worshipped still at dealer’s door
And begged in sad refrain.
They stole for it, they lied for it,
They sold their souls to gain
Just one more fix, just one more hit,
Just one more line -
Cocaine.
Suffolk University Law School has a continuing relationship with its Alumni which is unique among the vast majority of law schools. After graduation all former students are encouraged to remain as active participants in the Suffolk “family.” The commitment the Law School shows to its Alumni takes many tangible forms, including placement services, continuing education programs, and an opportunity to use one of the best law libraries in the area. We in the Law Library are honored to be a part of Suffolk Law School’s continuing commitment to our Alumni, and I hope to share with you through a series of continuing articles in the ADVOCATE, news of some of the exciting developments that are taking place in the Law Library.

Contrary to popular belief the work of the Law Library staff does not slow over the summer months. While there are fewer patrons in the Library, there is no shortage of projects for us to work on.

I want to take this opportunity to inform our Alumni community that we intend to bring an on-line catalog to the Law Library sometime this academic year to replace our traditional card catalog. This is exceptionally exciting news because simply put, the automated catalog will revolutionize the accessibility of our collection to all library patrons. The on-line catalog should be of particular interest to Alumni because anyone with a PC, modem, and the correct phone number will be able to dial in and search our catalog from his or her home or office. Putting the catalog on-line is just the beginning of our efforts to automate library operations totally. Soon to follow will be the creation of automated circulation/reserve, ordering, and periodical control systems, all of which are designed to make the Library more user friendly and efficient.

Purchasing an automated library system is a tremendously expensive proposition, and we are certainly indebted to several foundations and individuals who have awarded substantial grants or gifts in support of our automation project. The financial support we have been receiving in support of this project is a clear indication of just how vital it is that we fully automate our Law Library in order not only to improve the research capabilities of our patrons, but also to stay competitive with other law school libraries.

Another step we are taking to help us get on the cutting edge of technology is to move Reference Librarian John Nann to exciting new responsibilities as our Computer and Electronic Services Librarian. In this recently created position John will be working on ways to bring technology to the advantageous use of the entire Law School community. As research and informational methods change you can rest assured that the Law Library will be making every effort to integrate the latest and best technology into our operations.
Another major summer activity was the Law Library's involvement in the annual meeting of the 5,000 member strong American Association of Law Libraries (AALL). This year AALL met in Boston, and the Suffolk Law Library was honored to serve as one of the hosts for the convention. Among the highlights was the opportunity to serve as an official tour site. Our visitors were greatly impressed with our library operations, and, via an outstanding archival display put together by Reference Librarian Beth Gemellaro and Catalog Librarian Ed Huff, they were able to learn about the proud history of Suffolk University. A further noteworthy event resulting from the AALL meeting was the creation of a newly published version of Law Librarian Emeritus Edward Bander’s The Path of the Law: A Lawyer’s Guide to Boston, a guide to significant historical legal luminaries and sites on Beacon Hill. Thanks to the generosity of the Law School Administration, every person attending the convention received a copy of this publication and was therefore able to take a little bit of Suffolk back to their own institutions. There were many other highlights involving our Staff's work at the AALL annual meeting, in fact too many to mention here, but perhaps the most important aspect of our involvement was that our visitors went back home to their firms, law schools and courts with a stronger image of Suffolk University Law School as a terrific place with a great deal to offer the legal community. I think we can all take pride in the positive image that Suffolk projects to everyone who becomes familiar with our Law School.

Until next time, please remember that the Law Library is happy to be of service to the entire Suffolk Community, and please don’t hesitate to contact us if you think we may be of assistance.

Student Bar Association President Anthony Bonanno, ’93, presents Professor Charles E. Rounds, Jr., with the award as the outstanding teacher in the 1992-1993 academic year.
This year will mark the fifth year of the Bimonthly Review of Law Books under the able coeditorship of Law Librarian Emeritus Edward J. Bander and Professor of Law Michael Rustad.

The Review is published six times a year and features some 20 lengthy reviews, a number of shorter reviews, and Ed Bander's inimitable "Nota Bander," a column of wit, wisdom and whatnot about books, lawyers and the legal profession. Each year some two hundred books are mentioned, digested, lauded, and panned.

The editors draw extensively on Suffolk faculty, alumni and students for help in getting out each issue. Faculty that contribute include Dean Kindregan, Professors Cronin, Ortwein, Perlmutter, Slinger, and Rounds. Guest reviewers include Father Drinan, Robert Granfield, William B. Moran, Thomas Koenig, George M. Dery and Richard Bort. Alumni include David F. Bander, Joan S. Pizzano, Robert F. Fitzpatrick, Jr. and Karin Anne Christian. Student reviewers include Wayne J. Carroll, Neil L. Cohen and Chrisann Leal. Many librarians have also contributed reviews including John B. Nann of Suffolk, Donald Dunn of Western New England, and many others.

Every two years a listing of all titles reviewed or mentioned is published in the Bimonthly. The editors not only produce the only publication devoted exclusively to reviewing books about or related to law, but also include reviews of fiction about law and comments about film and theatre. Readers of the Review will not only find themselves up on the latest books on law, but will have a reference publication that will be of service to them in their practice or their teaching.

Subscription to Bimonthly Review of Law Books is $75.00 for six issues and is available from the Fred B. Rothman Co., 10368 W. Centennial Rd., Littleton, CO 80127.

As in this issue the Advocate from time to time has published old photos that may be of interest to our readership. Also, in recent months many photos that help to remind us of the history of Suffolk Law School have been displayed throughout the law school. If you have any such photos that you would be willing to donate or loan to the law school please contact Associate Dean Charles P. Kindregan at (617) 573-8157.
NEW RESIDENT FACULTY

MARIE ASHE, VISITING PROFESSOR OF LAW

Professor Marie Ashe received her B.A. in 1966 from Clark University, her M.A. in 1971 from Tufts University, and her J.D. with honors in 1979 from the University of Nebraska. She was a staff member of the Nebraska Law Review and a member of the Order of the Coif.

Upon graduation from law school, Professor Ashe served as a Deputy Public Defender in Lancaster County, Nebraska, where her duties included the representation of clients in a variety of criminal and civil matters. In 1983, Professor Ashe joined the Nebraska Advocacy Services as a staff attorney. Her duties there included the representation of developmentally disabled clients, primarily in areas of employment discrimination and special education law. Professor Ashe has been admitted to the Massachusetts Supreme Judicial Court, to state and federal courts in Nebraska and West Virginia, and to the United States Supreme Court.

Professor Ashe began teaching law in 1983. She has taught at the University of Nebraska, and has visited on the faculties of Boston University School of Law and Boston College Law School. In 1990, Professor Ashe was appointed the Roscoe Pound Posten Professor of Law at West Virginia University. Professor Ashe has directed or taught in clinical programs in many of the law schools with which she has been associated. She has since 1990 been Co-Chair of the Association of American Law Schools Clinical Section Committee on Research and Scholarship.


At Suffolk, Professor Ashe will teach in the areas of Criminal Law, Constitutional Law and Clinical Practice.

ROSANNA CAVALLARO, ASSISTANT PROFESSOR OF LAW

Rosanna Cavallaro grew up in Brooklyn, NY, and attended Hunter College High School, a girl's high school in Manhattan. She received her A.B. degree, magna cum laude, in the combined fields of Classics and English Literature, from Harvard College in 1983. She went straight on to law school from college, and received her J.D. degree, magna cum laude, from Harvard Law School in 1986. While in law school, Professor Cavallaro was Case Comments Editor for the Harvard Women's Law Journal, as well serving as an instructor in Legal Methods, a teaching assistant in a course on Federal Litigation, and a tutor to students in academic difficulty. During the summers, she worked as a summer associate in the litigation departments of large firms in Chicago, Washington, DC, and Boston.

Upon graduation, Professor Cavallaro clerked for Judge Thomas A. Flannery in the United States District Court for the District of Columbia. After her clerkship, Professor Cavallaro returned to Boston and served for three years as an Assistant Attorney General in the Government Bureau, representing state agencies and officials in state and federal courts, including the Appeals Court and the Supreme Judicial Court. In 1990, she became an associate with the firm of Peckham, Lobel, Casey, Prince & Tye, where she litigated some civil but mostly criminal cases. In 1991, Professor Cavallaro became an associate of Alan Dershowitz, a Professor at Harvard Law School, in his criminal appellate practice. In that position, she worked on appeals of criminal convictions in a number of federal and state appellate courts, as well as several petitions to the United States Supreme Court.

Professor Cavallaro is a member of the bar of the
Massachusetts Supreme Judicial Court, as well as the United States Supreme Court and the United States Court of Appeals for the First Circuit. She lives in Brookline, Massachusetts with her husband who is also an attorney.

STEPHEN MICHAEL McJOHN, ASSISTANT PROFESSOR OF LAW

Professor Stephen McJohn received his B.A. in 1981 from Northwestern University and his J.D., magna cum laude and Order of the Coif, in 1985 from Northwestern University School of Law. Upon graduation, Professor McJohn spent a year studying German law in Tubingen and Dusseldorf at a program administered by the German Academic Exchange Service. Upon completion of the Juristenprogramm in Germany, Professor McJohn returned to the United States to serve as law clerk to the Honorable Jesse Ernest Eschbach, United States Court of Appeals, Seventh Circuit. Upon completion of his clerkship, Professor McJohn joined the law firm of Latham & Watkins, Chicago, Illinois, where he practiced in the areas of bankruptcy, litigation and transactional practice in finance, securities, commercial and environmental law. Prior to joining the faculty at Suffolk, Professor McJohn taught as a visiting assistant professor of law at IIT Chicago-Kent College of Law. Professor McJohn will be teaching in the areas of Commercial Law and Law and Economics.

LINDA SANDSTROM SIMARD, ASSISTANT PROFESSOR OF LAW

As a new member of the faculty at Suffolk University Law School, Linda Sandstrom Simard will be teaching Civil Procedure and Federal Courts. Prior to joining the faculty at Suffolk, Ms. Simard was a litigation associate with Hale and Dorr in Boston and taught as an adjunct instructor at Northeastern University. At Hale and Dorr she was involved in all aspects of domestic and international civil litigation. Her caseload included complex contract disputes, shareholder derivative suits, securities fraud class actions, civil RICO suits and employment disputes. Prior to joining Hale and Dorr, she served as a law clerk to Honorable William G. Young, United States District Judge.

Ms. Simard graduated, magna cum laude, from Boston College Law School where she was elected to the order of the Coif and served as Executive/Managing Editor of the Boston College International and Comparative Law Review. Prior to entering law school, Ms. Simard served as an aide to Senator Edward M. Kennedy and worked with the Chief Economist of the State of Delaware researching position papers for Governor Pierre Dupont. She received a Bachelor of Science degree with honors from the University of Delaware.

Ms. Simard has published in the areas of immigration law and expert witness testimony. Currently she is co-authoring an article with Judge Young discussing the implications of the Supreme Court's recent decision in Daubert v. Merrell Dow Pharmaceuticals.

NEW LEGAL PRACTICE SKILLS INSTRUCTORS

TERRY JEAN SELIGMANN

Terry Jean Seligmann joins the Legal Practice Skills Program at Suffolk University Law School as an Instructor. She attended New York University Law School where she wrote her law review note, “Pinocchio’s New Nose,” on lie detector evidence. Ms. Seligmann clerked for the Honorable W. Arthur Garrity, Jr. in the United States District Court for the District of Massachusetts. For five years she worked as an Assistant Attorney General representing state agencies and officers in civil litigation.

Ms. Seligmann has practiced in both large and small firm settings, most recently as Of Counsel with the litigation firm of Heidlage & Reece, P.C. She was also Staff Counsel to the Supreme Judicial Court of Massachusetts. She serves on the Advisory Committee on Ethical Opinions for clerks of the Court, served on the Supreme Judicial Court Committee on Lawyer Solicitation Rules and was Vice-Chair of the Massachusetts Bar Association's Professional Ethics Committee. She is a former President of the Women's Bar Association of Massachusetts.

Ms. Seligmann has previously taught legal research and writing and trial practice. She has also participated in continuing legal education seminars on at-will employment and litigation practice. She co-authored materials on these subjects and co-authored a published article on litigation of special education appeals.

As a resident of Newton, Ms. Seligmann has served as president of an after-school program, organized a grass-roots neighborhood environmental organization, run the elementary school book fair, and been a parent representative to a city-wide advisory committee on special education.

YVONNE TAMAYO

Yvonne Tamayo is a new Instructor in the Legal Practice Skills Program at Suffolk University Law School. Prior to joining Suffolk University, Ms. Tamayo practiced law with Fitzgerald, Charlip, Delgado, Befeler & Portuondo, a civil practice firm having offices in
Miami and Palm Beach, Florida. She handled all phases of commercial, personal injury, products liability, domestic litigation and corporate law cases.

Ms. Tamayo taught Advanced Legal Research, Writing, and Analysis at St. Thomas Law School in Miami as an Adjunct Faculty Member. She was also an Instructor of Real Estate, Wills, Corporations, and Bankruptcy at the Legal Training Institute, a paralegal college in Palm Beach, Florida. Ms. Tamayo was also a Spanish interpreter/translator for judges and attorneys in federal and state courts.

Ms. Tamayo graduated from Loyola School of Law in 1987. She received a B.S. degree in Merchandising from Louisiana State University and Certificate in French Language Studies from Sorbonne University, Paris, France.
When a legal writer relies on aggregated prepositional phrases, he or she creates verbal hurdles that trip the reader. To persuade, lawyers must aim for the clearest possible prose. Identify your prepositional phrases and eliminate approximately half of them. Miss Zadravetz, Miss Pepin, and Mr. Page will give you an A+.

Those attorneys who remember how to diagram sentences will have a head start on incorporating this writing hint: control your prepositions and avoid prepositional strings. A preposition is a part of speech, a connecting word that relates a noun or pronoun to another word in the sentence, for example, “up, under, into.” A prepositional phrase begins with a preposition and ends with a noun, pronoun, or another preposition:

- in relation to
- until such time as
- by means of
- into the store
- behind the car
- next to the defendant

Consider the following sentence: “The man crawled over the wrecked car.” The phrase “over the wrecked car” begins with the preposition “over.”

To identify prepositions (in the words of Miss Zadravetz, Miss Pepin, and Mr. Page), think of where a bird flies: over, under, around, on, into, behind, in, among, between, etc. Using any document, identify the prepositional phrases and place the whole prepositional phrase in parentheses. Next, select approximately half of the phrases and replace them with a possessive pronoun—or rewrite the sentence. Before you begin, review this example from a student paper. The class assignment involved a magazine advertisement that allegedly solicited an illegal act: arson. The prepositional phrases appear in parentheses.

Whether or not Soldier of Fun, defendant, failed to uphold a standard (of care) (of investigating) the content (of Lloyd Weber’s advertisement) presents a case (of first impression) (in the First Circuit).

These strings of prepositional phrases take the reader on a roller coaster ride. For conciseness, rewrite to eliminate or reduce the number of prepositional phrases:

In this case (of first impression), the First Circuit must decide whether Soldier of Fun breached its duty to investigate Lloyd Weber’s advertisement. [Or—“the content of Lloyd Weber’s advertisement.”]

The rewritten example cuts the prepositional phrases from four to one, although this changes the meaning of the sentence somewhat.
Another example:

The court can find a legal duty exists (on the part) (of Soldier of Fun) to investigate the content (of advertisements) placed (by readers) (for their illegal nature) based (upon two distinct rationales). [Six prepositional phrases.]

Try replacing this sentence with another version:

Two distinct rationales support a judicial determination that Soldier of Fun failed to investigate its reader's illegal advertisements. [Zero prepositional phrases.] ³

One of the most easily identifiable (and most abused) prepositions is "by"—as in the phrases "by his superiors" and "by the facts."

(In the Smith case), the court held that the plaintiff's allegation (of intentional tortious interference) (with his employment contract) (by his superiors) was not supported (by the facts).

Better:

The court held that the facts did not support plaintiff's allegation that his superiors intentionally and tortiously interfered (with his employment contract). Citation. [Five phrases reduced to one.]

Some prepositions actually foster imprecision. Note, how the sentence is redrafted for force and impact.

Attorneys seeking to improve their writing should also eliminate all unnecessary prepositions. This streamlines the document with minimal effort.

The plaintiff fell off the chair.
The plaintiff fell off the chair.
The group of teen-agers split up at about midnight.
The group of teen-agers split up about midnight.
The suspect entered into the bar.
The suspect entered the bar.

Finally, an attorney should even use prepositions to identify (and then eliminate) associated, but unnecessary nouns:

Until such time as ➔ Until
With the exception of ➔ Except
In back of ➔ Behind
With reference to ➔ Concerning

Attorneys cannot improve their writing without hard work. Fortunately, reducing prepositional phrases is one of the easiest hints to implement.

ENDNOTES

¹ This sentence could have been composed: "Before you begin, review this example (from a paper) (of a student)."
² Generally, one does not need the "or not" in "whether or not." The word "whether" implies its converse.
³ A conceptional problem exists in both examples: they do not explain "for their illegal nature" or "illegal advertisements." The Instructor, of course, would ask the student to explain and clarify.
SUFFOLK UNIVERSITY LAW LIBRARY
RECENT PRACTICE ORIENTED ACQUISITIONS

BY SUSAN D. SWEETGALL, ASSISTANT DIRECTOR FOR PUBLIC SERVICES;
ELIZABETH GEMELLARO, REFERENCE LIBRARIAN; AND MADELEINE G. WRIGHT, PALLOT LIBRARIAN.

The titles listed below are a selection of the practice oriented materials recently acquired by the Suffolk University Law Library. The titles are arranged alphabetically by subject, with the call number, which indicates the location of the material within the library, underlined at the end of each entry. With the exception of the titles which contain the designations “REFERENCE,” “L-LEAF,” “STATE MATERIALS,” 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/Circulation Desk. Most books may be checked out for a period of one month.

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, which is located on the main floor of the Mugar Library.

The Law Library is open from 8:00 a.m. to 11:00 p.m. Mondays through Fridays, and from 9:00 a.m. to 11:00 p.m. 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 9:00 a.m. to 10:00 p.m. Mondays through Thursdays, from 9:00 a.m. to 6:00 p.m. Fridays, and from 9:00 to 5:00 p.m. on Saturdays, Sundays, and most holidays. You may reach the Reference Department at 573-8516 (Reference Desk) or 573-8199 (Reference Office).

ACTIONS AND DEFENSES

SHEPARD'S CAUSES OF ACTION. Prepared by the Shepard's editorial staff. 2nd ed. Colorado Springs: Shepards/McGraw-Hill, 1993-
KF 8863 .S53 1993

The volumes in this set consist of articles which discuss causes of action in a variety of areas. Each article gives the steps needed to determine if a set of facts will lead to court action. The abbreviation for the set is COA2d.

AIDS (DISEASE)

RESERVE KF 3570 .B36 1993

This treatise covers federal, state and local laws related to AIDS in the workplace for both employers and employees. Several chapters also discuss issues concerning AIDS in health care settings.

PALLOT LIBRARY YE.AC7:2/A12

This final report is the cumulation of four years of study. The report provides suggestions for the mobilization needed to contain the AIDS epidemic. It also contains an index to other National Commission on AIDS reports.

CLASS ACTIONS (CIVIL PROCEDURE)

NEWBERG ON CLASS ACTIONS. Herbert Newberg, Alba Conte. 3rd ed. Colorado Springs: Shepard's/McGraw-Hill, 1992-
L-LEAF KF 8896 .N4 1992

The theoretical and practical points of class action litigation are covered in this set. Topics discussed include: who can maintain a class action, the prerequisites for a suit, class categories, filings and settlements. The set contains a list of cases broken down by subject and jurisdiction.

CRIMINAL PROCEDURE

KF 9619 .S92 1992

The federal criminal process from both the prosecutor's and defense attorney's perspective is presented in this treatise. It covers the topics of claims, burden of proof, the development of a police initiated federal case, and the development of a case initiated by a prosecutor or federal grand jury.

DISCRIMINATION IN EMPLOYMENT

REFERENCE KF 480 .Z9 A45 1992

This is a quick guide to issues concerning the application of the ADA to employment of the disabled, services provided by state and local governments, public accommodations and transportation. A list of federal government agencies with ADA information is also included.
EMINENT DOMAIN
TAKING PROPERTY AND JUST COMPENSATION: LAW AND ECONOMICS PERSPECTIVES OF THE TAKINGS ISSUE.

This treatise explores, from many legal and economic viewpoints, the question of whether and when individuals should be compensated for takings.

ENVIRONMENTAL SCIENCES
DIRECTORY OF ENVIRONMENTAL INFORMATION SOURCES.

This reference book contains annotated lists of federal and state government environmental agencies, professional and trade environmental and scientific associations, newsletters and databases with environmental information.

EVIDENCE, EXPERT

The use of DNA as a forensic science tool is discussed in the articles in this treatise. The reliability of using DNA typing and the public policy implications of DNA tests are addressed here.


Addresses the use of evidence obtained from electronic surveillance. Also provided is a list of selected Title III federal cases, and a synopsis of the various devices used in the interception of wire, oral and electronic communications.

FORENSIC PSYCHIATRY

This treatise is written by a psychiatrist and begins with a summary of neurological, psychological and psychiatric concepts. Other chapters examine psychiatry in relation to criminal, divorce, and child custody cases. The use of psychiatrists as expert witnesses is also discussed.

HANDICAPPED
THE AMERICANS WITH DISABILITIES ACT MANUAL.

This looseleaf discusses the ADA in relation to employment, state and local government requirements, transportation, public accommodations and telecommunications. It also contains a monthly newsletter.

INSIDER TRADING IN SECURITIES

This is a practical guide to stock ownership reporting requirements for insiders. It also covers the rules regarding liability of insider transactions.

INSURANCE LAW

The procedures and issues involved in litigating insurance coverage claims are discussed in the papers in this volume. Topics covered include: notice, investigation of a claim, denial of a fraudulent claim, how to dispute coverage, and when an insurer refuses to settle.

INTERNAL REVENUE

This treatise is written by a former IRS counsel and examines how and why the IRS witholds its' records from the public, and how to obtain individual records. It also discusses how to obtain information on the internal procedures of the IRS.

LAND USE, RURAL

Many different issues concerning the use of land in New England are addressed in this book. Some of the issues considered include agricultural land use, maintenance of scenic areas, planning for growth, and land conservation.
LIABILITY FOR HAZARDOUS SUBSTANCES POLLUTION DAMAGES


This book presents an overview of CERCLA and the Superfund program. It covers enforcement, settlements, cost recovery, contributions and other causes of action, potentially responsible parties' liabilities and defenses, and natural resources damages.

LOCAL PROSECUTION OF ENVIRONMENTAL CRIME.

Outlines the strategies and efforts by local district attorneys to prosecute environmental crime.

MALPRACTICE


This set provides information on medical facts and procedures as well as the legal procedures involved in a medical malpractice case.

MUNICIPAL BONDS


This volume covers reimbursement bonds, allocations, refundings and two-year construction issues.

PARENT AND CHILD


This treatise presents an overview of the following areas: contraception, abortion, adoption, paternity, pregnancy, child support, discipline, abuse and neglect and parent/child tort responsibilities.

PERSONAL INJURIES


The whole process of litigating a personal injury case from initial interviews to final argument is covered in this treatise. One chapter covers arbitration and mediation in PI cases.

PRACTICE OF LAW


The basic steps in setting up and running a law practice are outlined in this handbook.

REAL ESTATE BUSINESS


This looseleaf covers topics such as listing agreements, the broker's commission, holding the broker accountable, broker's tort liabilities, broker's civil rights and antitrust violations, and alternative forms of brokerage.

REMEDIES


This edition is a completely revised version of the first edition. The general organization of the chapters remains the same, although the material covered reflects the changes in the law of remedies that have occurred since 1973.

SPORTS


Topics related to professional athletes include agents, contracts with teams, franchises and endorsements. Topics related to amateur athletes include eligibility and disciplinary rules, injuries and violence.

STRATEGIC ALLIANCES (BUSINESS)


This looseleaf covers the process of structuring corporate partnerships and some strategic alliance agreements, such as supply and distribution agreements, technical and product license agreements, and research and development agreements. Also, one section examines equity investment by one partner into the other partner's share.
PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS RIGHTS.

This treatise presents a basic overview of current public school legal issues. Topics covered include: state control of education, church/state relations, school attendance and instructional issues, students' rights, discipline and classification. Teachers' constitutional rights and employment matters are also discussed.

WHISTLE BLOWING


This book provides background information on why and how people whistle blow, the types of opposition they encounter, what happens to the individual and the organization after a report is made, and what legal issues are involved in the process.

MASSACHUSETTS

CIVIL RIGHTS


The use of the Lesbian and Gay Rights Law in employment, housing, and public accommodations is covered in the first part of this MCLE. The second part discusses pursuing a complaint through the MCAD and private employment litigation.

DEPOSITIONS


The basics of deposition practice, including taking the deposition, predeposition motions, defending the deposition, using depositions in civil and criminal cases, and deposing experts are covered in this volume.

ENVIRONMENTAL LAW


This MCLE presents an overview of criminal and civil enforcement by the Attorney General and the federal government. The applicable state and federal laws are discussed in context. The Massachusetts Environmental Strike Force is covered in one chapter.

GOVERNMENT INFORMATION


This book demonstrates how citizens can obtain records under the state Freedom of Information Act, how the government should handle data under the Fair Information Practices Act, and how open meeting laws work. Forms related to the Freedom of Information Act are included.

LANDSCAPE PROTECTION


This handbook discusses what conservation restrictions are and how they are related to the policies of the EOEA. It also contains the conservation restriction application form used for approval by the EOEA.

LEGAL ETHICS


Each chapter of this MCLE presents information an attorney needs to maintain an ethical practice. Topics covered include how to obtain legal business, conflicts of interest, attorney/client relationship, fee agreements, and duties to clients, colleagues, courts and third parties. One chapter discusses the disciplinary process.

REAL PROPERTY


Each issue contains reports of Land Court decisions. A cumulative digest is also included in each issue.

TORTS


Those other torts covered here include: defamation, tortious interference with advantageous business relations, emotional distress, false arrest and imprisonment, Section 1983 claims, social host and dram shop liability, tobacco litigation, and state civil rights suits brought by private practitioners.
ZONING LAW


This treatise discusses the steps for zoning and subdivision control approvals or challenges and how to prepare for appeals. Recent developments in these areas and the role of the trial courts are also covered.

NEW HAMPSHIRE

ENVIRONMENTAL LAW


This treatise provides an overview of state environmental laws and regulations in the areas of the definition of hazardous waste, CERCLA, state hazardous waste laws and their application, owners' and operators' responsibilities and liabilities, transfer and acquisition of real estate, and site assessments.

Listed below are New Hampshire Practice volumes in alphabetical order by title. The set is located with the New Hampshire state materials on the fifth floor of the Mugar Library. The call number for each of the volumes is KFN 1280 .N48. Each volume has an index and is kept up to date with pocket parts. They also contain forms.


PERSONAL INJURY: TORT AND INSURANCE PRACTICE. by Richard McNamara Orford,NH: Equity Pub., 1988 (New Hampshire prac. v. 8,9)


RHODE ISLAND

ENVIRONMENTAL LAW


This book provides an overview of the Rhode Island environmental agencies and their administrative rules of practice and procedure. It also discusses the laws and regulations for many environmental areas such as pollution, waste management and disposal, right to know acts, and asbestos laws.

Listed below are Rhode Island Practice volumes in alphabetical order by title. The set is located on Reserve in the Mugar Library. The call number for each of the volumes is KFR 80 .R47 1990. Each volume has an index and is kept up to date with pocket parts. They also contain forms.


Hon. James Queenan of the U.S. Bankruptcy Court makes a point at the meeting of the Adjunct Faculty on Oct. 7, 1993.